*2009 IWCC 666; 2009 Ill. Wrk. Comp. LEXIS 669, **

STEPHEN BROWN, PETITIONER, v. DAVINCI CONSTRUCTION & DESIGN, INC., RESPONDENT.

NO: 08WC2676

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 IWCC 666; 2009 Ill. Wrk. Comp. LEXIS 669

**June** 30, 2009

**CORE TERMS:** arbitrator, altercation, aggressor, temporary total disability, failed to prove, customers, employment relationship, employee-employer, drafted, weekly, independent contractor, causal connection, disputed issues, credit card, employer-employee, conversation, contradicted, work-related, secretary, salesmen, notice, accrue, phone, blow, cell, mid

**JUDGES:** Molly C. Mason; Yolaine Dauphin; Nancy Lindsay

**OPINION: [*1]**

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, employment relationship, § 19(k) penalties, § 19 (l) penalties, and § 16 attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator cited two bases for denying this claim. He found that Petitioner failed to prove an employment relationship and that Petitioner was the **aggressor** in a work-related altercation. After considering the entire record, the Commission reverses the Arbitrator's finding that Petitioner failed to prove an employment relationship but affirms and adopts all else. Based on the record as a whole, and specifically the evidence concerning Respondent's control of Petitioner's work activities, the Commission finds that Petitioner was an employee rather than an independent contractor at the time of the altercation.

IT IS THEREFORE ORDERED BY **[*2]** THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: JUN 30 2009

ATTACHMENT:

**ILLINOIS WORKERS' COMPENSATION COMMISSION NOTICE OF ARBITRATOR DECISION**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Gilberto Galicia, arbitrator of the Workers' Compensation Commission, in the city of **Chicago**, on **7/15/08 and 10/7/08**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**
B. Was there an employee-employer relationship?
C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
F. Is the petitioner's persent condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?
M. Should penalties **[*3]** or fees be imposed upon the respondent?

**FINDINGS**

. On **December 28, 2007**, the respondent **DaVinci Construction & Design, Inc. *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did not*** exist between the petitioner and respondent.

. On this date, the petitioner ***did not*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **80,000.00**; the average weekly wage was $ **1,538.46**

. At the time of injury, the petitioner was **44** years of age, ***married*** with **1** children under 18.

. Necessary medical services ***have not*** been provided by the respondent.

. To date, $ **0** has been paid by the respondent for TTD and/or maintenance benefits.

**ORDER**

. The respondent shall pay the petitioner temporary total disability benefits of $ **1,025,64/** week for **0** weeks, from through , which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **636.15 [*4]** /week for a further period of **0** weeks, as provided in Section of the Act, because the injuries sustained caused .

. The respondent shall pay the petitioner compensation that has accrued from through , and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ **0** for necessary medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ **0** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ **0** in penalties, as provided in Section 19(l) of the Act.

. The respondent shall pay $ **0** in attorneys' fees, as provided in Section 16 of the Act.

**The Petitioner failed to prove an employer-employee relationship, and he was the aggressor in a work-related altercation, so compensation is hereby denied.**

**RULES REGARDING APPEALS** Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

**STATEMENT OF INTEREST RATE** If the Commission reviews this award, interest at the rate set **[*5]** forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

10-29-08

Date

OCT 30 2008

FINDINGS OF FACTS

I. Pre-Occurrence Facts:

The Petitioner started working for the Respondent in mid 2007 after he responded to an ad looking for a-Project Manager. The Petitioner alleges that he was "an employee of" the Respondent. As a Project Manager, the Petitioner was to oversee various residential construction projects for the Respondent. This included ordering and obtaining supplies and materials, locating and scheduling the appropriate subcontractors for each project, and supervision of their activities. According to the owner of the Respondent, his job simply was to get the construction jobs done.

The Petitions was paid a weekly amount and was to receive a bonus based upon the satisfaction of the Respondent's customers. He was reimbursed for the cost of health insurance and his expenses. No taxes or any deductions were taken from the Petitioner's ' checks. The Petitioner used his **[*6]** own vehicle, chose the jobsites he was to visit and had no set schedule. The Respondent provided a credit card for supplies and a cell phone. The Petitioner drafted a written document entitled "Pete and Steve Agreement" which summarized the obligations of the parties. As part of the arrangement, the Respondent would help the Petitioner obtained a tax ID number, so no taxes would be withheld from his pay.

On or about July 10, 2007, the Petitioner was involved in a tiff with Mr. William Yotis. Mr. Yotis was talking with Dori, a secretary in the office, when the Petitioner interjected himself in the conversation because he did not like the way Mr. Yotis was addressing Dori. The Petitioner went after Mr. Yotis with a "cocked fist". Mr. Peter Abatangelo, the owner of the company, who witnessed the event, interceded and demanded that the Petitioner apologize to Mr. Yotis.

II. Occurrence Facts:

The Respondent usually had a weekly production meeting each Tuesday to discuss the status of various projects. One such meeting took place on December 28, 2007. Present at this meeting were William Yotis, John Cavello and Nick Abatangelo, all salesmen for the Respondent. The owner, Peter Abatangelo, **[*7]** was in a meeting in the next room.

During the course of the meeting there was some criticism of the Petitioner's performance. There was some discussion regarding the dissatisfaction of some of their customers. At some time during the meeting, Mr. Yotis decided to go to the bathroom. He had to pass the Petitioner who was seated in a chair. As Mr. Yotis walked past the Petitioner, the Petitioner elbowed Mr. Yotis in his mid-section. Mr. Yotis went after the Petitioner in retaliation. They wound up grabbing each other, and in the ensuing fracas, Mr. Yotis to fell

backwards over a file cabinet with the Petitioner on top of him. The Petitioner was then pulled off of Mr. Yotis by Mr. Cavello. Mr. Yotis testified to the events and the altercation. His testimony was substantiated by two witnesses who were present and saw and heard the events that occurred.

III. Post-Occurrence Facts:

Following the incident, Mr. Yotis left the premises. The Petitioner was treated at Swedish Covenant Hospital. Follow up care was provided by Dr. David Jun and Dr. Jarosław Dzwinyk. The Petitioner was treated for a cervical strain superimposed on degenerative disc disease and a fracture of the left little finger. **[*8]** He is alleging lost time from 12-29-07 to 2-5-08.

CONCLUSIONS OF LAW

With regard to issue (B), whether there was an employee-employer relationship, the Arbitrator concludes the following:

The owner of the Respondent, Peter Abatangelo, testified that he contracted with the Petitioner to work as an independent contract in mid 2007 as a Project Manager. Pursuant to the agreement between Mr. Abatangelo and the Petitioner, the Petitioner drafted a document entitled "Pete and Steve Agreement." This document indicated the amount and form of compensation the Petitioner was to receive as well as reimbursement of expenses. The Petitioner received a weekly payment with no deductions. A 1099 form was to be provided. The Petitioner also filed for a Federal tax I.D. number demonstrating his intention to be independent of the Respondent.

Mr. Abatangelo testified that the Petitioner's responsibilities were to "produce the jobs." There were no set hours or days that the Petitioner was to work although he was asked to appear at a weekly production meeting. He visited job sites as he felt appropriate. He was given access to the Respondent's premises and was given a credit card for supplies and a **[*9]** cell phone. He also pointed out that everyone, including the secretaries, were hired as "independent contractors".

The Petitioner's testimony was contradicted by Mr. Abatangelo as well as other co-workers whose relationship with Da Vinci Construction were also that of an independent contractor. Based upon the requisite lack of control of the Petitioner's activities by the Respondent, as well as the apparent intentions of the Parties, as evidenced by the document drafted by the Petitioner, the Arbitrator concludes the Petitioner failed to prove an employer-employee relationship existed on December 28, 2007.

With regard to issue (C), whether an accident occurred which arose out of and in the course of the employment, the arbitrator concludes the following:

Assuming, arguendo, that the Petitioner is found to be an employee of the Respondent, with regard to the incident of December 28, 2007, two questions must be addressed in this assault case:

1. Did the underlying argument which gave rise to the altercation arise over employment related issues?

2. Who was the **aggressor?**

All the witnesses testified that just prior to the incident, the Petitioner's job performance, was being criticized. **[*10]** The salesmen were afraid they were going to lose their customers due to some aberrant behavior on the part of the Petitioner. It is unclear whether they would lose their "bonuses" if the customers were somehow alienated. The. arbitrator concludes that the altercation arose out of an argument/conversation dealing with employment related issues.

We are then left with the question of which of the combatants was the **aggressor.** Two of the three Respondent's witnesses contradicted the Petitioner's testimony, however, that he was not the **aggressor.** They were emphatic that Petitioner delivered the first blow, prior to tussling to the ground. Ills incident, coupled with the fact that petitioner almost came to blows in the June incident, clearly establish that the Petitioner has a short fuse, or, he prefers to resolve his disputes by going *mano-a-mano*. Arbitrator concludes the Petitioner was the **aggressor** in the altercation and is thus barred from recovery. For these reasons, all compensation is denied.

With regard to issue (F), causal connection; issue (J), medical services; issue (K) amount of TTD due; issue (L), the nature and extent of the injury; and issue (M), penalties, the arbitrator **[*11]** concludes the following:

In light of the foregoing rulings, the rest of the issues are rendered moot.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: aggressor and date geq (06/08/2009) (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, June 8, 2010 - 9:19 AM EDT

09 IWCC 777

*2009 Ill. Wrk. Comp. LEXIS 725, **

BOUBOU SOUMARE, PETITIONER, v. CARGILL, INC., RESPONDENT.

NO: 08WC 02381

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF CASS

2009 Ill. Wrk. Comp. LEXIS 725

**July** 24, 2009

**CORE TERMS:** arbitrator, videotape, broke, aggressor, lunch, box, conversation, video, locker room, camera, plant, temporary total disability, physical contact, door frame, supervisor, initiated, doorway, punch, frock, neck, written request, signature, threatening, suspension, grabbing, backwards, abusive, hallway, grabbed, cooler

**JUDGES:** Nancy Lindsay; Molly C. Mason; Yolaine Dauphin

**OPINION: [*1]**

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, evidentiary rulings and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 23, 2008 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such **[*2]** a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 20,500.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JUL 24 2009

ATTACHMENT:

**ILLINOIS WORKERS' COMPENSATION COMMISSION 19(b) ARBITRATION DECISION**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Jeffery Tobin, arbitrator of the Commission, in the city of Beardstown, on April 30, 2008. After reviewing all of the evidence presented, the arbitrator **[*3]** hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

F. Is the petitioner's present condition of ill-being causally related to the injury?

J. Were the medical services that were provided to petitioner reasonable and Recessary?

K. What amount of compensation is due for Temporary Total Disability?

**FINDINGS**

. On **November 24, 2007**, the respondent Cargill, Inc. *was* operating under and subject to the provisions of the Act.

. On this date, and employee-employer relationship *did* exist between the petitioner and respondent.

. On this date, the petitioner *did* sustain injuries that arose oout of and in the course of employment.

. Timely notice of this accident was given to the respondent.

. In the year preceding the injury, the petitioner earned ***N/A***; the average weekly wage was $ ***545.51***.

. At the time of injury, the petitioner was 32 years of age, *married* with 1 child under 18.

. Necessary medical services have *not* been provided by the respondent.

. To date, **[*4]** ***$ 0.00*** has been paid by the respondent on account of this injury.

**ORDER**

. The respondent shall pay the petitioner Temporary Total Disability benefits of $ ***363.67***/week for ***22-3/7*** weeks, from ***November 25, 2007*** through ***April 30, 2008***, which is the period of Temporary Total Disability for which compensation is payable.

. The respondent shall pay the outstanding medical bills of $ 12,272.59 pursuant to the-medical fee schedule and the parties' stipulation set forth in Arbitrator's exhibit # 4.

. In no instance shall this award be a bar to a further hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for permanent disability, if any.

. Penalties were not an issue for this hearing.

RULES REGARDING APPEALS Unless a party files a Petition for Review within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 2.35% shall accrue from the date listed below to the day before the date of payment; **[*5]** however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

6/20/08

Date

JUN 23 2008

**THE ARBITRATOR FINDS THE FOLLOWINGFACT'S REGARDING ALL DISPUTED ISSUES:**

The Supreme Court issued *Franklin vs. Industrial Commission (211 Ill.2d 272, 811 N.E. 2d 684, 285 Ill.Dec. 197)* in 2004. The Supreme Court held that injuries arising out of an altercation between employees are compensable if the origin of the dispute is work related and the injured employee is not the **aggressor.** This is called the "**Aggressor** Defense".

In determining whether the Petitioner is the **aggressor,** the Supreme Court instructs the trier of fact to analyze the totality of the circumstances. The **aggressor** is not always the person who initiates the physical contact. The **aggressor** can also be the person who makes non physical threatening or abusive conduct that brings about a physical response from the recipient of the non physical threatening or abusive conduct.

The first factor is whether or not the dispute has an origin in the workplace. The Petitioner met his burden in that **[*6]** regard. This case involved two incidents. The first incident occurred on the neck bone line when the employees, including Petitioner, were arguing about breaks. The second incident occurred when Petitioner's supervisor was trying to prevent the Petitioner from leaving the plant without turning over his work identification card. Both of these disputes have an origin in the workplace and therefore, the Arbitrator turns next to an analysis of which party was the **aggressor.**

The initial dispute began with an argument on the neck bone line. The Petitioner refused to cover for a bat hroom break for another employee. Witness Ramono Carrero, talked to the Petitioner about his refusal. While Petitioner was explaining to witness Carrero why he would not relieve the co-worker, another line employee, Josh Dean, jumped into the conversation.

Witness Josh Dean stated that he became angry over hearing the conversation between Petitioner and witness Carrero. Josh Dean testified that upon hearing this conversation he pointed his finger at the Petitioner and stated "hey, Mother Fucker, you haven't come back on time". Witness Josh Dean testified that he pointed within 1 inch of the Petitioner and he could **[*7]** have been pointing at Petitioner's face. Prior to Josh Dean becoming angry and entering the conversation, Petitioner had not addressed any of his verbal communication to Josh Dean, nor had Petitioner made any physical contact with Josh Dean.

The testimony of Petitioner, witness Carrero, and witness Martinez are substantially similar to Josh Dean's testimony regarding Josh Dean's comments and gestures. Their testimony concerning statements allegedly made by Dean is admitted as an exception to the hearsay rule for excited utterance and to show the state of mind of Petitioner. Witness Carrero testified that Josh Dean pointed in Petitioner's face, but he did not see Josh Dean touch the Petitioner. Witness Carrero testified that Josh Dean called Petitioner a

"Mother Fucker" and "Nigger". Witness Martinez testified that Josh Dean pointed dose to Petitioner's face and told Petitioner to shut up "Mother Fucker". Petitioner testified that Josh Dean called him a "Nigger" and "Mother Fucker," and when pointing in his face, touched Petitioner's nose.

In response to Josh Dean's comments and pointing in his face, Petitioner testified that he grabbed Josh Dean's frock around his neck and told him **[*8]** that he would knock him out if he called him names again. Petitioner testified that he was tired of being called names to include "Nigger". Witness Josh Dean apologized and Petitioner released his grab of witness Dean's frock within a couple of seconds. The Arbitrator does not find witness Dean's testimony that Petitioner held him for 1 to 2 minutes to be credible.

Witness Jesus Lopez was the neck bone line supervisor. Witness Lopez viewed the incident but could not hear the conversation. Witness Lopez stated that he heard a scream and looked over at the line. He did not know who screamed. He saw the Petitioner holding on to witness Dean's frock. Lopez was worried that the argument could escalate. Lopez stated that Josh Dean was holding his knife while Petitioner Soumare's knife was hanging up.

The Arbitrator finds that witness Dean initiated the first incident and is the **aggressor.** First, witness Dean jumped into a conversation of which he was not a' participant. Witness Dean used abusive and threatening language and pointed in the Petitioner's face, at least within 1 inch, if not contacting Petitioner's nose. Witness Dean had a knife in his hand. Petitioner's response of grabbing **[*9]** witness Dean's frock is not an unexpected reflexive response based upon the above behavior of Dean.

As a result of this incident, supervisor Lopez took witness Josh Dean to the "penthouse" for a statement. Witness Dean provided a statement and returned to the line. Then, Petitioner Soumare was sent to the "penthouse". Petitioner Soumare was suspended indefinitely; asked to turn over his ID and leave the plant. Petitioner Soumare refused to sign the document regarding the indefinite suspension, and also refused to turn over his ID. Petitioner Soumare did not agree with the suspension, wanted to see his Union, and was going to follow up with Human Resources on the following Monday.

Petitioner 'Soumare testified that he was not allowed to give his version of events regarding the incident between Josh Dean and Petitioner. Witness Mellor testified that the Petitioner was allowed to provide a statement and that witness Mellor wrote out the statement and read it to the Petitioner.: Witness Mellor stated that he wrote down 90% of what Petitioner stated and read it to Petitioner three times before Petitioner signed the statement. Petitioner denied giving the statement and signing the statement. **[*10]**

The Arbitrator finds the written statement, R.X. # 2, unreliable and it is not admitted into evidence. The Arbitrator finds the alleged statement written by witness Mellor to be unreliable for a number of reasons. The signature on the statement does not match the Petitioner's signature on the other documents introduced into evidence. Petitioner indicated that he did not sign the statement. Witness Mellor was eventually involved in the incident where Petitioner broke his hand. Petitioner has no formal education and is unable to read or write English. Witness Mellor agreed that he failed to write down about io% of what Petitioner had told him and that Petitioner's accent made it difficult to understand what Petitioner was saying.

Petitioner was upset as a result of being indefinitely suspended without an opportunity to provide his full version of events. He refused to turn over his ID and sign the indefinite suspension. Petitioner had 'money' credited on his ID and wanted to cash it out at the canteen. Petitioner went to the line to get his equipment, and then the locker room to change his clothes. Petitioner was going to leave the plant. Petitioner was followed by witness Mellor to **[*11]** the locker room, wherein Petitioner again refused to hand over his ID. Witness Mellor had been asked to escort the Petitioner out of the facility and obtain the Petitioner's ID.

Witness Mellor testified that Petitioner was agitated and speaking loudly in the locker room. According to Mellor, Petitioner continued to be loud and agitated until the incident occurred where Petitioner broke his hand. The Arbitrator notes that witness Mellor had a radio. Prior to the Petitioner breaking his hand, witness Mellor never felt sufficiently threatened or endangered that he needed to call security or for additional help from management.

Following the locker room, the Petitioner went to the lunch box area where Petitioner's cooler was stored. Petitioner picked up his cooler and attempted to leave the plant. Witness Mellor again asked for Petitioner's ID which was refused. The Arbitrator heard from numerous witnesses regarding the occurrence in the lunch box area hall and also had the opportunity to view the videotape.

The videotape shows the Petitioner picking up his cooler and carrying it with his right hand. Mellor impedes and attempts to prevent the Petitioner from walking down the hallway towards **[*12]** the camera to Mellor's right side. The videotape then shows Mellor holding out his left arm and blocking the Petitioner's path as Petitioner simply tries to walk around to the left side of Mellor. The videotape then shows Mellor grabbing Petitioner around the chest with two hands and turns Petitioner around so that Petitioner is then facing away from the camera (the direction Petitioner was originally going). The video ends with Petitioner moving away from Mellor with Mellor clearly grabbing the left sleeve of Petitioner's red sweater from behind. Petitioner makes no aggressive moves towards Mellor or anyone else in the entire video. This is the last scene on the video. According to the Respondent's witness Koch, the cameras did not record the area where Petitioner broke his hand. Witness Koch is a plant maintenance supervisor. Witness Koch testified that the videotape produced was a copy. Witness Koch was instructed by the plant manager to view the videotape from the day of the occurrence and provide copies of all videotape of Petitioner and Mellor. Witness Koch testified that there are 78 cameras in the facility, but the area where the Petitioner broke his hand was not on any of **[*13]** the videotape.

The Arbitrator notes that the witnesses testified that the Petitioner broke his hand approximately 12 to 24 inches from the area last seen on the videotape. The Arbitrator also notes that witness Mellor and witness Muellersman testified that witness Mellor stepped backwards when Petitioner allegedly tried to punch witness Mellor. If there is only 12 to 24 inches from the last point seen on the tape to the doorway where the Petitioner broke his hand, the videotape would have captured witness Mellor stepping backwards in reaction to a punch. Mellor initiated the physical contact in the lunch box area and that can not reasonably be interpreted in any other way. Petitioner and Mellor both testified that the first physical contact occurred in the lunch box hallway when Mellor attempted to block Petitioner's path and ultimately grabbed Petitioner.

Witness Blair testified that he assumed that Petitioner had sort of pushed his way around Mellor who was standing in front of Petitioner in the men's locker room. This would have been prior to the incident in the lunch box area. Witness Blair testified that he did not see anyone get pushed into a locker but that it sounded like **[*14]** it. Witness Blair's testimony is not supported by Petitioner, or Mellor. The Arbitrator finds that any inference from witness Blair's testimony that anyone was shoved into a locker at that point is not reasonable. There was conflicting testimony as to who closed Petitioner's locker as between Mellor and Petitioner.

Respondent asserts that Petitioner broke his hand while attempting to punch Mellor. Respondent asserts that Petitioner missed Mellor and punched the door frame which was just out of frame of the video. Petitioner Soumare testified that Mellor pushed him into the doorway, causing the Petitioner to break his hand. Respondent offered the testimony of Betsy Thurman, Frank Muellersman and Rebecca Sweeney. Ms. Thurman no longer works for Respondent. Ms. Thurman was more than halfway down another hallway that leads into the lunch box area through a door way, where Petitioner broke his hand; when she saw the incident. Ms. Thurman saw Mellor and another gentleman. She was unsure of Petitioner's name. Petitioner had his arms in the air but she was unsure about Mellor. Witness Thurman could not identify Petitioner as the person involved in the incident with Mellor. Witness Sweeney **[*15]** no longer works for Respondent and can be seen in the lunch box video in a white coat. Witness Sweeney testified that she saw Petitioner pull away from Mellor and then saw and heard his hand hit the door frame. She was unsure which hand. She did not indicate that Petitioner threw a punch at Mellor. Witness Muellersman testified that Mellor initiated the contact and grabbed Petitioner's jersey. Muellersman was waiting for Sweeney just under the camera which recorded the video footage although he is out of the recorded picture. Witness Muellersman testified that Petitioner lost his balance in the doorway and swung his flat open left hand backwards striking the door frame. Mellor was not credible in testifying that he was simply trying to stop Petitioner to ensure that Petitioner did not hurt anyone else. The Arbitrator notes again that Kevin Mellor initiated the incident and was the **aggressor.** The moment the Petitioner struck his hand on the doorway was not captured on the videotape. The Arbitrator finds that Petitioner was drawing back his left arm simply to break free from the grasp of Mellor at which time he struck his left hand on the door frame. This claim is compensable.

The Petitioner **[*16]** was responding in both incidents to the actions of Josh Dean and Kevin Mellor. Pursuant to *Franklin vs. the Industrial Commission*, the Arbitrator finds that the Petitioner's surgically repaired left ulnar fracture with delayed union arose out of and in the course of Petitioner's employment and is causally connected to the accidental occurrence. There was no dispute as to the cause of the fracture. The Arbitrator notes that neither party objected to what would normally be inadmissible evidence regarding past character and reputation of the Petitioner.

Petitioner has been off work since the accidental occurrence. Petitioner has been completely off work, per his physician; from November 25, 2007 through February 24, 2008. On February 22, 2008, Petitioner agreed that he was released to one handed duty only. A few days prior to the hearing, Petitioner was seen by his surgeon and continues under his doctor's care. The Petitioner was fired by the Respondent and Respondent has not offered light duty work. The Petitioner has looked for work since his light duty release. The Petitioner has not reached maximum medical improvement. Since Petitioner is not at maximum medical improvement, **[*17]** the Respondent is liable for TTD through the date of hearing.

The Arbitrator finds that the Petitioner has been temporarily totally disabled from November 25, 2007 through April 30, 2008, for a period of 22- 3/7 weeks, and Respondent is found liable for same.

Petitioner introduced into evidence the following medical bills that remain outstanding:

| | |
|---|---|
| Passavant Hospital | $ 350.31 |
| Clinical Radiologists | $ 20.28 |
| Ortho & Rheumatology | $ 1,943.74 |
| Trinity West Medical Center | $ 9,934.52 |
| Advanced Radiology | $ 21.74 |
| TOTAL OUTSTANDING | $ 12.272.59 |

The Respondent is found liable for the same. Pursuant to the parties stipulation the Respondent can make payments directly to the above medical providers. (Arb.X. # 4)

Therefore the Arbitrator, in summary, concludes:

1. Petitioner proved accident and causation.

2. Medical bills of $ 12,272.59 are awarded and same shall be paid in accordance with the medical fee schedule and the parties stipulation.

3. TTD is awarded for 22 and 3/7ths weeks.

4. Petitioner has yet to reach MMI.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Compensability > Course of Employment > Personal Comfort
Workers' Compensation & SSDI > Defenses > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: **aggressor and date geq (06/08/2009)** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, June 8, 2010 - 9:19 AM EDT

09 IWCC 865

*2009 Ill. Wrk. Comp. LEXIS 900, **

DARRELL BULLINER, PETITIONER, v. SWIT INC., RESPONDENT,

NO: 08WC 33585

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF ST. CLAIR

2009 Ill. Wrk. Comp. LEXIS 900

**August** 19, 2009

**CORE TERMS:** concrete, arrived, driveway, fight, altercation, truck, ankle, job site, happened, re-hired, started, fired, talked, scene, dumpster, fracture, morning, street, poured, cement, cross-examination, probation, walked, holes, accidental injuries, preparation, seeing, parked, scared, minute

**JUDGES:** Mario Basurto; James F. DeMunno; David L. Gore

**OPINION: [*1]**

DECISION AND OPINION ON REVIEW

Respondent appeals the Decision of Arbitrator Teague in a § 19(b) proceeding finding that as a result of accidental injuries arising out of and in the course of his employment on July 7, 2008, Petitioner was temporarily totally disabled from July 7, 2008 through October 24, 2008, the date of arbitration, a period of 15-5/7 weeks, and that Petitioner is entitled to medical expenses listed in Px2. The Arbitrator found that Petitioner was the-victim of an unprovoked assault by a co-worker. The issues on Review are whether Petitioner sustained accidental injuries arising out of and in the course of his employment on July 7, 2008, whether a causal relationship exists between those injuries and Petitioner's current condition of ill-being and if so, the extent of Petitioner's temporary total disability and the amount of reasonable and necessary medical expenses. The Commission, after reviewing the entire record, reverses the Decision of the Arbitrator finding that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on July 7, 2008 and denies Petitioner's claim for the reasons set forth below.

FINDINGS **[*2]** OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Belleville Police Officer William Lautz testified that he has been a policeman in Belleville for 22 years (Tr 12). At 6:37 a.m. on Monday, July 7, 2008, he was dispatched to a work site in a new subdivision on a report of a fight. He arrived there in 5 or 6 minutes. There were several officers already present on the scene when he arrived (Tr 15). Officer Lautz was the primary officer handling the scene (Tr 16). Upon his arrival, Officer Lautz was given the name of one of the individuals involved in the fight and noticed him walking down the street letting off steam (Tr 16). Then he observed Petitioner seated on the ground and another individual applying pressure to an injury on the back of his head (Tr 16). He came to learn that Mike Krausz, Respondent's owner, was the individual applying pressure to Petitioner's head (Tr 16). The individual walking away, Kevin Sharrod, was not fleeing the scene (Tr 17). Officer Lautz identified Rx4 as a diagram of the subdivision area and Petitioner's attorney stipulated that was so (Tr 17). Petitioner was sitting at the edge of a newly poured concrete driveway (Tr 18). He was lucid and aware **[*3]** of his surroundings. Petitioner complained of his head, arm and ankle (Tr 19). An ambulance was called.

Officer Lautz asked Petitioner what happened (Tr 19). Petitioner reported that on Friday, July 4, 2008, he had a confrontation with Kevin Sharrod at a trailer park they both reside in (Tr 19). The confrontation occurred at a girl named Tammi's residence. Mr. Sharrod and Tammi had dated at some point, but Officer Lautz did not know when. Petitioner stated that Mr. Sharrod had come over to Tammi's residence and knocked on the door and began to yell profanities at him and Tammi, who were inside (Tr 20). Mr. Sharrod was asked to leave and did so (Tr 20). Petitioner reported that when he arrived to work on July 7, 2008, Mr. Sharrod was giving him the eye, that some words were said and the two were involved in a physical altercation (Tr 20). Petitioner did not tell Officer Lautz the words that Mr. Sharrod said to him (Tr 20). Ten to fifteen minutes had passed from the time Officer Lautz arrived to the time he spoke with Petitioner (Tr 20-21).

Officer Lautz also spoke with Mike Krausz, but not about the altercation (Tr 22). What Petitioner stated to Officer Lautz was put into a police **[*4]** report, which he prepared shortly after he had arrived at the scene (Tr 22). Mr. Sharrod eventually returned to the scene on his own and was not aggressive with law enforcement officers (Tr 23). Mr. Sharrod did not appear under the influence at all of any type of substance (Tr 23). Mr. Sharrod was injured on his left cheek and was attended to at the scene and was not transported to a hospital (Tr 23). There were no witnesses to the altercation or the minute or two before (Tr 24). Petitioner made no other statements to him about any other problem (Tr 24).

On cross-examination, Officer Lautz testified that the initial investigation was for aggravated battery, but in the end, a non-traffic complaint was signed for misdemeanor battery against Kevin Sharrod (Tr 25). To his knowledge, no charges were filed against

Petitioner (Tr 25).

2. Belleville Police Officer Gary Becker testified that he has been a policeman in Belleville for over 20 years (Tr 26). At 6:37 a.m. on July 7, 2008, Officer Becker was dispatched to a work site in a new subdivision on a report of a fight. He arrived a couple minutes later and separately from Officer Lautz and Officer Abernathy (Tr 27). When Officer Becker **[*5]** arrived, he observed Petitioner sitting on the ground with his legs out in front of him and another person applying a cloth to his head. He could tell Petitioner had been bleeding from his head (Tr 28). It also appeared that Petitioner had a compound ankle fracture (Tr 29).

Officer Becker spoke briefly with Petitioner and asked him what happened (Tr 29). He told Officer Becker that Kevin Sharrod had hit him with a hammer and prior to being hit, he and Mr. Sharrod were having words (Tr 29). Officer Becker asked Petitioner what the words were about and he basically said it was a girl thing (Tr 30). Officer Becker did not go into any detail with that (Tr 30). At that point there were other officers around coming up to the scene. Officer Becker went to look for Mr. Sharrod (Tr 30). He found Mr. Sharrod, who did not try to flee (Tr 30). He spoke with Mr. Sharrod, who was relatively calm and was not hiped up or anything and was not combative and did not appear to be under the influence of anything (Tr 31-32). Officer Becker did not speak with Mike Krausz or Julie Krausz (Tr 32). There were no eye witnesses (Tr 32). Officer Becker did not prepare a report relative to this dispatch (Tr 32). **[*6]** Kevin Sharrod had some cuts and redness on the left side of his face (Tr 33). Officer Becker identified Rx3 as a drawing of the area (Tr 33). Petitioner was where the X is marked on Rx3 when he arrived at the scene (Tr 34).

On cross-examination, Officer Becker testified that Mike Krausz was present at the scene and attended to Petitioner (Tr 34). Officer Becker did ask Mike Krausz whether he witnessed what happened and Mr. Krausz told him he had not (Tr 35). His understanding was that Mike Krausz was present at the location when the altercation occurred, but that he did not see the altercation occur (Tr 35).

3. Petitioner, a 49 year old cement mason, testified that he is the person the above officers were referring to that was struck in the skull and leg with a hammer (Tr 36). In the altercation, Petitioner sustained a fractured jaw, a fractured skull and a fractured ankle (Tr 36-37). He treated with Dr. Karges at St. Louis University Hospital and underwent ankle surgery (Tr 37). He is still under care for his injuries (Tr 37). No doctor has released him to return to any type of work and he currently attends physical therapy (Tr 37-38). Petitioner stated that he has reviewed the **[*7]** medical records in Px1 and the medical bills in Px2, which reflect the treatment he had for his injuries sustained on July 7, 2008 (Tr 38). He had no problems with his skull, jaw or ankle before the July 7, 2008 altercation (Tr 38). He is a cement mason who was employed with Respondent on that date (Tr 38). Mike Krausz and Julie Krausz own Respondent (Tr 39). At the time this happened on July 7, 2008, Mike Krausz and Julie Krausz were parked behind a dumpster in her Denali, approximately 70 feet from where this took place (Tr 39).

Petitioner testified that he was attacked by Kevin Sharrod, who he had known since 2001 (Tr 39). Mr. Sharrod had worked with him on jobs in the past, including for Respondent (Tr 39-40). Some of the time, the Krauszes were on the job sites when he and Mr. Sharrod were both working (Tr 40). Petitioner had spoken to Mr. and Mrs. Krausz four or five times over the last 7 years concerning his relationship with Mr. Sharrod (Tr 41). Following the altercation when he was in the hospital, Mrs. Krausz called Petitioner (Tr 41).

Back in 2001, Petitioner's position with Respondet was a concrete finisher (Tr 41). At some point, Petitioner graduated and was promoted to **[*8]** foreman at Respondent (Tr 42). On July 7, 2008, he was acting job foreman with Respondent (Tr 42). On that date, Mr. Sharrod's job was a regular concrete finisher (Tr 42). He was Mr. Sharrod's supervisor that day (Tr 42).

On July 7, 2008, Petitioner arrived at the job site at 5:30 a.m. He identified Rx4 as a receipt for bags of ash delivered that day (Tr 42). He also described pieces of paper which represent the time the concrete order was called in and the time it got to the jobsite on July 7, 2008 (Tr 43). He was gone before the concrete was delivered that day (Tr 43). Petitioner's duties before a cement delivery arrived were to make sure everything is ready to go when the cement truck arrives at the jobsite. That way, the cement can be poured and not have the truck sit and get hot (Tr 43). Duties before the cement truck arrives were to empty out the truck and make sure the concrete delivered gets finished right and that there are a certain number of workers to get the concrete done (Tr 44). On this project, two sections of driveway had already been done and the last section was to be done on July 7, 2008. Before the concrete for this last section was to be done, holes had to be **[*9]** drilled into the existing concrete so when the concrete was poured, the other section do not sink. Petitioner testified that he drilled holes in the existing concrete July 7, 2008 before the altercation. He then got his tools out of the truck, consisting of a bull float, the poles and the Fresno, different tools used to finish concrete (Tr 44). After that, he got into the Bobcat to smooth out the driveway and move a heavy rock that was in there (Tr 44). Four inches of concrete were to be poured (Tr 45). Petitioner had worked for about 45 minutes before the altercation occurred (Tr 45). He opined that this preparation work benefits his employer because otherwise, Respondent would have to pay overtime (Tr 45). When a cement truck is waiting, the cement gets hot and hard and will not come out of the chute and is a lost batch (Tr 45). Petitioner stated he was in the middle of completing the preparation work when Kevin Sharrod arrived at the jobsite on July 7, 2008 (Tr 46). Mr. Sharrod did not begin doing any work until Petitioner was on the Bobcat, then he began working (Tr 46).

In 2001, Mr. Sharrod was his supervisor when he was working for Respondent (Tr 46). On occasion at that time, **[*10]** he had to take orders from Mr. Sharrod (Tr 46). At that time, he had no problems taking orders or following orders from Mr. Sharrod (Tr 47). One day in November 2004, Mr. Sharrod lost his leadership position and this was given to Petitioner (Tr 47). Petitioner explained that Mr. Sharrod had taken a 5-day hiatus and had a work truck and no one could find him. When Mr. Sharrod finally showed back at work, he was informed by Mike Krausz that he was no longer the foreman and that Petitioner was the foreman (Tr 48). Petitioner was present when this occurred (Tr 48). Then Mr. Sharrod was fuming and pouting while working. Petitioner was setting up the driveway and Mr. Sharrod and another worker were setting up the sidewalk from the house to the driveway (Tr 49). When it came time to almost pour the concrete, Petitioner received a call from a worker who said he was heading home (Tr 49). He asked the worker what he was doing leaving and the worker told him that Mr. Sharrod had sent him home (Tr 49). Petitioner called Mr. Sharrod and told him that he should have let him know before he sent a man home because there was only a certain amount of men there and this left him to get the driveway **[*11]** done with less men (Tr 49). Petitioner stated that Mr. Sharrod started hollering at him and cussing him and grabbed him by the throat (Tr 49). After this happened, the Krauszes got a phone call and were made aware of what happened; Petitioner did not make this call (Tr 50). He spoke to Mr. and Mrs. Krausz and told them what happened (Tr 50). The Krauszes responded by firing Mr. Sharrod that day (Tr 50). Mr. Sharrod remained fired for about 2 years and was then re-hired by Mike Krausz. Petitioner did not speak to Mike Krausz about Mr. Sharrod's re-hiring (Tr 51). When Mr. Sharrod came back to work at Respondent, Petitioner was not his supervisor (Tr 51). He worked with Mr. Sharrod on a daily basis during 2007 and up until the July 7, 2008 altercation and they got along during that time (Tr 51). Mr. and Mrs. Krausz were aware of the November 2004 incident with Mr. Sharrod (Tr 52). When Mr. Sharrod was re-hired after the 2 year period, on certain occasions he would miss work. At least one day a week, Mr. Sharrod did not work for a lot of different issues. Petitioner worked daily (Tr 52). He did not discuss Mr. Sharrod's absences with the Krauszes as they already knew it (Tr 53). The Krauszes **[*12]** told him that Mr. Sharrod was missing work because of court dates and different things that would come up (Tr 53). It was clear from his conversations with both Mr. and Mrs. Krausz that they

were aware that Mr. Sharrod had some serious trouble with the law during those two years after his re-hiring and they continued to employ Mr. Sharrod (Tr 53-54). The Krauszes continued to employ Mr. Sharrod even though they were aware of the November 2004 attack on Petitioner by him (Tr 54).

In the latter part of 2004 or early 2005, Petitioner began dating Tammi. This was after Mr. Sharrod had choked him in November 2004 (Tr 54). He still sees Tammi; but would not say they are dating (Tr 54). He and Tammi are friends and she helped him out a lot after the altercation with Sharrod on July 7, 2008 (Tr 55). At some point, Petitioner was having a relationship with Tammi and Mr. Sharrod was not aware of this relationship (Tr 55). At some point, Mr. Sharrod did become aware of this relationship (Tr 55). On Friday evening of July 4, 2008, Tammi invited Petitioner to her residence to watch a movie. As soon as Petitioner walked into the residence, Mr. Sharrod came over and was banging and beating on all **[*13]** the windows and saying they were doing this and that. Petitioner told Tammie to open up the door so Mr. Sharrod could see they were not doing anything (Tr 56). Tammi opened the door and Mr. Sharrod walked in and told Tammi he wanted his possessions back and that was all. When Mr. Sharrod left, Petitioner told Tammi to take him home because he did not feel comfortable with the situation and that he thought she and Mr. Sharrod were done (Tr 56). Petitioner then went back to his house (Tr 56). He did not see Mr. Sharrod again until Monday morning July 7, 2008 (Tr 57).

On the morning of July 7, 2008, the Krauszes were not on the jobsite before Petitioner got there (Tr 57). Before he was assaulted, Mike Krausz did speak to him. Petitioner was walking down the driveway and Mike Krausz pulled up and asked him if he had ordered the concrete yet. Petitioner responded that he had not and thought Mr. Krausz had already done so. That is when Mike Krausz went and got into the Denali with his wife (Tr 57). Petitioner figured Mr. Krausz was in the Denali and called in the concrete order (Tr 58).

Petitioner identified Px3 as a statement that he gave a detective while in Memorial Hospital. He identified **[*14]** his signature on the statement and the statement is in his printed handwriting (Tr 58-59). Petitioner was transferred at some point from Memorial Hospital to St. Louis University Hospital (Tr 59). To the best of his recollection, Petitioner wrote this statement while at Memorial Hospital (Tr 59). At the time he wrote the statement, he was pretty well doctored up and went through all the brain scans and different things (Tr 60).

Petitioner testified that he did nothing to provoke the attack. He did not attack Mr. Sharrod first or strike him first (Tr 60). Petitioner was not charged in any way by any law enforcement agency in conjunction with this incident (Tr 60). He has not been called to court to testify against Mr. Sharrod (Tr 60). Mr. Sharrod is not employed with Respondent Mike Krausz called Petitioner and informed him that he fired Mr. Sharrod that same day on the spot (Tr 61).

When Petitioner was in the hospital and before his surgery, Mrs. Krausz called him and asked how he was doing and said she did not think he was going to make it (Tr 62). At some point, Mrs. Krausz told Petitioner she was very scared of Kevin Sharrod because of the type of person he was and she did not **[*15]** know when he might go off and that was why she stayed away from him (Tr 62). She was referring to the incidents in November 2004 and July 7, 2008 (Tr 62). She did not tell Petitioner that Mr. Sharrod was fired, Mike Krausz had told him (Tr 62). When he was in the hospital after the operation, Mike Krausz informed Petitioner that Mr. Sharrod had lost his employment with a previous employer for fighting (Tr 62).

Petitioner testified that there was no fight between he and Mr. Sharrod and that it was just Mr. Sharrod hitting him (Tr 65). He had no idea how Mr. Sharrod got cut on the left side of his face, unless it was just his adrenaline while Petitioner was blacked out. Petitioner remembers Mike Krausz coming to them and telling Mr. Sharrod to go down the road. Petitioner believed that if Mike Krausz had not come, he would be dead (Tr 65). Petitioner felt the hits and got stomped on his foot and that is when he raised up (Tr 65). He believed Mr. Sharrod stopped when Mike Krausz came around (Tr 65).

4. On cross-examination, Petitioner testified he worked four days prior to Friday July 4, 2008 (Tr 66). During that time, two sections of the driveway were done (Tr 66). Rx3 is an accurate **[*16]** depiction of the area being worked on (Tr 67). The X on the drawing Rx3 is where Petitioner and Mike Krausz were after the incident occurred. Boo is Petitioner's nickname (Tr 67). The Krauszes were parked behind the dumpster when this was happening (Tr 68). Rx3 shows they were parked behind the dumpster. Petitioner blacked out in the altercation and did not know if anyone witnessed it (Tr 68). On Sunday July 6, 2008, Petitioner talked to Mike Krausz about the work schedule. Petitioner told him he had a dental appointment on July 7, 2008 and would need to leave work around noon and he said fine (Tr 69). The project July 7, 2008 was at a newly constructed home (Tr 72). Respondent's workforce consisted of the Krauszes, Petitioner, Kevin Sharrod, Jim Goodman and another guy (Tr 72-73). Jim Goodman was on the site July 7, 2008, but had not started work yet when the incident occurred (Tr 73). He had worked with Jim Goodman for about 6 months (Tr 73).

Between 2001 and 2004, Petitioner worked with Mr. Sharrod and had no problems (Tr 73). The November 2004 incident happened on Thanksgiving eve (Tr 74). Petitioner agreed that there were no other significant issues between he and Mr. Sharrod **[*17]** from Thanksgiving 2004 through July 7, 2008 (Tr 74-75). Petitioner did not report the November 2004 incident to law enforcement (Tr 75). Petitioner lived in the same trailer park as Mr. Sharrod for about two years between 2006 and 2008 (Tr 75). When Mr. Sharrod's vehicle was broken down, he would ride to work with Petitioner (Tr 76). Tammi used to date Mr. Sharrod (Tr 76). Petitioner started to see Tammi in late 2004/2005 (Tr 76). Petitioner continued to see Tammi from that time through the present (Tr 76). Tammi had already left Mr. Sharrod when Petitioner started seeing her (Tr 76-77). At least initially, Mr. Sharrod was not aware Petitioner was seeing Tammi (Tr 77). Tammi had her own trailer in the same trailer park as Petitioner and Mr. Sharrod (Tr 77). The conversation with Julie Krausz took place a day or two after the incident and while Petitioner was in the hospital (Tr 77). Before that, Julie Krausz had never told Petitioner that she was scared of Mr. Sharrod (Tr 77). Mike Krausz had never told Petitioner he was scared of Mr. Sharrod (Tr 78). Jim Goodman had never said he was scared of Mr. Sharrod (Tr 78). From 2001 through the present, Petitioner never reported any problems **[*18]** or concerns about violent propensities or any other issues with Mr. Sharrod to any agency, law enforcement or otherwise, only to the Krauszes (Tr 78). He did tell the Krauszes when they re-hired Mr. Sharrod that he was a loudmouth on the job (Tr 79). Petitioner never said to the Krauszes that he was scared of Mr. Sharrod (Tr 80). After the November 2004 incident, Petitioner told the Krauszes to keep Mr. Sharrod away from him (Tr 80). The Krauszes tried to do that by having Mr. Sharrod on the set-up crew and Petitioner on the finishing crew (Tr 80). Petitioner was not afraid that he was going to get attacked (Tr 81). He never told Jim Goodman that he was afraid of Mr. Sharrod (Tr 81). He did tell Jim Goodman about the quality of Mr. Sharrod's work and the type of person he was (Tr 81).

Petitioner identified Px3 as his voluntary statement concerning the incident (Tr 85). He wrote this and signed it (Tr 85). The information contained in Px3 is accurate (Tr 85). When Mr. Sharrod came over to him and the incident took place, Mr. Sharrod was basically really angry because of Tammi and this was the major reason for his anger (Tr 86). Petitioner testified that Mr. Sharrod would always ridicule **[*19]** him about how he walked, how he looked, how he was built. He described Mr. Sharrod as a jealous person (Tr 86). Petitioner stated that the Friday July 4, 2008 incident at Tammi's house really threw Mr. Sharrod over the edge and maybe boiled over during that weekend (Tr 86). Petitioner agreed that Mr. Sharrod was really ticked on Monday morning July 7, 2008

(Tr 87). When Mr. Sharrod came up to Petitioner, he could tell something was wrong with him (Tr 87). Petitioner did not think Mr. Sharrod would attack him (Tr 87). Petitioner's statement Px3 indicates Mr. Sharrod started yelling that Petitioner was not to f--k with his old lady and Petitioner understood that Mr. Sharrod meant Tammi (Tr 88-89). It is true that Mr. Sharrod had always accused Petitioner of messing with Tammi (Tr 89).

On re-direct examination, Petitioner testified that there were discussions with the Krauszes in 2006 and 2007 after Mr. Sharrod was re-hired about his attitude, work performance, anger and that they knew Petitioner was unhappy with that (Tr 90). On re-cross examination, Petitioner testified that he did not tell the Krauszes that he needed help, that he was afraid of Mr. Sharrod, that he needed someone **[*20]** to protect him and that he was concerned about his physical well-being. Petitioner did tell the Krauszes that they needed to watch Mr. Sharrod. Petitioner never expressed any concern for his own self-preservation (Tr 91).

5. In the Belleville Police Department Voluntary Statement of Petitioner taken July 7, 2008, Px3, the following is noted, "On 07-07-08 at about 6:30 a.m. I was at work at a site 2100 block of Southern Oak Circle in Belleville, IL. I saw Kevin Sharrod who works with me. He started yelling you don't f--k with my old lady. He always has accused me of messing with his ex Tammy. On Friday he came over to Tammy's house banging on the windows. I opened up the door and Tammy told him to leave. Today when he was yelling at me he was holding a hammer and a stake in his hands. He was about 5 feet away and rushed up on me. I grabbed him near his neck to keep him off me. The next thing I know I was on the ground and my right ankle was hurt. I tried to get up but could not. My boss Mike came over. He was trying to stop the bleeding to my head. I don't remember being hit. When I came to Kevin walked away. The police and ambulance came and took me to Memorial Hospital. I was told **[*21]** I have a fractured skull, fractured jaw and dislocated right ankle. They are now taking me to SLU Hospital for further treatment. I wish to prosecute Kevin for hitting me."

6. Julie Krausz testified that she is president of Respondent and has been since 2002 (Tr 93). She has known Petitioner since 1998. Respondent's business is hauling, excavating and concrete flat work (Tr 94). Respondent averages 7 to 8 employees and has had as many as 17 employees and much less (Tr 94). There were 6 employees on July 7, 2008 consisting of herself, Mike Krausz, Petitioner, Kevin Sharrod, Daniel Santell, Jamie Carbin, Bob Goodman and Jim Goodman (Tr 95). Mike Krausz is her husband and is considered a working supervisor at Respondent (Tr 95). Respondent does projects in different areas at the same time (Tr 95). Mike Krausz goes from place to place to check on the status of projects (Tr 95). Kevin Sharrod was an employee of Respondent (Tr 96). The last day the employees of Respondent worked was Wednesday July 2, 2008. It rained Thursday July 3, 2008 and the business was closed Friday July 4, 2008 (Tr 96). During the work week before July 4, 2008, Petitioner, Kevin Sharrod and Jim Goodman were working **[*22]** on the same project located at Lot 62 and 63 on Southern Oak Drive. She identified Rx3 as a diagram she drew of that area (Tr 97).

On July 7, 2008, Ms. Krausz arrived at that area at 6:30 a.m. (Tr 98). The driveway on Lot 62 was being done (Tr 98). Employees were to start work that day at 7:00 a.m. (Tr 99). The third portion of the driveway was to be poured that day (Tr 99). When she arrived, Petitioner was already there and standing by his truck (Tr 100). Kevin Sharrod was standing at the back corner of his pick-up truck (Tr 102). She drove to behind the dumpster and parked. She saw Petitioner started walking (Tr 102-103). She did not see anything else at that time (Tr 103). She did not see either Petitioner or Mr. Sharrod working on the driveway itself at that time (Tr 103). Preparation work before a concrete pour is something Mike Krausz would have handled (Tr 104). She did not talk with Petitioner before the incident on that day (Tr 104). Mike Ksausz had come to her vehicle and got in. Mike Krausz was on the telephone to order concrete for delivery. Mr. Sharrod was walking and Mr. Krausz asked him if he knew the measurements of the driveway and Mr. Sharrod said no (Tr 104-105). **[*23]** Mr. Sharrod said Petitioner was in one of his moods (Tr 105). Mr. Sharrod said Petitioner was with Tammi last night and he and Petitioner were not talking and he then walked off (Tr 105). This was around 6:33 a.m. (Tr 105). When Mr. Sharrod left, she and Mike Krausz heard some screaming. She thought it was just Mr. Sharrod talking loudly and it was early and he needed to be quiet. She looked to her right and saw employees of Kelehers coming out and the screaming got louder. Mike Krausz jumped out of the vehicle and she did also. She looked over and saw Petitioner was on the ground with Mr. Sharrod on him (Tr 106).

Ms. Krausz testified that Jim Goodman, the office manager, had informed her and Mike Krausz about an argument between Petitioner and Mr. Sharrod right before Thanksgiving 2004. She and Mike Krausz were out of town at that time (Tr 107). From January 2005 through July 7, 2008, she had no reports from Petitioner or any other employees about concerns or issues with Mr. Sharrod with respect to violence or physical safety (Tr 107). Prior to July 7, 2008, she had no concerns about the safety of employees of Respondent or herself in relation to any other employee at Respondent. **[*24]** Specifically, she had no concerns about safety issues or workplace safety with respect to Mr. Sharrod (Tr 108). Ms. Krausz takes her children to the job sites all the time. She has three children aged 7, 8 and 15 (Tr 109). Neither Petitioner nor Mr. Sharrod talked to her or Mike Krausz about the November 2004 incident (Tr 109). It is not true that Mr. Sharrod was fired because of the November 2004 incident (Tr 110). Mr. Sharrod's employment with Respondent was separated in 2006 (Tr 110). Mr. Sharrod had worked for Respondent from 2003 through 2006 and he was gone then for about a year. In 2006, Mr. Sharrod called her and Mike Krausz and said he had been arrested and was in jail and had called to tell them they probably needed to replace him, so they did (Tr 111). Mr. Sharrod told them he had violated probation for a DUI (Tr 112). At no time prior to July 7, 2008 did she have any knowledge at all about any concerns of any violent propensities on the part of Mr. Sharrod towards anyone else at Respondent (Tr 112).

Mr. Sharrod was re-hired in 2007. She had talked to Petitioner about this because he had a lot of work on himself (Tr 112). Respondent's business was extremely busy at that **[*25]** time. Petitioner told her he thought it would be okay to bring Mr. Sharrod back to work at Respondent because it would help relieve a lot of the stress that was on him (Tr 113). Petitioner did not express to her any reservations, concerns or fear about having Mr. Sharrod come back to work for Respondent (Tr 113). At the time Mr. Sharrod was re-hired in 2007, Ms. Krausz had no concerns for her personal safety, welfare, her children's safety, welfare or any other employee's safety or welfare (Tr 113-114). At no time between Mr. Sharrod's re-hiring in 2007 and July 7, 2008, no agency, law enforcement or otherwise, was ever called to any work site for any reason involving Mr. Sharrod and/or Petitioner (Tr 114). Prior to July 7, 2008, no one at any work site came to her to say they are really scared about working with Mr. Sharrod (Tr 114).

On July 7, 2008, Ms. Krausz had a conversation with Petitioner right after the incident (Tr 114). The purpose of the conversation was to keep Petitioner talking because he was in really bad shape (Tr 115). Mike Krausz was applying pressure to Petitioner's leg at that time (Tr 115). There were other people around. She asked Petitioner what was wrong. **[*26]** Petitioner replied that he thought it was because of Tammi, because they had a relationship. Ms. Krausz did not know that Petitioner was seeing Tammi and Tammi previously had a relationship with Mr. Sharrod (Tr 116). Other than Tammi, Petitioner did not reference any other issues or problems with Mr. Sharrod (Tr 118). Ms. Krausz was not aware of any other issues, other than what Petitioner told her about Tammi, that would have precipitated this incident (Tr 118).

Ms. Krausz stated that the incident was extremely traumatic for her. She called Petitioner while he was in the hospital. She

acknowledged she was upset. She told Petitioner she could not believe what she had seen and she was absolutely scared to death (Tr 117). She thought Petitioner was going to die (Tr 117). Ms. Krausz acknowledged she has had a hard time dealing with this situation (Tr 118). She keeps track of employees' work hours in a log book. Start times are 7:00 a.m. for everyone (Tr 119). On July 7, 2008, employee' start times were at 7:00 a.m. and that is the time they were to be paid from (Tr 120). Mr. Sharrod had been working for about a year after being re-hired until July 7, 2008 (Tr 121). During that year, there **[*27]** were no issues raised about Mr. Sharrod at all (Tr 121). Petitioner worked for Respondent since 2002.

7. On cross-examination, Ms. Krausz testified that Mr. Sharrod told them that the reason why he left his employment with Respondent in 2006 was because he had been picked up by the police and put in jail for violation of probation (Tr 123). At that time, she was not aware that Mr. Sharrod was on probation (Tr 123). When Mr. Sharrod was working for Respondent, he would miss work because of court dates and probation (Tr 123). She became aware he was on probation, but was not aware that that was the reason he went to jail (Tr 125). Mr. Sharrod did miss work because of court dates and probation meetings and she was aware he was missing work because he was on probation (Tr 125). She did inquire as to why he was on probation, but really did not know at that time (Tr 125-126).

Ms. Krausz testified that both Petitioner and Mr. Sharrod were terminated after the July 7, 2008 incident and she sent letters to both on July 18, 2008 (Tr 127). She did not know if Mr. Sharrod was charged with anything after the July 7, 2008 incident (Tr 127). Respondent's insurance company told her and Mike Krausz **[*28]** to leave it alone because the insurer was afraid the incident was going to be criminally investigated (Tr 128). The July 18, 2008 letter to Petitioner stated that he was involved in a fight on July 7, 2008 with a co-worker. Ms. Krausz had no evidence that Petitioner started, provoked or did anything to Mr. Sharrod to start the fight (Tr 128). Petitioner was fired because neither she or Mike Krausz knew who started the fight (Tr 128). The general contractor, Keleher, told her that Petitioner and Mr. Sharrod were not allowed back at the job site (Tr 128). On Thursday July 3, 2008, Ms. Krausz overheard Mr. Sharrod tell Mike Krausz that the job was 100% ready to go and that all that was needed was to walk in and pour concrete (Tr 130). Concrete tools would have been needed to finish the concrete (Tr 130). She did not know about drilling holes (Tr 131). Ms. Krausz was not sure whether Tammi was Mr. Sharrod's girlfriend or ex-girlfriend (Tr 132). She knew who Tammi was before July 7, 2008 (Tr 132). She did not know Petitioner and Mr. Sharrod were seeing the same woman at various times (Tr 132). She did not know if Petitioner had talked to Mike Krausz before he ordered the concrete (Tr 133). **[*29]** She did not know what time Petitioner arrived at the job site on July 7, 2008. Petitioner was always early and she would have no reason to doubt his testimony that he was there at 5:30 a.m. (Tr 133). The times Ms. Krausz had been at a job site that early, Petitioner usually waited for Mike Krausz to arrive and they all went out at the same time (Tr 133). She did not know what Petitioner did when he arrived early (Tr 134). The Bobcat was not running the morning of July 7, 2008 (Tr 134). She did not know if the Bobcat had been run before she arrived at the job site that morning (Tr 134).

When Mr. Sharrod came back from prison, Ms. Krausz talked to Petitioner about whether it was acceptable to re-hire him because Petitioner was pretty much running the project out there and wanted to know what he thought (Tr 135). She never had a conversation with Petitioner before about bringing someone else on (Tr 135). She stated Petitioner thought they should bring Mr. Sharrod back to work (Tr 136). There was no discussion about whether or not it was a good idea to bring Mr. Sharrod back because there was a conflict between Petitioner and Mr. Sharrod and she was aware of it (Tr 136). She thought Petitioner **[*30]** and Mr. Sharrod were friends (Tr 136). If it turns out that Petitioner is cleared and Mr. Sharrod's criminal charges come to fruition, she would welcome Petitioner back if allowed to do so. She did not know what the law was (Tr 137). Mr. Sharrod called her and told her that if she did re-hire Petitioner, he would file a lawsuit against her (Tr 137). She told Mr. Sharrod that: 1) Petitioner was not well enough to return to work and 2) she did not know what was going on (Tr 137). The hospital would not talk to her or Mike Krausz at all (Tr 137). Ms. Krausz stated she did go to the police station and asked for information, but she was told she had to go through the insurance company to find out that information (Tr 138). She was able to get the information, but the insurance company had to contact the police for why she was requesting same (Tr 139). Mr. Sharrod was claiming that Petitioner started the fight (Tr 139). She did not know who started the July 7, 2008 fight (Tr 139). She had not seen the exhibits obtained from the police deparment (Tr 140). Ms. Krausz has not been told that Mr. Sharrod was charged with misdemeanor battery (Tr 141). She did not know that it was her place to **[*31]** ask (Tr 141).

On re-direct examination, Ms. Krausz testified that Mr. Keleher is the general contractor at the job site (Tr 142). She did not believe Petitioner was engaged in any work on July 7, 2008 from the time he arrived at the job site until the fight occurred. She did not see Petitioner working when she arrived (Tr 143). She had information that Petitioner was involved in the fight. Ms. Krausz saw a cut above Mr. Sharrod's eye on the left side (Tr 145).

8. Michael Krausz testified that he has been part of Respondent since 2002 (Tr 146). He is a supervisor. He is familiar with Petitioner and Mr. Sharrod (Tr 147). On the evening of July 6, 2008, Mr. Ksausz called everyone and told them to be at work on the job site at 7:00 a.m. the next day (Tr 147). There would be no reason at all for Petitioner to be there at 5:30 a.m.(Tr 148). On Wednesday July 2, 2008, Mr. Krausz talked to Mr. Sharrod who told him that the job was 100% ready to go. The concrete was going to be poured on Thursday July 3, 2008, but it rained and was not done (Tr 148). Friday July 4, 2008 was a holiday. Monday July 7, 2008 was the next work day (Tr 148). On July 7, 2008, Mr. Krausz arrived at the job site at **[*32]** 6:30 a.m. (Tr 148). He saw Petitioner and Mr. Sharrod were already at the job site. Petitioner was over at his truck. Mr. Krausz walked around his box truck to open it up and put the keys back in. Mr. Sharrod was parked in front of him. Mr. Krausz said good morning to Mr. Sharrod and walked over to Julie Krausz's vehicle and got in it and began going over with her what had to be done for the week (Tr 149). He did not see Petitioner or Mr. Sharrod engaged in any work at the driveway (Tr 149). Julie Krausz's vehicle was parked by the dumpster and was facing the dumpster. He could not see anything except for the dumpster once he got into her vehicle (Tr 149-150). To his knowledge, there was no work left to do before the concrete pour (Tr 151).

While he was in Julie Krausz's vehicle, Mr. Sharrod came over and Mr. Krausz asked him if he remembered how big the driveway was so he would know how much concrete to order. Mr. Sharrod said he did not. Mr. Sharrod also said something to Julie Krausz about Petitioner being in some kind of mood (Tr 152). Mr. Krausz was already on the phone talking with the concrete plant and told them he would have to call them back with the amount he needed (Tr **[*33]** 152). Mr. Sharrod did not appear agitated (Tr 153). Mr. Krausz had not talked to Petitioner. Mr. Krausz was on the phone still with the concrete plant and out of the corner of his eye he saw two guys come out of Keleher's garage and they were looking up the street (Tr 153-154). He wondered what were these guys looking at (Tr 154). Mr. Krausz opened the car door and heard two guys screaming at each other. He could not see them, but he heard the screaming (Tr 154). Mr. Krausz got out of the vehicle and could see around the dumpster. He saw Petitioner on the ground and bleeding and ran towards him. He hollered at Mr. Sharrod, who still had the hammer up and was going to hit Petitioner again. Mr. Sharrod stopped and Mr. Krausz pushed him off Petitioner and onto the lot on the other side. He told Mr. Sharrod to stay right there and do not move. He then immediately went to Petitioner. Blood was everywhere on the street (Tr 155). Mr. Krausz held Petitioner up as he wanted to lay down and then stand up. He told Petitioner to sit still (Tr 155). Julie Krausz was calling 911 (Tr 155). One of the

guys brought paper towels and he applied them to Petitioner's head (Tr 156). He and Petitioner were **[*34]** just about in the middle of the street in front of the driveway (Tr 156). Mr. Krausz did not see anything transpire between Petitioner and Mr. Sharrod before he heard the screams or at the time he heard the screams (Tr 156-157). When holding him, Petitioner was not really in shape to talk. He thought he asked Petitioner what happened, but was not getting a whole lot. Mr. Krausz could not remember that Petitioner said anything about what caused the fight (Tr 157). The police arrived in 5 minutes, if that (Tr 157). The police took Mr. Sharrod away and the paramedics attended to Petitioner (Tr 158). He was with Petitioner until he was taken away by ambulance (Tr 158). At that time, Petitioner did not say anything about the fight (Tr 158). Jim Goodman showed up after they left and he and Mr. Krausz ordered the concrete and poured the driveway (Tr 159). There was no preparation work that had to be done because it was already done the week before (Tr 160).

Mr. Krausz acknowledged that Mr. Sharrod had worked for Respondent for a while and then he was off and had to go to jail (Tr 160). A couple years later, Mr. Sharrod was re-hired (Tr 160). Mr. Krausz stated that Mr. Sharrod was the kind **[*35]** that just got into trouble for things, like no driver's license, no insurance on his truck or driving a truck with no plates (Tr 161). Mr. Sharrod got arrested and went to jail and was gone. His employment ended at that time (Tr 161). At that time he had no reason to be concerned about any type of violent propensities for himself, his wife, his children or the employees. There were times Mr. Krausz had taken his children at 7 or 8 years old to the job sites (Tr 162). During Mr. Sharrod's first period of employment, neither Petitioner nor anyone else ever discussed with him that they had any fear or concern for their safety or any issues that related to Mr. Sharrod (Tr 162). If there had been, Mr. Krausz would try to resolve whatever issue there was (Tr 162). Little arguments did happen once and a while, but were resolved (Tr 163).

Sometime in 2006 or 2007, Mr. Sharrod returned. When he re-hired Mr. Sharrod, Mr. Krausz had no concerns for the safety and welfare of any of his employees or himself, his wife or children (Tr 163). Mr. Sharrod was always laughing and joking and kept it fun (Tr 164). Between 2002 and July 7, 2008, Petitioner never talked to Mr. Krausz about being concerned **[*36]** about working with Mr. Sharrod, other than having an argument once and a while (Tr 164). During the year prior to July 7, 2008, Mr. Krausz observed Petitioner and Mr. Sharrod interacting and coming to work together. Mr. Sharrod helped Petitioner get a trailer in the same trailer park where Mr. Sharrod and his girlfriend Tammi lived (Tr 164-165). After the July 7, 2008 incident, Petitioner did not call or convey to him in any way, shape or form that the incident had anything to do with Respondent or the work operation (Tr 165). It was Mr. Krausz's understanding that the incident was over Tammi, Mr. Sharrod's girlfriend that Petitioner had been seeing (Tr 165). Over the 6 months prior to July 7, 2008, Mr. Sharrod had said different things at different times and that Petitioner was seeing his girlfriend and this and that (Tr 166). In the year prior to July 7, 2008, Mr. Krausz was not aware of any incidents or expressions of hostility between Petitioner and Mr. Sharrod that gave him cause for concern for the welfare of his employees, himself or his family (Tr 166). Preparation work involved drilling holes in concrete and putting in rebar (Tr 167). The Bobcat was not running when Mr. Krausz **[*37]** arrived at the job site the morning of July 7, 2008 and there was no indication that it had been running as it was sitting on the side (Tr 168). Prior to this last year, Mr. Sharrod would miss work once a month to attend court dates (Tr 168-169). He did not know what the court dates were for as Petitioner never really said what happened (Tr 169). He was not aware of any incident between 2002 and July 7, 2008 where law enforcement was called for any conflict between Petitioner and Mr. Sharrod (Tr 170).

Mr. Krausz talked to Petitioner when he was in the hospital after the July 7, 2008 incident and did tell him that Mr. Sharrod had lost his other job over fighting. Mr. Krausz had heard that Mr. Sharrod had punched a guy named Todd's nephew in the head. He also heard that Mr. Sharrod stole some windows out of a house. He had heard these things a couple months after Mr. Sharrod had been re-hired and this was just talk on the street (Tr 171). Mr. Sharrod's behavior after he was re-hired did not suggest there were any problems and he actually kind of straightened out (Tr 171). During the year prior to July 7, 2008, Petitioner and Mr. Sharrod worked together daily (Tr 172). Mr. Krausz thought **[*38]** they were friends (Tr 172).

9. On cross-examination, Mr. Krausz testified he never asked Mr. Sharrod what he was on probation for and he never said (Tr 172-174). Mr. Krausz never asked Mr. Sharrod about being fired from the other job (Tr 174). On July 7, 2008, the concrete tools were on the truck and were taken out by Mr. Krausz and Jim Goodman (Tr 175). The bull float, Fresno and other stuff were in the truck (Tr 175). Mr. Krausz is aware that Petitioner would go to job sites early and just hang around (Tr 175). He had no idea what Petitioner did on the morning of July 7, 2008 before he arrived. The official start of work was 7:00 a.m. (Tr 176-177). Mr. Sharrod was a very good worker and Mr. Krausz hated to lose him (Tr 177). Sometimes Petitioner would just get mad about things. Like Mr. Sharrod, Petitioner would get mad about the way things were being done if it was not their way (Tr 177). Petitioner seldom missed work (Tr 177-178). Respondent's insurer suggested both Petitioner and Mr. Sharrod be fired (Tr 178-179). Mr. Krausz did not fire Mr. Sharrod in 2004. Mr. Sharrod just did not show up for work. His policy is if a person does not show up for work for 3 days, that person **[*39]** is terminated (Tr 180). Mr. Krausz had heard that the Bobcat key was out in the middle of the street after Petitioner was beat up. He did not pick up the key and was not sure what happened with it (Tr 180). Respondent has 5 or 6 Bobcats (Tr 181).

On re-direct examination, Mr. Krausz testified that Petitioner carried his own hand tools. The concrete drill was in the box truck. When he arrived on July 7, 2008, Mr. Krausz unlocked the box truck and put the keys back in the truck and went and sat in Julie Krausz's truck (Tr 182).

10. James Goodman testified that he is currently employed with PLM, an asphalt company. He had worked for Respondent for maybe a year (Tr 185). He is familiar with Petitioner and Mr. Sharrod and worked with them daily prior to July 7, 2008 (Tr 186). During that time, Mr. Goodman did observe hostile encounters and physical altercations between Petitioner and Mr. Sharrod (Tr 187-188). Two or three weeks before July 7, 2008, when they were working in Troy, Petitioner and Mr. Sharrod were arguing and others stepped between them and told them to knock it off (Tr 188). They were arguing about work and different things (Tr 188). This was the only time he saw an altercation **[*40]** between them (Tr 188). Mr. Goodman did observe Petitioner and Mr. Sharrod interact and socialize with each other and sometimes Mr. Sharrod came to work with Petitioner (Tr 189). Petitioner and Mr. Sharrod were friends (Tr 189). At no time did Mr. Goodman have any concern for his safety and welfare while working with them prior to July 7, 2008 (Tr 189).

Mr. Goodman arrived at the job site on July 7, 2008 after the incident occurred (Tr 190). The crew was supposed to be there at 7:00 a.m. Mike Krausz had called him the day before and informed him when to arrive (Tr 190). Mr. Goodman arrived at 6:45 or 6:40 a.m. (Tr 190). When he arrived, Petitioner was already on the ground. The police did not arrive until after he had arrived (Tr 190). He had no discussions with Petitioner at that time (Tr 191). There was no preparation work that needed to be done that day as it had already been done the last day worked the previous week (Tr 191-193). When he got there that day, there was no change in the driveway that was to be poured (Tr 193).

On cross-examination, Mr. Goodman testified that he did not know who got out the tools on July 7, 2008 (Tr 194). He had no reason to doubt Petitioner had got **[*41]** out the tools (Tr 194-195). He did not know who drilled the holes (Tr 195). The Krauszes were not there two or three weeks before July 7, 2008 in Troy when he had to step between Petitioner and Mr. Sharrod (Tr 195). As far as Mr.

Goodman knows, the Krauszes were not aware of that Troy incident and he did not tell them about it (Tr 196). On re-direct examination, Mr. Goodman testified that when he stepped between Petitioner and Mr. Sharrod, they had just been arguing, but it was headed to touching each other (Tr 196).

11. Petitioner was recalled and testified that he heard the testimony of Mr. and Mrs. Krausz. Their statements that he was not doing any work and the driveway being already ready were false (Tr 197-198). When Mike Krausz pulled up on July 7, 2008, Petitioner was walking down the driveway and he asked Petitioner if he had called in the concrete order yet. Petitioner replied no and that he thought Mike had done it (Tr 198). That was when Mike Krausz went to Julie Krausz's truck (Tr 198). Before the Krauszes had arrived, Petitioner got the key for the box truck from under the fuel tank and opened the back of the truck. He also opened up the gate. He got the electrical cord **[*42]** out and strung it across the driveway to drill the holes. After Petitioner drilled the holes, he rolled it up and put it on the front part of the driveway where the sidewalk would be set up. Petitioner took the concrete tools out and then got into the Bobcat and scraped out the high rock that was in the driveway (Tr 199). Petitioner always had the Bobcat keys with him. After the incident, the keys were laying in the middle of the street. Petitioner had used the Bobcat keys that morning and that was why they were in the street. Petitioner stated, "I came to the fight with a key." (Tr 199).

Petitioner testified that Julie Krausz's testimony and Mike Krausz's testimony that Mr. Sharrod was not fired in November 2004 and him simply not showing up for work was not true (Tr 200). Mike Krausz had come to Petitioner and told him he had fired Mr. Sharrod at that time (Tr 200). In his entire employment with Respondent, he was not ever disciplined, suspended or fined (Tr 200). He had never been terminated, except as result of this incident (Tr 201). On cross-examination, Petitioner testified that Mike Krausz told him he had fired Mr. Sharrod a few days after the November 2004 incident (Tr 202).

**[*43]** 12. The medical records, Px1, show that on July 7, 2008, Petitioner was seen at the emergency room of Memorial Hospital. EMS reported Petitioner was involved in an altercation at work and was hit in the head with a hammer. He had a head injury and right ankle deformity. A CT scan of Petitioner's head showed a left posterior parietal bone depressed skull fracture with adjacent pneumocephalus and small subdural hematoma as well as a left occipital laceration. X-rays of the ankle showed an oblique fracture through the supra-articular portion of the distal fibula with anteromedial dislocation of the tibiotalar joint space. A closed reduction of the ankle fracture and dislocation was performed. X-rays of the face showed a right mandibular ramus fracture. Petitioner was transferred to St. Louis University Hospital for neurological service not available at Memorial Hospital.

Petitioner was seen at St. Louis University Hospital on July 7, 2008. A history is noted of Petitioner being struck on the head with a claw hammer and loss of consciousness for 10-15 seconds. There was a parietal laceration of 5-6 cm. Petitioner complained of right 4th and 5th digit numbness and right ankle pain. On examination, **[*44]** a left depressed skull laceration with fracture was noted. There was abnormal right ankle movement. There was a bite mark with ecchymosis, edema and penetration on left dorsum of hand. There was edema of the right forearm and an abrasion on the right elbow. The laceration was stapled. It was noted that the mandibular fracture was nonoperable. It was also noted that right ankle surgery was to be done consisting of open reduction and internal fixation. Petitioner's mental status was within normal limits. Petitioner was discharged on July 9, 2008 with the following diagnoses: left occipital laceration; right talar dislocation; right fibular fracture; right mandible fracture. Restrictions were listed as no weight bearing of right leg, no driving and no vigorous activity. He was prescribed medications and to follow-up with various doctors.

In his Operative Report dated July 16, 2008, Dr. Karges noted a pre-operative diagnosis of right grade 1 open medial ankle injury with disruption of the right deltoid ligament and rupture of syndesmotic ligament. Dr. Karges performed an open reduction and internal fixation with plate and screws. Petitioner was discharged on July 17, 2008. When he was **[*45]** seen on August 18, 2008, Dr. Karges noted he wanted Petitioner to begin physical therapy in two weeks. Petitioner was to remain off work and the plan was to return to work in six weeks.

13. Medical bills were admitted as Px2 and show a total amount charged of $ 40,622.03.

14. Respondent admitted into evidence and the Commission has reviewed the following:
Rx1: Response to § 19(b) Petition;
Rx3: Drawing of Southern Oaks Circle;
Rx4: Batch order from Metro Concrete dated July 7, 2008.

Based on the record as a whole, the Commission reverses the Decision of the Arbitrator finding that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on July 7, 2008 and denies Petitioner's claim.

Injuries resulting from fights at work are compensable if the fight concerned the employer's business and if the victim was not the **aggressor.** *Franklin v. Industrial Commission*, 211 Ill.2d 272, 279 (2004); *Triangle Auto Painting & Trimming Co. v. Industrial Commission*, 346 Ill. 609, 618 (1931). When there is evidence that a fight between employees arose out of a purely personal dispute, **[*46]** the resulting injuries do not arise out of the employment. *Franklin*, 211 Ill.2d at 279. Moreover, "[t]he mere fact that association in the same work gives opportunity for an altercation is not sufficient to justify an award to the injured party." *Armour & Co. v. Industrial Commission*, 397 Ill. 433, 437 (1947). The quarrel must be over the proper manner of performing the employer's business. *Fischer v. Industrial Commission*, 408 Ill. 115, 119 (1951); *Armour & Co.*, 397 Ill. at 436-37; *Triangle Auto*, 346 Ill. at 617; see also *Rodriguez v. Industrial Commission*, 95 Ill.2d 166, 170 (1983) (injury compensable if dispute involved the conduct of work); *Laboy v. Industrial Commission*, 74 Ill.2d 18,25 (1978) (injury not compensable where quarrel was not related to the employer's work or performance thereof). Injuries to the **aggressor** in such a fight are not compensable. *Container Corp. of America v. Industrial Commission*, 401 Ill. 129, 133 (1948). **[*47]**

The Commission finds that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment in that he failed to prove a work-related motive for the fight. *Hurt v. Industrial Commission*, 191 Ill.App 3d 733 (1989), the case cited by the Arbitrator, is distinguishable and dealt with a situation where motive was unknown. Here, the motive was personal rather than work related. Petitioner's argument is that he was assaulted and that it was unprovoked. The officers and Julie and Mike Krausz all testified that Mr. Sharrod was injured on the left side of his face. Officer Lautz testified that Petitioner reported to him that when he arrived to work on July 7, 2008, Mr. Sharrod was giving him the eye, that some words were said and the two were involved in a physical altercation. Petitioner also stated that he came to the fight with the Bobcat keys. Therefore, the Commission finds that there was a fight between Petitioner and Mr. Sharrod and the evidence shows that the fight was about Tammi, a purely personal dispute.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove he sustained accidental **[*48]** injuries arising out of and in the course of his employment on July 7, 2008, his claim for compensation and medical expenses is hereby denied.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: AUG 19 2009

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > **IL Workers' Compensation Decisions**
Terms: **aggressor and date geq (06/08/2009)** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, June 8, 2010 - 9:18 AM EDT

09 IWCC 936

*2009 Ill. Wrk. Comp. LEXIS 971, **

JOSE JUAN GILES, PETITIONER, v. CARDINAL HEALTH, RESPONDENT.

NO: 06WC 7928

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF LAKE

2009 Ill. Wrk. Comp. LEXIS 971

**September** 22, 2009

**CORE TERMS:** disputed issues, failed to prove, terminated, struck, fight, rat, temporary total disability, name calling, supervisor, workplace, tolerance, violence, punched, larita, notice, accrue, radio, zero

**JUDGES:** Barbara A. Sherman; Paul W. Rink; Kevin W. Lamborn

**OPINION: [*1]**

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, the nature and extent of Petitioner's disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 17, 2008, is hereby affirmed and adopted.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: SEP 22 2009

ATTACHMENT:

**ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, an Arbitrator of the Commission, in the city of **Waukegan**, on **September 15, 2008**. After reviewing all of the **[*2]** evidence presented, the Arbitrator hereby makes findings on the disputed issues checked and in bold below, and attaches those findings to this document.

**DISPUTED ISSUES**
**C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?**
**F. Is the petitioner's present condition of ill-being causally related to the injury?**
**J. Were the medical services that were provided to petitioner reasonable and necessary?**
**L. What is the nature and extent of the injury?**

**FINDINGS**

. On **December 22, 2005**, the respondent **Cardinal Health *was*** operating under and subject to the provisions of the Act.

. On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.

. On this date, the petitioner ***did not*** sustain injuries that arose out of and in the course of employment.

. Timely notice of this alleged accident ***was*** given to the respondent.

. In the year preceding the injury, the petitioner earned $ **37,134.91**; the average weekly wage was $ **714.13**.

. At the time of injury, the petitioner was **41** years of age, ***married*** with **three** children under **[*3]** 18.

. Necessary medical services ***have not*** been provided by the respondent.

. To date, $ **0.00** has been paid by the respondent for TTD and/or maintenance benefits.

**ORDER**

. The respondent shall pay the petitioner temporary total disability benefits of $ **476.08**/week for **-0-** weeks, from **N/A** through **N/A**, as there is no period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **428.48**/week for a further period of **-0-** weeks, as provided in Section 8 of the Act, because **the Petitioner failed to prove an accident arising out of and in the course of his employment with the Respondent.**

. The respondent shall pay the petitioner compensation that has accrued from **N/A** through **N/A**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ **0.00** for necessary medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ **0.00** in penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay $ **0.00** in penalties, as provided in Section 19(l) of the Act.

. The respondent **[*4]** shall pay $ **0.00** in attorneys' fees, as provided in Section 16 of the Act.

**RULES REGARDING APPEALS** Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

**STATEMENT OF INTEREST RATE** If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

**October 7, 2008**

Date

OCT 17 2008

**In support of the Arbitrator's findings regarding (C.), Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent, the Arbitrator finds as follows:**

Petitioner testified that on December 22, 2005, he worked as a packer for Cardinal Health. He testified that on that date he told Mr. Joven Ramos that he was not doing his job correctly and that Mr. Ramos then struck him on the hip with a radio. He testified **[*5]** that his supervisor, Mr. Brian Ward, was right in front of them at the time and witnessed this event. He testified that Mr. Ward separated Mr. Ramos from the petitioner and that no further action was taken. Petitioner testified that about three hours later on that same day, Mr. Ramos struck him a couple of times with a roll of plastic wrap. Petitioner testified that he then pushed Mr. Ramos and Mr. Ramos then punched him in the face. Petitioner testified that Mr. Ramos continued to punch him until two other co-workers separated them.

The Petitioner admitted that prior to their alleged fight he called Mr. Ramos a "larita" which he stated meant little rat in Spanish. He stated that he called Mr. Ramos a little rat because Mr. Ramos had called him a "faggot." The Petitioner stated that he called Mr. Ramos this name on more than one occasion. On redirect examination, the Petitioner admitted that the name calling was not a result of their work.

Mr. Brian Ward, the Petitioner's supervisor, testified. He stated that contrary to the Petitioner's testimony, he was not present at work at any time on December 22, 2005 and never saw Mr. Ramos strike the Petitioner with a radio. Mr. Ward testified **[*6]** that his only involvement in the fight was his handling of the termination of both parties on the next day. Mr. Ward testified that both employees were terminated based on the Respondent's zero tolerance policy for workplace violence. Mr. Ward also testified that Mr. Ramos was a good employee.

Joven Ramos also testified. He stated that he was no longer an employee of Cardinal Health as he was terminated as a result of his altercation with the Petitioner. He testified that before the date of accident he worked for the Respondent for six months as a temporary employee. He stated that during that entire time the Petitioner harassed him and called him names. He stated that on several occasions, the Petitioner called him a "larita." He stated that when he found out that this meant little rat, he requested that the Petitioner stop calling him this name. He testified that as he argued with the Petitioner about the name calling, the Petitioner punched him in the face. He stated that he struck the Petitioner in response. Mr. Ramos stated that as a result of this incident, he was terminated from his employment with Cardinal Health pursuant to the zero tolerance workplace violence policy.

It **[*7]** is axiomatic that the Petitioner bears the burden of proving all the elements of his claim by a preponderance of the credible evidence. The Arbitrator finds that the Petitioner has failed to meet that burden, here. The Arbitrator questions the credibility and reliability of the Petitioner's testimony noting that his testimony was contradicted by the testimony of Mr. Ward and Mr. Ramos, neither of whom has any discernible financial interest in the outcome of the instant case. Based on the testimony of the witnesses and documentary evidence introduced into the record, the Arbitrator finds that the Petitioner was the **aggressor** in this incident. The Arbitrator further finds that the cause and purpose of the fight was strictly personal between the Petitioner and Mr. Ramos and in no way work-related. As such, the Arbitrator finds that the Petitioner has failed to prove that he sustained an accident which arose out of and in the course of his employment with the respondent. Therefore, the Petitioner's claim for benefits is hereby denied.

As the Arbitrator has found that the Petitioner has failed to prove that he sustained an accident which arose out of and in the course of his employment **[*8]** with the respondent, determination of the remaining disputed issues is moot.

The Petitioner's claim for compensation is denied.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

Labor & Employment Law > Workplace Violence

Workers' Compensation & SSDI > Benefit Determinations > Medical Benefits > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: **aggressor and date geq (06/08/2009)** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, June 8, 2010 - 9:18 AM EDT

09 IWCC 973

*2009 Ill. Wrk. Comp. LEXIS 1008, **

TROY LANGELLIER, PETITIONER, v. HOOPESTON FOODS, INC, RESPONDENT,

NO: 03WC054210

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF VERMILION

2009 Ill. Wrk. Comp. LEXIS 1008

**September** 28, 2009

**CORE TERMS:** arbitrator, nasal, load, beans, septal, pain, assault, punched, notice, supervisor, occurrence, deformity, accident report, prescription, congestion, co-worker, confirmed, aggressor, dizziness, ill-being, diagnosed, causally, surgery, filling, loud, altercation, accidental injury, causal connection, disputed issues, extent of loss

**JUDGES:** Mario Basurto; James F. DeMunno; David L. Gore

**OPINION: [*1]**

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, permanent partial disability, causal connection, medical expenses, notice, penalties and fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 11, 2008 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 11,800.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office **[*2]** of the Secretary of the Commission.

DATED: SEP 28 2009

ATTACHMENT:

**ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ruth White**, arbitrator of the Commission, in the city of **Danville**, on **November 27, 2007**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**
C. Did an, accident occur that arose out of and in the course of the petitioner's employment by the respondent?
E. Was timely notice of the accident given to the respondent?
F. Is the petitioner's present condition of ill-being causally related to the injury?
J. Were the medical services that were provided to petitioner reasonable and necessary'?
L. What is the nature and extent of the injury?
M. Should penalties or fees be imposed upon the respondent?

**FINDINGS**

. On **7/30/03**, the respondent **Hoopeston Foods, Inc**. operating under and subject to the provisions of the Act.

. On this date, an employee-employer **[*3]** relationship *did* exist between the petitioner and respondent.

. On this date, the petitioner *did* sustain injuries that arose out of and in the course of employment.

. Timely notice of this accident was given to the respondent.

. In the year preceding the injury, the petitioner earned $ **870.68**; the average weekly wage was $ **260.00**.

. At the time of injury, the petitioner was **32** years of age, with **1** child under 18.

. Necessary medical services **have not** been provided by the respondent.

. To date, $ **0** has been paid by the respondent for TTD and/or maintenance benefits.

**ORDER**

. The respondent shall pay the petitioner the sum of $ **156.00** /week for a further period of **75** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **facial and head injuries to the extent of 15% loss of use of the man as a whole.**

. Petitioner's Petition for Penalties and Attorneys Fees is denied.

**RULES REGARDING APPEALS** Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision **[*4]** of the Commission.

**STATEMENT OF INTEREST RATE** If the Commission reviews this award, interest of 3.27% shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

**January 4, 2008**

Date

JAN 11 2008

**In support of the Arbitrator's decision relating to C, accident, and E, notice, the Arbitrator finds the following facts:**

Petitioner was employed by the Respondent on July 30, 2003. On that date, the Petitioner was punched in the face by a co-worker, Joseph DeStefano. The Petitioner testified that he had been instructed by his supervisor several times prior to that date regarding the proper procedure for loading beans to be washed. In particular, he had been told to be careful about overfilling each load with beans since that causes waste.

On July 30, 2003, the Petitioner started his shift and discovered that Joseph DeStefano had overfilled a load of beans. The Petitioner testified that Mr. DeStefano had done this several times prior. In keeping with the instructions given to him by his supervisor, the Petitioner told Mr. **[*5]** DeStefano about the issues with overfilling the load with beans. The Respondent's job site is loud, and communication typically has to be done in close range with the listener and at a relatively loud volume in order to be heard.

After talking with Mr. DeStefano about properly filling each load with beans, the Petitioner then went back to his paperwork in order to reflect the changes he had made to the current load. As the Petitioner began to turn back around, he was struck in the face by Joseph DeStefano. The Petitioner was knocked out and fell onto the grated walkway. The Petitioner did not realize what had happened at first, but was later told by Mr. DeStefano that he punched him The Petitioner testified that he did nothing aggressive to warrant being struck in the face.

The only other witness to the occurrence, Joseph DeStefano, is in California, and did not testify.

The Respondent called Lou Merritt to testify. Lou Merritt was the Petitioner's direct supervisor, and the safety coordinator for the Respondent at the time of the occurrence. He performed an investigation into the occurrence as a result of information received from one of the Petitioner's co-workers, and prepared **[*6]** an accident report less than a week after the occurrence. (PX 3). His testimony confirmed that the Respondent's job site is loud, and that it is typical for employees to have to talk loudly and closely to one another in order to be heard. His testimony also confirms that the version of events contained in his accident report indicating that the Petitioner was the **aggressor** came solely from Joseph DeStefano. He confirmed that the Petitioner was a good worker and a conscientious worker, and that he had instructed the Petitioner with respect to proper filling of each load of beans. He also confirmed that if the Petitioner noticed someone improperly filling a load of beans, then it was within the purview of the Petitioner's job duties to correct the person who improperly filled a load of beans.

It is clear that injuries caused by an assault by a co-worker at the work place during work hours are compensable if the assault arose in the course of a dispute involving the conduct of the work, provided the claimant is not the **aggressor.** *Village of Winnetka v. Industrial Comm'n*, 250 Ill. App. 3d 240, 243 (1st Dist. 1993). In this case, there is no question that **[*7]** the altercation that took place arose in the course of a dispute involving work conduct. Additionally, there is also no dispute that the Petitioner was not the **aggressor.** The Petitioner threw no punches, and his actions in speaking with Mr. DeStefano were not unusual for the workplace, and certainly did not warrant being punched in the face.

With respect to notice, Lou Merritt testified that he was the direct supervisor for the Petitioner, and found out about the altercation the next day. He filled out an accident report dated August 4, 2003, well within the 45 day time limit for providing proper notice.

Based upon the foregoing facts, the Arbitrator finds that the Petitioner sustained accidental injuries to his face and head which arose out of and in the course of his employment and that timely notice was given to the Respondent.

**In support of the Arbitrator's decision relating to F, causal connection and L, nature and extent, the Arbitrator finds the following facts:**

The findings of fact stated above relating to (C) and (E) are adopted and incorporated by reference herein.

The Petitioner testified that he worked the remainder of the day on July 30, 2003. He did not go to the **[*8]** hospital until two days after being punched. He sought emergency care at Iroquois Memorial Hospital where he was diagnosed with a nasal fracture and cervical strain. The records reflect that he was advised that he "may call for follow-up." He was also prescribed Flexeril and Ibuprofen. (PX 4)

The Petitioner did not return to see a medical care provider until November 9, 2003 when he was seen at Carle Hospital (a Sunday). This was his first choice of doctor after emergency care. He testified that he was driven there by his mother and that the pain was so intense that he simply could not wait any longer. At that time he complained of double vision, neck pain, and dizziness. He was diagnosed with otitis media with vertigo and prescribed amoxicillin, Anaprox and Flonase. He was advised to continue care with his primary physician. (PX 7)

The Petitioner testified that he did not have a primary physician, so Carle Clinic gave him a list of physicians to chose from, one of whom was Dr. Matthew Taylor. Dr. Taylor saw the Petitioner on March 1, 2004, and performed a fiberoptic evaluation of the Petitioner's injured nose. Dr. Taylor found that the Petitioner had a severe nasal septal deformity **[*9]** to the right, blocking the side of his nose. Dr. Taylor diagnosed the Petitioner with a nasal airway obstruction secondary to nasal septal deformity, and a possible TMJ problem. The Petitioner was advised to use a mouth guard and anti-inflammatories, and was also referred for nasal septal reconstruction. (PX 8) This procedure was not performed.

The Petitioner returned to Iroquois Memorial Hospital two further times (on March 19, 2004 and June 9, 2004) still complaining of jaw aching and nasal congestion, as well as neck pain, double vision and dizziness. (PX 5, 6) He also returned one further time to Carle Hospital on June 25, 2004 reporting a sore throat, earache and backache. (PX 9) The Petitioner testified that ever since he was punched in the face, he has had constant problems with congestion.

The Petitioner also testified to being seen at Milford Chiropractic, but testified that the services were not much help. (PX 10) The services rendered also appear to be predominantly for lower back pain, which seems to be a new complaint, and not one for which the Petitioner had previously been treated in relation to the work injury. Therefore, the Arbitrator fords that these services are **[*10]** not related to the July 30, 2003 work injury.

The Petitioner also testified that he had last been seen by Dr. Russo, and that he had been referred to him by Carle Hospital. However, the record reflects that he was a self referral. In any event, Dr. Russo's records reveal substantially similar findings to those from Dr. Taylor. Dr. Russo's diagnosis was of: 1) functional nasal and nasal septal deformity including loss of tip support due to caudal septal malposition; 2) bilateral nasal septal deformity with impingement on left inferior turbinate; 3) significant hypertrophy of the left inferior turbinate; 4) rhinitis medicamentosa; 5) visual complaints; and 6) TMJ malfunction. Dr. Russo recommended surgery, an evaluation by an oral surgeon for TMJ, and an evaluation by an ophthalmologist. (PX 11)

The only history of injury provided to any medical provider was of the July 30, 2003 work assault.

The Petitioner testified that he was unable to obtain the surgery recommended because of lack of finances and denial of his claim by his employer. He also testified that he has learned to live with his problems, and is not currently interested in having the surgery done.

In terms of current difficulties, **[*11]** the Petitioner testified that he still lives every day with pain in his face and jaw, difficulty eating and chewing, increased pain in colder weather, frequent colds and congestion, and occasional dizziness. He did not have these problems prior to the work assault.

Based upon the above, the Arbitrator finds that the Petitioner's conditions of ill-being in the face and head are now permanent in nature, and are also causally related to the accidental injury sustained on July 30, 2003 while in the employment of the Respondent. The Arbitrator also finds that the Petitioner sustained an injury to the extent of 15% loss of use of the man as a whole.

**In support of the Arbitrator's decision relating to J, reasonableness and necessity of medical, surgical or hospital bills or service, the Arbitrator fords the following facts**:

The findings of fact stated above relating to (C), (E), (F), and (L) are adopted and incorporated by reference herein.

The following unpaid bills and expenses were asserted by the Petitioner and are shown by the bills, medical records, and testimony submitted into evidence to be reasonable and necessary and causally connected to the Petitioner's work related injuries **[*12]** and should be paid by Respondent:

| | |
|---|---|
| Iroquois Memorial Hospital | $ 3,463.88 |
| Carle Hospital | $ 649.00 |
| Carle Clinic | $ 486.70 |
| Comprehensive Imaging Associates | $ 553.00 |
| Iroquois Emergency Medicine Specialists | $ 1,133.00 |
| TOTAL | $ 6,285.58 |

In addition, the Petitioner submitted prescription receipts corresponding to the prescriptions he received from his treating physicians. These prescriptions total $ 174.96, and the Arbitrator finds these to be reasonable and necessary to treat the conditions of ill-being the Petitioner suffered as a result of the July 30, 2003 work assault.

**In support of the Arbitrator's decision relating to M, whether penalties should be imposed upon Respondent, the Arbitrator finds the following facts**:

Respondent did not cause the significant delays in getting this case to trial. There has been a legitimate liability issue in dispute from the beginning. Penalties are not appropriate.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Course of Employment > Personal Comfort
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: **aggressor and date geq (06/08/2009)** (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, June 8, 2010 - 9:18 AM EDT