*285 Ill. 31, *; 120 N.E. 530, **;*
*1918 Ill. LEXIS 821, ****

THE PEKIN COOPERAGE COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.* -- (HENRY RASOR, Defendant in Error.)

No. 12163.

Supreme Court of Illinois

285 Ill. 31; 120 N.E. 530; 1918 Ill. LEXIS 821

October 21, 1918.

PRIOR HISTORY: **[***1]** WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff in error employer sought review of the decision of the Circuit Court of Peoria County (Illinois), which entered a decision confirming the decision of defendant in error Industrial Commission of Illinois awarding **workmen's compensation** benefits to defendant in error employee.

OVERVIEW: The employee was injured while **working** for the employer. The employee sustained the injuries in a fight with a co-**worker** that was intoxicated and ordered to leave. The employee filed a claim that sought **workmen's compensation** benefits for the injury. The claim was heard by an arbitrator, and the Commission awarded benefits to the employee. The appealed the decision to the trial court, and the trial court entered a decision confirming the Commission's decision. The employer argued that the trial court erred because the injury had allegedly not arisen out of the employment of the employee. On appeal, the court affirmed the trial court's decision. The court reviewed the record from the trial court proceedings and determined that the trial court correctly confirmed the award of benefits to the employee. The court held that the determination of whether the injury arose out of the employment was a fact specific decision, and the court concluded that the trial court's decision was justified.

OUTCOME: The court affirmed the decision of the trial court.

CORE TERMS: claimant, staves, fellow-workman, barrel, workman, rack, objected, assault, threw, cooperage, culling, raiser, culler's, accidental injury, entitled to compensation, superintendent, watchman, foreman, struck, killed, shovel, fight, stone, horses, evidence tending, trifling, whisky

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN1 The court's consideration of the evidence is limited to the inquiry whether the record contains competent evidence to sustain the award of **workmen's compensation** benefits. If the evidence in favor of an applicant sustains the award, the weight of the evidence to the contrary will not be considered by the reviewing court. The determination of the facts upon contradictory evidence by the Illinois Industrial Commission is final. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries
Workers' Compensation & SSDI > Defenses > Injury by Fellow Servant

HN2 The **compensation** to be provided and paid by the employer under the **Workmen's Compensation** Act is not, however, for all accidental injuries which may be sustained by his employees in the course of their employment but only for such as also arise out of the employment. There must be some causal relation between the employment and the injury. It is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which after the event may be seen to have had its origin in the nature of the employment. The courts administering **compensation** laws similar to ours do not disagree upon the interpretation of the law, but in the great variety of circumstances which they are called upon to review it is frequently difficult to make the application to the facts. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Horseplay

HN3 An employee is not entitled to **compensation** for an injury which was the result of horseplay or skylarking, whether he instigated it or took no part in it. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN4 An injury to an employee who was struck and injured by an automobile in going across the street from his **working** place in the line of his duty, for the purpose of telephoning orders in furtherance of the business of his employer, arose out of the employment. More Like This Headnote

COUNSEL: FYFFE, RYNER & DALE, for plaintiff in error.

KIRK & SHURTLEFF, for defendant in error.

OPINION BY: DUNN

OPINION

[*31] **[**531]** Mr. JUSTICE DUNN delivered the opinion of the court:

Henry Rasor received an injury while at **work** for the Pekin Cooperage Company, for which an award was made in his favor by an arbitrator under the **Workmen's Compensation** act, which was confirmed by the Industrial Commission. A writ of *certiorari* sued out of the circuit court of Peoria county was quashed on motion of the respondents, and the judge of that court having certified that the **[*32]** cause was one proper to be reviewed by the Supreme Court, a writ of error was sued out for that purpose.

The question is whether Rasor's injury, which was received in the course of his employment, arose out of his employment, and it has been argued as if we were to determine it from the weight of the evidence. HN1 Our consideration of the evidence is limited to the inquiry whether the record contains competent evidence to sustain the award. If the evidence in favor of the applicant **[***2]** sustains the award, the weight of the evidence to the contrary will not be considered by the reviewing court. The determination of the facts upon contradictory evidence by the Industrial Commission is final.

On December 26, 1916, the Pekin Cooperage Company was engaged in the cooperage business in Peoria. Rasor was engaged in picking out or culling barrel staves for another employee who was known as a "barrel raiser," whose duty it was to make the barrels. George A. Miller was culling staves a few feet from Rasor for another barrel raiser. It was the duty of each culler to cull staves for his barrel raiser, and in case his rack ran out of staves it was customary for the culler to take staves from another culler's rack. Miller had been taken from the half-barrel department and put to culling staves in the afternoon and had been **working** about half an hour when the injury happened. He had taken a half-pint bottle of whisky with him to the plant in the morning, from which he had taken two or three drinks, and he had about half the whisky left. Shortly after the injury the superintendent sent Miller home because he was drinking on the job. Miller had gone to another part of the **[***3]** building a few minutes, and when he returned he took some staves from Rasor's rack and put them in his own. Rasor objected to this in language which was offensive and a fight ensued, the details of which are clouded in the obscurity which usually attends such occurrences. There is evidence tending to show, and which would justify the conclusion, **[*33]** that Miller was the **aggressor** throughout and that Rasor did no more than defend himself. Rasor's claim is for injuries received in this encounter.

Rasor clearly suffered an accidental injury in the course of his employment. It was a sudden and unexpected mishap occurring outside of the usual course of events without any design on his part while he was engaged at his **work.** HN2 The **compensation** to be provided and paid by the employer under the **Workmen's Compensation** act is not, however, for all accidental injuries which may be sustained by his employees in the course of their employment but only for such as also arise out of the employment. There must be some causal relation between the employment and the injury. It is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which after **[***4]** the event may be seen to have had its origin in the nature of the employment. The courts administering **compensation** laws similar to ours do not disagree upon the interpretation of the law, but in the great variety of circumstances which they are called upon to review it is frequently difficult to make the application to the facts. In *Armitage* v. *London and Western Railway Co.* 86 L.T. 883, (a case under the English **Workmen's Compensation** act,) two boys, fellow-**workmen** of the claimant, were "larking" and one pushed the other into a pit. The latter in anger threw a piece of iron at the former but missed him and injured the claimant, who was engaged at his **work.** It was held that the act had no relation to the employment but was an intentional wrongful act and was not a risk of the employment. In *Baird* v. *Burley,* 45 Scott L.R. 416, the claimant, who was **working** in a coal mine, was pursuing a fellow-**workman** to prevent him from carrying off a hutch. The latter threw some rubbish, and the former, in seeking to avoid it, struck his head against the side of the passage. It was held the accident was caused by the act of a fellow-**workman** outside the scope of his employment **[***5]** and that the **[*34]** claimant was therefore not entitled to **compensation**. In *Murphy* v. *Berwick,* 43 Ir. L.T. 126, a customer came out of the bar of a hotel into the kitchen, which adjoined it, and made a rush at the cook, who in trying to avoid him threw her hand through a glass door and was injured, and it was held that the accident did not arise out of her employment. In New Jersey it was held that HN3 an employee is not entitled to **compensation** for an injury which was the result of horse-play or sky-larking, whether he instigated it or took no part in it. (*Hulley* v. *Moosbrugger,* 88 N.J.L. 161.) To the same effect is *Pierce* v. *Boyer Coal Co.* 99 Neb. 321. This is contrary to our decision in the case of *Pekin Cooperage Co.* v. *Industrial Board,* 277 Ill. 53. The death of a watchman in a mill, who was killed by a robber who concealed himself for the purpose of robbing the watchman and not the mill, was held not to arise out of his employment. (*Walther* v. *American Paper Co.* 89 N.J.L. 732.) **[**532]** On the other hand, in the following cases the injuries have been held to arise out of the employment: Where a premeditated assault was made upon **[***6]** a schoolmaster by unruly pupils, resulting in his death. (*Trim Joint School District Board* v. *Kelly,* [1914] A.C. 667.) Where an attack was made on a cashier traveling with a large amount of money. (*Nesbit* v. *Rayne & Beam,* [1910] 2 K.B. 689.) Where a **workman** was injured by lightning upon a high and unusually exposed scaffold. (*Andrew* v. *Failsworth Industrial Society,* [1904] 2 K.B. 32.) Where a **workman** was bitten by a cat habitually kept on the premises. (*Rowland* v. *Wright,* [1909] 1 K.B. 963.) Where a stone thrown by a boy at a locomotive injured the engineer. (*Challis* v. *London and Southwestern Railway Co.* [1905] 2 K.B. 154.) Where an assault by a fellow-**workman** on the claimant resulted from a struggle over a brush to be used in the **work.** (*McIntyre* v. *Rodgers & Co.* 41 Scott. L.R. 107.) Where a **workman,** whose duty it was to take care of the horses which he drove, objected to the amount **[*35]** of cold water which a fellow-**workman** was throwing on the horses in washing them and was injured in a fight growing out of the quarrel. (*Heitz* v. *Ruppert,* 218 N.Y. 148.) Where a **workman** was killed while at **work** by an intoxicated **[***7]** fellow-**workman,** whose condition and habits were known to the superintendent. (*In re McNicol,* 215 Mass. 497.) Where a **worker** on a railroad section was not doing his **work** properly, and upon his neglecting to follow the foreman's directions the latter told him to drop his shovel and get his time, but the man refused and the foreman undertook to take his shovel from him and was injured. (*Western Indemnity Co.* v. *Pillsbury,* 170 Cal. 686.) In *Mueller*

Construction Co. v. Industrial Board, 283 Ill. 148, we held that [HN4] an injury to an employee who was struck and injured by an automobile in going across the street from his **working** place in the line of his duty, for the purpose of telephoning orders in furtherance of the business of his employer, arose out of the employment.

Each of the decisions cited was rendered upon a consideration of the facts of the particular case. Two cases are seldom precisely alike in their facts. Some, at least, of the cases cited are doubtful, and with the conclusions reached in some of them we do not agree. All concur in the rule that the accident, to be within the **Compensation** act, must have had its origin in some risk of the employment. **[***8]** No fixed rule to determine what is a risk of the employment has been established. Where men are **working** together at the same **work** disagreements may be expected to arise about the **work,** the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's **work** in which two men are engaged and as a result of it one injures the other, it may be inferred that the injury arose out of the employment. The origin of this difficulty **[*36]** was trifling, -- the taking of a few staves from the claimant's rack, to which he objected, saying, as he testified, that if Miller would stay in there he would be up with the claimant. The dispute was concerning the employer's **work** in which the men were both engaged, and there is evidence tending to show that the claimant was not responsible for the assault.

The judgment will be affirmed.

Mr. JUSTICE STONE having heard this case in the circuit court took no part in its decision here.

*287 Ill. 564, *; 122 N.E. 796, **;*
*1919 Ill. LEXIS 1204, ****

SWIFT & CO., Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.* -- (FRANK BLUM, Defendant in Error.)

No. 12280.

Supreme Court of Illinois

287 Ill. 564; 122 N.E. 796; 1919 Ill. LEXIS 1204

April 15, 1919

PRIOR HISTORY: [*1]** WRIT OF ERROR to the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer sought review of the judgment of the Circuit Court of Cook County (Illinois), which affirmed a decision of appellee Illinois Industrial Commission awarding 416 weeks of disability benefits to appellee injured steam-fitter. At issue was whether the steam-fitter's injury by reason of an altercation with another employee arose in the course of employment.

OVERVIEW: The steam-fitter's duty was to repair plumbing leaks in the employer's meat packing plant. When a leak occurred in the sewing department, the steam-fitter was asked to respond. The evidence was controverted, but it appeared that the steam-fitter and the employee who called for repairs engaged in an altercation over the leak and whether the steam-fitter would repair it. According to the employee, the steam-fitter raised a metal pipe as if to strike him, whereupon the employee struck the steam-fitter a blow that caused the latter to fall and sustain a fracture of the head. The steam-fitter testified but he had little or no memory of the incident. The Commission's award of 416 weeks of benefits was affirmed on appeal to the circuit court and the employer appealed, arguing that the injury was not sustained in the course of employment. The court affirmed, stating that an injury occurred in the course of employment if the event had its origin in the nature of the employment. The court noted that the evidence was controverted, but concluded that there was evidence to support the Commission's determination that the altercation had its origin in the steam-fitter's employment.

OUTCOME: The court affirmed the judgment that the trial court affirming the Industrial Commission's award of disability benefits to the steam-fitter.

CORE TERMS: blum, leak, struck, pipe, blow, whistle, probabilities, watchmen, threatening manner, steam-fitting, threatening, altercation, talking, raising, repair, floor, valve, injury arose, burden of proof, reasonable man, competent evidence, arbitrator, incidental, comparing, balancing, harmony, drawing, night, witnesses testified, personal matters

LEXISNEXIS® HEADNOTES Hide

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

HN1 An employee is injured in the course of his employment when the injury occurs within the period of his employment at a place where he may reasonably be and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it. There must be some causal relation between the employment and the injury. It is not necessary that the injury be one that ought to have been foreseen or expected, but it must be one that after the event may be seen to have had its origin in the nature of the employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Inferences & Presumptions > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN2 An accident, to be within the Illinois **Workmen's Compensation** Act, must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of the employment has been established. Where men are **working** together at the same **work** disagreements may be expected to arise about the **work,** the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's **work** in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Inferences & Presumptions > General Overview

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Proof > Burdens of Proof

Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof

HN3 The burden of proof rests upon a disability benefits applicant to furnish evidence from which an inference can logically be drawn that the injury arose out of and in the course of the employment, but such proof may be circumstantial as well as direct. It is impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn by the Illinois Industrial Board, but that the evidence must be such as would induce a reasonable man to draw it; that where there is ground for comparing and balancing probabilities at their respective values, and where the more probable conclusion is that for which the applicant contends, the arbitrator is justified in drawing an inference in favor of the applicant. What is evidence of a fact and what is merely guessing at the fact cannot be defined by any formula that one can invent; what is wanted is to weigh the probabilities, to see if there be proved facts sufficient to enable one to have some foothold or ground for comparing and balancing the probabilities and their respective values, one against the other. More Like This Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Proof > Burdens of Proof

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview

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

HN4 Although the burden of proof is on the disability benefits applicant to prove his case, that does not mean that he must demonstrate it beyond all reasonable doubt. It only means that there must be evidence in his favor upon which a reasonable man can act. If the evidence, though slight, is sufficient to make a reasonable person conclude that the applicant was injured while performing his duties in the course of his employment or duties incidental to that employment, then the case is proved. In proceedings under the Illinois **Workmen's Compensation** law the Supreme Court of Illinois' consideration of the evidence is limited to the inquiry whether the record contains competent evidence to sustain the award, and if so, the weight of evidence to the contrary will not be considered. The only question before the court is whether the Industrial Board was justified, on the facts proved, in drawing the conclusion that it has drawn. The finding of the Industrial Board is not to be set aside if warranted by the evidence, although the court might feel that a different conclusion would have been reached if the members of the court had been called upon to decide the question in the first instance. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: THOMAS M. COEN, and JOHN E. KEHOE, for plaintiff in error.

JOHN A. BLOOMINGSTON, for defendant in error.

OPINION BY: CARTER

OPINION

[*565] **[**796]** Mr. JUSTICE CARTER delivered the opinion of the court:

An application was filed with the Industrial Board on October 13, 1914, by Frank Blum, defendant in error, for adjustment of claim for injuries alleged to have been incurred by him while in the employ of Swift & Co. The arbitration committee decided that he was not entitled to **compensation.** On review the Industrial Board awarded **compensation** of $7.50 per week for a period of 416 weeks from April 10, 1914, and ordered that if at the expiration of that time Blum were living, he should recover from the plaintiff in error a pension of $257.60 a year, payable semimonthly, as long as he might live. The case was taken to the circuit court of Cook county by writ of *certiorari* and the judgment of the Industrial Board was affirmed. The trial judge certified that the cause was one proper to be reviewed by this court, and it is here on writ of error.

[*2]** At the time of the injury, April 3, 1914, Frank Blum was employed by Swift & Co. at its packing plant at the Union Stock Yards in Chicago. At and before the time of the injury it was his duty, together with other employees in the steam-fitting department, to look after water-pipe leaks in the different buildings, including that occupied by the pork department. The custom was, throughout these **[*566]** buildings, in case of pipe leaks and other matters where repairs were needed, to blow a whistle, in response to which an employee of the steam-fitting department would come. Frank Nieukirk was foreman of sewing and tying in the smoked-meat room on the fourth floor of house No. 19 of the pork department. On the Sunday prior to te injury Nieukirk told Blum there was a leak in one of the pipes on the fourth floor, and according to Nieukirk's testimony Blum replied that he would take care of it. On Thursday before the injury Frank Selen, who **worked** with Blum in the steam-fitting department, attempted to repair the leak but without success, and the pipe kept leaking. Nieukirk directed the whistle be blown for one of the pipe repairmen. There was no response, and he ordered the whistle **[***3]** blown, again, and then the third time. Selen, upon hearing the whistle, found Blum and told him of the call. Blum started at once for Nieukirk's department and Selen followed a short distance behind. When Blum entered the smoked-meat room he walked at once towards Nieukirk, and, according to the latter's testimony on the hearing, the first he knew Blum camp up to him, took him by the shoulder, pulled him around and asked, "What do you want?" Nieukirk testified: "I had not spoken to Blum before. Blum said, 'What in hell do you fellows mean by blowing a whistle?' I says, 'You know what we want; we want that leak repaired.' I says, 'I want to **work** in harmony with you as much as I can; I tried to get you to fix this leak aince last Sunday; nothing has been done to remedy it since.' He says, 'Well, I haven't got time to fix the leak.' I says, 'All right; that is all I want to know; I will take it up with the superintendent's office and sec that this leak is done; I dont't like to go over you boys' heads, but that is what I am going to do this time.' He says, 'All right; to ahead; I will fix you.' He stepped around with an attitude as if he was going **[**797]** to strike me, and said, **[***4]** 'All right, you bastard, go ahead; I will fix you." He stepped **[*567]** around in an attitude to strike and I hit him with my fist. He had a valve or pipe. He raised his hand up to strike, -- clear up, in a manner of striking me. I am sure about that." Nieukirk further testified that he had never had any trouble before with Blum, and that Blum was apparently a harmless individual though of a quarrelsome disposition.

When struck by Nieukirk, Blum fell to the cement floor and sustained a basal fracture of the occipital bone, either by the blow or the fall. The testimony shows, without contradiction, that after the injury he was confined to his bed until August, and after, that was unable to walk, except with difficulty; that his memory was gone and he could not articulate properly. On the hearing of this proceeding he testified, but it was apparent that he remembered very little, if anything, in regard to the accident or how it occurred. He did, however, testify that he had no feeling or grudge against Nieukirk and ao far as he remembered did not raise his hand to

strike him; that he never wanted to have a scrap there. According to Nieukirk's testimony, also, there had never **[***5]** been any trouble between himself and Blum before that time.Selen, Blum's assistant, who followed into the room and according to his testimony was about thirty feet away at the time of the accident, does not understand English very well. He testified that he did not see Blum start to hit Nieukirk; that Nieukirk and Blum were both talking loud and that Blum was moving his hands. Miss Owens, another witness, who was **working** in the room, did not see Blum raise the pipe or valve which he had in his hand over his head, but testified that he had the pipe in his hand and that his hand was drawn back, as we understand the record, about six inches. Mrs. Brzana, another employee, was sewing bags, with her back to Nieukirk and Blum at the beginning of their interview but turned around to watch them, and she testified, in answer to a question, that blum did not raise his hand to strike Nieukirk, but afterwards, on cross-examination, stated that **[*568]** she may not have seen all that took place. Timothy Kelleher was called by plaintiff in error and was the best situated to hear and see all that took place. He stated that Nieukirk, at the time Blum came into the room, was piling hams on **[***6]** a truck; that witness was close at hand; that Blum stood at the end of the truck nearest witness; that he heard them talking loud, but that the first he took heed of was Nieukirk telling Blum to get away, which he did three times, and then Blum threw his right hand back about six inches and Nieukirk immediately struck him on the jaw and knocked him down.

These are all the witnesses who testified with reference to this occurrence. All of them, as we understand the record, testified before the arbitrator, but their testimony was not heard before the Industrial Board except that of Mrs. Brzana, which seems to have been taken before the board. All of these witnesses except Kelleher were called by defendant in error, and it is argued by counsel for plaintiff in error that defendant in error is bound by the testimony of Nieukirk as to what took place, as Nieukirk was called by him and was the only witness who testified in detail as to what happened, and that, so far as any of the other witnesses testified, their testimony tends to corroborate that of Nieukirk, while, counsel for defendant in error insists that Nieukirk's testimony is contradicted in material matters, especially as to **[***7]** Blum threatening to strike him or raising his hand in a threatening attitude. Counsel for both parties are very vehement in their arguments in the briefs as to what actually occurred and contradict each other very positively, each claiming that the statements of opposing counsel as to certain facts are not borne out by the record. We think it is clear that Nieukirk's testimony as to Blum raising his hand in a threatening attitude to strike him with a valve or iron in his hand, before Nieukirk struck Blum, is not corroborated in the record by the testimony of any other witness. The most that can be said is that Kelleher **[*569]** testified that Blum drew his hand back and that the motion was such that witness would think that something was going to happen, but there is no testimony, outside of Nieukirk's, that the hand was raised high in a threatening manner. Four witnesses testified to seeing the blow struck. Nieukirk's testimony is to the effect that he struck the blow immediately upon Blum raising his hand in a threatening manner, and while it is true that none of these witnesses except Kelleher were so situated that they could see all that took place or that they claimed **[***8]** they saw all that took place, it would seem somewhat surprising if Blum had raised his hand in a threatening manner, as testified by Nieukirk, that some of them would not have seen that act, for two of them did testify that Blum drew his hand back.

The chief question discussed in the briefs is whether or not this accident arose out of and in the course of Blum's employment.This court has said that HN1 an employee is injured in the course of his employment when the injury occurs within the period of his employment at a place where he may reasonably be and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it. (*Dietzen Co. v. Industrial Board*, 279 Ill. 11.) We have said also that there must be some causal relation between the employment and the **[**798]** injury; that it is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which after the event may be seen to have had its origin in the nature of the employment. (*Pekin Cooperage Co. v. Industrial Com.* 285 Ill. 31; see, also, *In re McNicol*, 215 Mass. 497.) The courts do not usually disagree as to the general **[***9]** fundamental principles necessary for recovery under the **Workmen's Compensation** act, but in the great variety of circumstances under which they are called upon to apply these principles they sometimes disagree as to the application of the law to the facts. As this court said in *Pekin Cooperage Co. v. Industrial Com. supra*, two cases are seldom **[*570]** precisely alike in their facts, and the opinion further states (p. 35): "All concur in the rule that the HN2 accident, to be within the **Compensation** act, must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of the employment has been established. Where men are **working** together at the same **work** disagreements may be expected to arise about the **work,** the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's **work** in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment." The opinion in that **[***10]** case reviews a large number of cases in other jurisdictions where the injury was caused by disagreements of fellow-employees, and it is apparent from an examination of those various cases that they are not all consistent, and, as stated in that opinion, not all in harmony with the ruling of this court in that case.

Counsel for defendant in error in this connection argues at length that under the reasoning of this court in *Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96, and other cases of like nature where men employed as night watchmen were attacked, the test whether they were injured in the course of their employment was stated to be whether they were engaged in duties such as were likely to cause the watchmen to deal with people who were likely to attack them, but we do not think the *Ohio Building Vault Co. case,* and other cases of like nature as to watchmen or night policemen, are controlling on the question here before us. Those cases were dealing with questions very different from the questions here involved. The case of *Pekin Cooperage Co. v. Industrial Com. supra*, and cases therein cited and reviewed, are much more in point on the question **[***11]** here under consideration.

[*571] The argument of counsel for plaintiff in error is that the accident did not occur in the course of and arise out of the employment of Blum, because, after Blum reached the room where Nieukirk was and found out what was wanted, it was his duty to go at once and repair the leaking pipe, but that he chose to remain at the place where Nieukirk was **working** and engage him in a verbal dispute; that from the time he was told what was wanted, until the accident, he had been acting out of the course of his employment and was gratifying merely his own personal feelings in carrying on a dispute. Counsel also argues that even though Nieukirk was the **aggressor** in a physical conflict, he testified that he was prompted to strike Blum in what he considerd self-defense, and that therefore he (Nieukirk) was not acting within the line of his employment.Counsel for defendant in error argues that even though Nieukirk's story is literally true as to how the altercation started and as to everything that happened there, yet it is clear from uncontradicted testimony that Blum went there in response to the whistle calling him; that Nieukirk was insisting that he had complained **[***12]** several times about the leak and that it had not been fixed, and that while talking about the matter Nieukirk struck Blum without any provocation; that in any event the talk was about the **work** of the master; that neither had a personal grudge against the other; that the blow was struck after the argument regarding the master's **work,** and, whether the foreman's explanation is correct or not, that the accident arose out of and in the course of the employment; that even though it is true the blow was struck either as the result of anger on the part of Nieukirk or a mistaken idea as to it being necessary for his self-defense, it grew out of a discussion over business and not out of the personal matters of either Blum or Nieukirk. Counsel on both sides have cited numerous authorities as tending to support their respective positions in this case, but none of them are so similar on **[*572]** the facts that we deem it necessary to review or distinguish them.

This court has said that HN3 the burden of proof rests upon the applicant to furnish evidence from which an inference can logically be drawn that the injury arose out of and in the course of the employment, but that such proof may be **[***13]** circumstantial as well as direct. (*Ohio Building Vault Co. v. Industrial Board, supra,* and cases there cited.) We have also said that it is impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn by the Industrial Board, but that the evidence must be such as would induce a reasonable man to draw it; that where there is ground for comparing and balancing probabilities at their respective values, and where the more probable conclusion **[**799]** is that for which the applicant contends, the arbitrator is justified in drawing an inference in favor of the applicant. (*Peoria Railway Terminal Co. v. Industrial Board,* 279 Ill. 352.) It has also been said that what is evidence of a fact and what is merely guessing at the fact cannot be defined by any formula that one can invent; that what is wanted is to weigh the probabilities, to see if there be proved facts sufficient to enable one to have some foothold or ground for comparing and balancing the probabilities and their respective values, one against the other. (*Owners of Ship Swansea Vale* v. *Rice,* 4 B.W.C.C. 298.) HN4 While the burden of proof is on the applicant **[***14]** to prove his case, this does not mean that he must demonstrate it beyond all reasonable doubt. It only means that there must be evidence in his favor upon which a reasonable man can act. If the evidence, though slight, is sufficient to make a reasonable person conclude that the applicant was injured while performing his duties in the course of his employment or duties incidental to that employment, then the case is proved. (*Marshall* v. *Owners of Ship Wild Rose,* 3 B.W.C.C. 514.) In proceedings under the **Workmen's Compensation [*573]** law this court's consideration of the evidence is limited to the inquiry whether the record contains competent evidence to sustain the award, and if so, the weight of evidence to the contrary will not be considered. (*Pekin Cooperage Co. v. Industrial Com. supra.*) The only question before the court is whether the Industrial Board was justified, on the facts proved, in drawing the conclusion that it has drawn. The finding of the Industrial Board is not to be set aside if warranted by the evidence, although the court might feel that a different conclusion would have been reached if the members of the court had been called upon to decide **[***15]** the question in the first instance. *VonEtte* v. *Globe Newspaper Co.* (Mass.) L.R.A. 1916D, 641.

We find much discussion in the briefs as to who was the **aggressor** in the fight in which Blum was injured. While such question might have some bearing on whether the dispute arose out of and in the course of the employment or was purely a personal matter between the parties, we do not think it is necessarily decisive. Considerable space is taken up in the briefs as to the comparative size and physical strength of Nieukirk and Blum. We find nothing in the record that clearly and definitely shows the size, weight or physical ability of Blum, and, moreover, we do not regard the comparative size and physical strength of these men as a controlling fact in deciding the question here under consideration. We think there is evidence in the record that justified the Industrial Board in finding that the altercation grew out of matters connected with Blum's **work,** and that therefore the accident arose out of and in the course of his employment, and that the altercation was not purely a personal one, entirely outside of the scope of such employment. The fact that Blum was not actually doing **[***16]** the special **work** of repairing when he was injured does not alter the case. He was where he was expected to be, preparatory to fixing the leak.

[*574] While the case, upon the facts and application of the law, is close, we hold that there is sufficient competent evidence in the record to justify the conclusion of the Industrial Board, and that therefore the courts are bound by that finding.

The judgment of the circuit court will therefore be affirmed.

Mr. JUSTICE CARTWRIGHT took no part in this decision.

*288 Ill. 126, *; 123 N.E. 278, **;*
*1919 Ill. LEXIS 1069, ***; 10 A.L.R. 1170*

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.* -- (KATHERINE KRAUJALIS, Defendant in Error.)

No. 12511.

Supreme Court of Illinois

288 Ill. 126; 123 N.E. 278; 1919 Ill. LEXIS 1069; 10 A.L.R. 1170

April 15, 1919

SUBSEQUENT HISTORY: **[***1]** Rehearing denied June 5, 1919.

PRIOR HISTORY: WRIT OF ERROR to the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff in error railway company challenged a judgment from the Circuit Court of Cook County (Illinois), which confirmed an award of **compensation** to defendant in error widow, an applicant for **workers' compensation** benefits as a result of the death of her husband, a railway employee.

OVERVIEW: While engaged in **work** as a locomotive boiler-washer, the employee was shot and killed in the round-house of the company by another employee of the company. In challenging the award of **compensation,** the company contended that the injury which caused the employee's death did not arise out of his employment and that no award of **compensation** under the state act could be made when the decedent was engaged in interstate commerce at the time of his fatal shooting. The court noted that it was the performance of the employee's job-related duty that aroused the anger of his coworker and caused him to quarrel and fight with the employee, which eventually led to the shooting. The court therefore found that the shooting was incidental to and arose out of the employment, noting that it could not be said, as a matter of law, that the injury was such as might have happened to anyone and did not arise out of the employment. In affirming, the court rejected the merit of the interstate commerce argument, noting that at the time of the incident, the locomotive was not engaged in either interstate or intrastate commerce, as it had not yet begun upon other **work.**

OUTCOME: The court affirmed the judgment.

CORE TERMS: helper, engine, foreman, night, commerce, deceased, shooting, train, store-house, shot, struck, hose, machinist, quit work, sledge hammer, fight, ran, injury arose, causal connection, freight trains, round-house, permanently, accidental, incidental, directing, aggressor, assigned, revolver, quarrel, pleaded

LEXISNEXIS® HEADNOTES Hide

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

HN1 An injury arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the condition under which the **work** is required to be performed and the resulting injury. Under that test, if the injury can be seen to have followed as a natural incident of the **work** and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Personal Comfort
Workers' Compensation & SSDI > Compensability > Course of Employment > Risks

HN2 A risk of injury may be incidental to the employment for purposes of determining compensability when it is either an ordinary risk directly with the employment or an extraordinary risk which is only indirectly connected therewith. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: M. L. BELL, and A. B. ENOCH, for plaintiff in error.

JOHN L. HOPKINS, and A. G. ABBOTT, for defendant in error.

OPINION BY: FARMER

OPINION

[*126] **[**279]** Mr. JUSTICE FARMER delivered the opinion of the court:

Alexander Kraujalis was employed by the Chicago, Rock Island and Pacific Railway Company in its yards at Blue Island as a locomotive boiler-washer. While engaged in **work** he was shot and killed in the round-house of the railroad company by another employee of the company who was known as a machinist's helper and was employed by the same company. The killing occurred Monday night, November 19, 1917. Kraujalis left surviving him a wife and two children, and application was made for **compensation** under the **Workmen's Compensation** act, it being **[*127]** claimed that the death occurred in the course of and arose out of the employment of deceased.

Kraujalis was, as we have said, a locomotive boilerwasher, and for some months his assistant or helper in that **work** was his brother-in-law, Kaupus. Saturday night, **[***2]** November 17, Kaupus was not on duty, and Hunt, a machinist helper, was assigned to the duty of assisting deceased in the **work.** Through the week machinist helpers were let off at 11:30 P.M. and on Saturday night at 10:30 P.M. Saturday night, November 17, Hunt quit and left his **work** about 10 o'clock P.M., and deceased was left without any helper. Kraujalis reported that fact to the foreman, Dan Dougherty, and the foreman directed him to get a Mexican to help him the rest of the night. Monday night, November 19, Kaupus was assisting Kraujalis as his helper and Hunt was at **work** as a helper to a machinist named Deady. About 7 o'clock P.M. the deceased went to the store-house for some oil, and about the same time Hunt was sent by Deady to the same store-house for some cotterkeys. The two men met in the store-house and a quarrel ensued. Hunt called deceased a vile name and they engaged in a fight. Kraujalis threw Hunt down and held him for some minutes. Hunt pleaded with him to be allowed to get up, which Kraujalis permitted him to do, and when he arose he struck Kraujalis on the jaw and "put him out." Kraujalis called for his brother-in-law, Kaupus, who came to the store-house and **[***3]** threw Hunt out. He testified Hunt said Kraujalis had reported him to the boss and that if he was fired he would kill Kraujalis. Immediately afterwards Kraujalis and Kaupus went to the office of Dougherty, the foreman, and reported that Hunt was fighting them. Hunt had returned to his place of **work** and Dougherty and the two men went to where Hunt was engaged and Dougherty called for Hunt. He came to where the man were and there struck or tried to strike Kaupus with a sledge hammer. In some manner the sledge hammer got **[*128]** out of Hunt's hands and Kaupus testified he then tried to grab him in the breast. About that time another employee came by with a hose on his shoulder, and Kaupus took the hose and struck Hunt with the end of it, on which was a metal tip. The blow staggered Hunt, an when he recovered he ran or went away. Kraujalis and Kaupus went back to the engine they were washing out. Kaupus turned the water on and Kraujalis was handling and directing the hose. While they were thus engaged Hunt came with a revolver and began shooting at Kaupus. One bullet passed through Kaupus's shirt and he ran away. Hunt then shot Kraujalis, wounding him so severely that he **[***4]** died.

The above is the substance of the material testimony as to how the death occurred. The arbitrator before whom the application for **compensation** was heard denied **compensation.** A petition for a review was filed before the Industrial Commission, and upon the hearing the commission awarded **compensation** to the applicant. The award was confirmed by the circuit court of Cook county, and that court certified the cause was a proper one to be reviewed by the Supreme Court. Accordingly the case is before us by writ of error.

A reversal is asked by the plaintiff in error upon two grounds: (1) The injury to deceased which caused his death did not arise out of his employment; (2) both deceased and Hunt were engaged in inter-State commerce at the time of the shooting and no award can therefore be made under the State **Compensation** act.

The determination of the question whether an injury arose out of the employment in some cases presents one of the most difficult problems in connection with the act. (Glass on **Workmen's Compensation,** 40.) This court has in several cases adopted the definition of the Supreme Court of Massachusetts in the *McNicol case,* 215 Mass. 497, viz.: HN1"It [the **[***5]** injury] arises out of the employment when there is apparent to the rational mind, upon consideration **[*129]** of all the circumstances, a causal connection between the condition under which the **work** is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the **work** and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment." (See *Ohio Building Vault Co.* v. *Industrial Board,* 277 Ill. 96; *Mueller Construction Co.* v. *Industrial Board,* 283 id. 148.) Kraujalis was not the superior of Hunt in the sense that he had authority to **[**280]** discharge him, but his (Kraujalis') **work** was such that he could not perform it without the assistance of a helper. When the helper quit before the **work** was completed it was his duty to ask the foreman for help, which made it necessary for him to inform the foreman his helper had quit **work.** It was the performance of this duty that aroused the anger of Hunt and caused him to quarrel and fight with Kraujalis. It does **[***6]** not appear that Kraujalis at any time was the **aggressor** or sought an altercation with Hunt. The meeting of the two men at the store-house the night of the shooting was accidental. Hunt had learned Kraujalis had reported to the foreman that Hunt had quit **work** Saturday night before quitting time and began abusing Kraujalis and called him an offensively vile name. They engaged in a fight, but Kraujalis, who was the larger man, does not appear to have done anything more than throw Hunt down and hold him until he pleaded to be allowed to get up. This Kraujalis permitted him to do, and he then struck Kraujalis on the jaw, -- a blow which a witness said "put him out." It was also testified Hunt there said Kraujalis had reported him and if he was discharged he would kill him. When Kraujalis and his helper, Kaupus, went with the foreman to the place where Hunt was at **work,** Hunt was the **aggressor** according to the testimony and sought to strike Kaupus with a sledge hammer. It **[*130]** is not shown by the testimony that Kraujalis there said or did anything. After Kraujalis and Kaupus had returned to and were engaged in the duties of their employment Hunt came to them with a revolver **[***7]** and began shooting at Kaupus. When he ran away he then turned on and shot Kraujalis, who was holding and directing the hose in washing out the boiler. The shooting was incidental to and arose out of the employment. It cannot be said, as a matter of law, that the injury was such a one as might happen to anyone and did not arise out of the employment. HN2"It [the risk of injury] may be incidental to the employment when it is either an ordinary risk directly with the employment or an extraordinary risk which is only indirectly connected therewith." (*Bryant* v. *Fissel,* 84 N.J.L. 72.) There was a causal connection between the conditions under which Kraujalis was required to perform his **work** and the injury. It cannot be said that the proof does not tend to show that the shooting of Kraujalis was caused by his report to the foreman that Hunt had quit **work.** This the nature of his **work** required him to do, as he was obliged to ask the foreman for another helper. He was acting entirely in the line of his duties, and this brought upon him the murderous assault by Hunt with a gun. That such an attack is an unusual and extraordinary result makes it none the less an incident of the **[***8]** employment. There is no dispute that Kraujalis was shot in the course of his

employment, and we cannot say the Industrial Commission and the circuit court erred in finding the injury arose out of the employment, and this conclusion is sustained, in principle, by *Trim School District* v. *Kelly,* 7 B.W.C.C. 274, where the teacher was assaulted and killed by bad and unruly pupils. *Polar Ice and Fuel Co.* v. *Mulray,* (Ind.) 119 N.E. Rep. 149; *In re Heitz,* 218 N.Y. 148.

It was stipulated at the hearing that plaintiff in error was engaged in both inter-State and intra-State commerce. There was a division point on plaintiff in error's road after **[*131]** leaving Blue Island, at Silvis, Illinois, a city of about three thousand population, about eight miles east of the Iowa line. The engines which hauled inter-State trains to Silvis hauled inter-State trains coming from the west from Silvis to Chicago. The proof tends to show that there were five engines in the round-house at Blue Island that were used principally for inter-State trains, and it is claimed the engine Kraujalis was **working** on when shot was one of them. Its number was 2008. The road foreman of equipment **[***9]** testified there was no written order assigning engines to different trains; that if the exigencies required it they would not let an engine lie idle but would use it on any train when for the benefit or advantage of the company. It was the duty of the foreman to assign the power. At times engine 2008 was used in intra-State service. At the time Kraujalis was at **work** on the engine it had not been assigned to any particular train. In *Minneapolis and St. Louis Railroad Co.* v. *Winter,* 242 U.S. 353, it was alleged in the declaration that the plaintiff, when injured, was making repairs on an engine and that the parties were engaged in inter-State commerce. It was stipulated that the engine had been used in hauling freight trains over defendant's lines, which freight trains carried both intra-State and inter-State commerce, and was so used after the plaintiff's injury. The court said: "This is not like the matter of repairs upon a road permanently devoted to commerce among the States. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might **[***10]** be needed for. It was not interrupted in an inter-State haul to be repaired and go on. It simply had finished some inter-State business and had not yet begun upon any other. Its next **work,** so far as appears, might be inter-State or confined to Lowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its **[*132]** employment at the time, -- not upon remote probabilities or upon accidental later events." That decision appears to us conclusive of the contention of plaintiff in error that **[**281]** the parties were at the time of the injury engaged in inter-State commerce.

The judgment of the circuit court is affirmed.

CARTWRIGHT and DUNN, JJ., dissenting.

*292 Ill. 463, *; 127 N.E. 84, **;*
*1920 Ill. LEXIS 1067, ****

THE MARION COUNTY COAL COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.* -- (LORENZO BENVANUTA, Admr. Defendant in Error.)

No. 13141.

Supreme Court of Illinois

292 Ill. 463; 127 N.E. 84; 1920 Ill. LEXIS 1067

April 21, 1920.

PRIOR HISTORY: [*1]** WRIT OF ERROR to the Circuit Court of Marion county; the Hon. THOMAS E. FORD, Judge, presiding.

DISPOSITION: *Judgment reversed.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff in error employer sought review of a judgment of the Circuit Court of Marion County (Illinois), which affirmed an award of defendant in error the Industrial Commission (Illinois) to the administrator of an employee killed by another employee.

OVERVIEW: The deceased employee was employed as a miner and the employee who killed him was employed as a driver, delivering empty coal cars, and hauling loaded cars away. The two employees had a disagreement regarding the number of cars the deceased employee received the day before from the other employee to be loaded. As a result of the disagreement the deceased employee was killed when he was struck on the head with a sprag. The court held that an employer was liable to pay **compensation** for an accidental injury to his employee arising out of an in the course of the employment, but the employer was liable when the injury was the result of an accident arising in the course of the employment and when there was a causal connection between the employment and the injury. The court held the deceased employee's abuse and cursing of the other employee was not in respect to anything being done at the time and had no relation or connection with the present **work** or present conditions. The court further held that the deceased employee was not performing any duty or protecting any property and was not hired to incite, begin or carry on a quarrel with the other employee.

OUTCOME: The court reversed the judgment and set aside the Commission's award.

CORE TERMS: machine, coal, chain, sprag, empty car, aggressor, cursing, assault, loader, morning, quarrel, killed, vile, causal connection, injured employee, consequent, runner, number of cars, under-cutting, cutter-head, confirmed, entrance, loaded, track

LEXISNEXIS® HEADNOTES Hide

Torts > Negligence > Causation > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

HN1 An employer is liable to pay **compensation** for an accidental injury to his employee arising out of and in the course of the employment, but he is only so liable when the injury is the result of an accident arising in the course of the employment and when there is a causal connection between the employment and the injury. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: FRANK F. NOLEMAN, ROBERT E. WRIGHT, and JUNE C. SMITH, for plaintiff in error.

A. W. KERR, and F. H. KRUGER, for defendant in error.

OPINION BY: CARTWRIGHT

OPINION

[*463] [84]** Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Joe Muzzarelli was killed by Roy Orison in the mine of the plaintiff in error, the Marion County Coal Company, where both were

employed, and the administrator of Muzzarelli's **[*464]** estate made application under the **Workmen's Compensation** act for **compensation** for the death of his intestate. An arbitrator made an award and on a review by the Industrial Commission the award was confirmed. The record was removed to the circuit court of Marion county by writ of *certiorari* and the award was again confirmed and the writ quashed. On the petition of the coal company a writ of error was awarded by this court.

There was not controverted question of fact. Joe Muzzarelli was employed as a miner by the plaintiff in error and Roy Orison was a driver, delivering empty coal cars and hauling loaded cars away. In the **[***2]** room where Muzzarelli was employed machine men under-cut the coal with a machine, and Muzzarelli was a digger and loader of coal on the cars. In the morning of August 31, 1917, Orison, according to custom, brought an empty car to the entrance of Muzzarelli's room. The car had a chain in it, weighing thirty-five pounds, called a "cutter-head," which had been called for by the machine man, to be installed in the under-cutting machine. It was the duty of Muzzarelli to push the empty car to the face of the coal and the machine man was to remove the chain and install it. The loaders were paid according to the number of cars loaded, and the rule of the mine was that each loader should receive the same number of cars each day. At quitting time the day before, Muzzarelli had received one car less than the other loaders, and this car was delivered to him the first one in the morning. When Orison put the car for Muzzarelli in the switch at the entrance of the room, Muzzarelli came there and commenced cursing Orison and calling him vile names and said that he did not give him a fair turn the day before. While Muzzarelli was cursing Orison and calling him vile names he noticed the cutter-head **[***3]** in the car and said he did not want that car because there was a chain in it. Orison explained to him that he did not have to unload the cutter and that the machine men **[*465]** in the room would do it. There was a sprag in a wheel of a car which had run off the track, and Orison went to that car and pulled the sprag out and shoved the car on the track and walked back to Muzzarelli's car with the sprag in his hand. Muzzarelli was still cursing him and repeating the vile epithets, when Orison said if he did not shut up he would hit him on the head with the sprag, which was a stick of wood. Muzzarelli came toward Orison and made a jump as if to grab him, when Orison struck him on the head with the sprag and killed him. The fact that the chain was in the empty car did not impose any duty on Muzzarelli or interfere in the slightest degree with his duties or service, but it was to be taken out by others for use in the under-cutting machine.

HN1 An employer is liable to pay **compensation** for an accidental injury to his employee arising out of and in the course of the employment, but he is only so liable when the injury is the result of an accident arising in the course of the employment **[***4]** and when there is a causal connection between the employment and the injury. There have been several cases where an injury has resulted from an assault when the employee was engaged in the performance of his duties so that the employment could be said to be the origin or cause of the accident and injury, and in each of those cases an award has been sustained. In *Ohio Building Safety Vault Co. v. Industrial Board*, 277 Ill. 96, the assault was upon a night watchman and was a natural incident of the employment and his duties, and the injury was regarded as resulting from the employment. In *Pekin Cooperage Co. v. Industrial Com.* 285 Ill. 31, **[**85]** the employee making the assault had taken staves from the rack of the injured employee and put them in his own and was the **aggressor**, while the injured employee did no more than to defend himself and was in no way responsible for the assault. In *Swift & Co. v. Industrial Com.* 287 Ill. 564, the court held that the evidence warranted a conclusion that the altercation **[*466]** in which a steam-fitter was injured was not personal but grew out of matters connected with his **work,** and that he was not the **aggressor**. **[***5]** In *Chicago, Rock Island and Pacific Railway Co. v. Industrial Com.* 288 Ill. 126, where a locomotive boiler-washer was killed, the court concluded that there was a causal connection with the conditions under which the employee was required to perform his **work** and the consequent injury. None of these cases, in which the injured party was not the **aggressor** but was injured in the course of his employment, would justify upholding the award in this case, in which the quarrel was about a past event and in which Muzzarelli was the **aggressor**. His cursing and abuse of Orison were not in respect to anything being done at the time and had no relation or connection with the present **work** or present conditions. Muzzarelli was not performing any duty or protecting any property and was not hired to incite, begin or carry on a quarrel with Orison about the fact that it happened at the last delivery of empty cars the day before there was a car due him and it was not delivered until the next morning. There was no reason whatever for his conduct on account of the chain, which was properly delivered in the car for the machine runner in accordance with a request and was to be taken out by the **[***6]** machine runner and not by Muzzarelli. The interests of the employer were not being aided, protected or advanced in any manner by what Muzzarelli did, and the quarrel and consequent injury had no reasonable connection with any **work** then being done for the plaintiff in error.

The judgment of the circuit court is reversed and the award of the Industrial Commission set aside.

*322 Ill. 23, *; 152 N.E. 498, **;*
*1926 Ill. LEXIS 1083, ****

THE FRANKLIN COAL AND COKE COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.* -- (EMITT TROTT, Defendant in Error.)

No. 16897.

Supreme Court of Illinois

322 Ill. 23; 152 N.E. 498; 1926 Ill. LEXIS 1083

June 16, 1926.

PRIOR HISTORY: **[***1]** WRIT OF ERROR to the Circuit Court of Franklin county; the Hon. JOHN C. EAGLETON, Judge, presiding.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff in error employer sought review of a judgment entered in the Circuit Court of Franklin County (Illinois) that confirmed an award of **compensation** made by the Industrial Commission for defendant in error employee. The employer claimed that a co-employee's shooting of the employee had no causal connection to the employee's employment.

OVERVIEW: The employee was a roustabout for the employer and had to help the co-employee with his delivery route. The employee complained of the assigned routes and got into a heated argument with the co-employee. Six days later the co-employee shot the employee while he was in the employer's bath house. The employer claimed that there was no connection established between the shooting and the employment. The court affirmed. The evidence clearly showed that the injury in question arose out of the employment. It was the direct and final result of the quarrel that the employee and the co-employee had over the question of whether or not the co-employee was treating the employee fairly in the designated routes that led to the shooting. Where an employee was injured by a co-employee because of a dispute about the manner of doing the **work** he was employed to do, the accident to the injured employee grew out of the employment and was compensable. An injury arose out of the employment when there was apparent to a rational mind upon consideration of all the circumstances a causal connection between the condition under which the **work** was required to be performed and the resulting injury.

OUTCOME: The judgment was affirmed.

CORE TERMS: driver, quarrel, shooting, shot, coal, bath-house, bath-room, replied, regular, walked, fight, assigned, clothes, injured employee, causal connection, resulting injury, aggressor, deceased's, per week, witness testified, roustabout, remarked, o'clock, spray, stood, times, bath, door, trips, hauls

LEXISNEXIS® HEADNOTES Hide

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

HN1 Where one is injured by another employee because of a dispute about the manner of doing the **work** he is employed to do, the accident to the injured employee grows out of the employment and is compensable. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Benefit Determinations > Dependents
Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

HN2 An injury arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the condition under which the **work** is required to be performed and the resulting injury. More Like This Headnote

Workers' Compensation & SSDI > Benefit Determinations > Dependents
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

HN3 It is a prerequisite in all the cases in which injuries result from quarrels arising in the course of and out of employment that the injured employee who seeks **compensation,** or whose representatives or wife and children seek **compensation** by reason of his death, shall not have been the **aggressor** in the fight or conflict in which he was injured, so that he may be said to be at fault or the cause of his injury at the time of the conflict. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: HENRY J. & CHARLES AARON, and WILLIAMS, LEWIS & COFFEY, (FRANKLIN RABER, of counsel,) for plaintiff in error.

A. W. KERR, and A. C. LEWIS, for defendant in error.

OPINION BY: DUNCAN

OPINION

[*24] **[**498]** Mr. JUSTICE DUNCAN delivered the opinion of the court: The Industrial Commission reviewed, sustained and ordered to stand as its decision an award of the arbitrator in favor of Emitt Trott, defendant in error, for accidental injuries received by him, and against the Franklin Coal and Coke Company, and made its order and finding that the defendant in error was entitled to receive the sum of $15 per week for a period of 30 weeks for temporary total incapacity for **work,** $15 per week for a period of 175 weeks, as provided in paragraph (*e*) of section 8 of the **Compensation** act, for total, permanent and complete loss of the left leg, and the further sum of $664 for first aid, medical, surgical and hospital services, as provided in paragraph (*a*) of said section. On review by *certiorari* proceedings the circuit court of Franklin county quashed **[***2]** the writ of *certiorari* and confirmed the award of the commission. A writ of error was allowed by this court on petition of the coal company for a review of the record. On October 3, 1922, defendant in error, an employee of the plaintiff in error, was shot and injured while taking a bath in its bath-house just after he had finished his day's **work.** He was shot by Athern Beam, another employee of plaintiff in error, who had on the morning of that day terminated his employment with the company and collected the amount due him for past **work** to that time. Beam and Trott were both former residents of Arkansas and had been good friends prior to the shooting and both had been employed as drivers in the mine of said company prior to the shooting. As evidence of their former close friendship it is shown in the **[**499]** record that Beam was surety on Trott's note in September, 1922, in order that Trott might receive money to bring his wife from Arkansas to Royalton, near which place the mine was located. Beam had preceded Trott to Royalton and had been **working** in the said mine some time before Trott came and was employed there, and **[*25]** both of them were employed there as drivers **[***3]** in the mine up until about nine o'clock of said day, when Beam called at the paymaster's office of the company and asked for his time, stating that he was quitting. He drew his pay and left the company's office. About three o'clock of the same day Trott came out of the mine and went to the bath-house of the company to take a bath. When he entered the bathhouse he saw Beam, and after he had undressed himself he went into the bath-room and got under the spray. Beam then walked under the spray near Trott and stood looking at him, with his clothes on. Trott said to him, "Well, you ain't gone yet." Beam replied, "No." Trott then told him to get back or he would get wet. Beam immediately turned and walked out of the bath-room but returned shortly. Trott asked him to wait a minute and he would walk home with him. Beam replied that he was going out, and when he got to the door of the bath-room he pulled his gun and began shooting at Trott. He fired six shots, striking Trott in the left side and left leg. Beam then walked out and remarked to a bystander, "How do you like that?" Beam had been drinking, and took a drink out of his bottle in the bath-room just prior to the shooting. **[***4]** Trott was taken to Zeigler Hospital in a truck.

It appears that while Trott was **working** at the mine he did not have a regular run as a driver but was known as a "roustabout," or a driver assigned to help the regular drivers according to their wants. If a driver was behind in his turn Trott would be sent to help that driver so that each man would have delivered to him the same number of cars to load. It is shown that it was a custom in that mine of several years' standing that the roustabout driver received his directions from the regular driver as to the places he should go to get the cars of coal he was pulling. About six days before the accident Trott was assigned to help Beam on his run, Beam being a regular driver. Some of the rooms on that run were far away from the point to **[*26]** which the coal therein was to be hauled and the rooms were difficult to get into and out of. The evidence shows that Beam assigned these difficult runs to Trott and that Trott protested, and that the two quarreled with each other and became very angry, both using ugly and insulting words. One witness testified that he heard Beam say that if he, Trott, did not want to make the runs where **[***5]** he told him, "to h -- I with him." Another witness heard Trott say something about his mule falling down every time he went into a certain room and that he could hardly get out of there. The evidence shows that the quarrel became very heated; that they swore at each other and were talking fight, but there was no actual fighting by them, the only attempted violence being at the time and as above related. Trott testified positively that there was never any other trouble between them. One or two witnesses testified while Trott was on the way to the hospital he remarked to those who accompanied him that he would not shoot a man over another man's wife. He denies making this statement, and there is nothing else in the record tending to show that there was any cause of quarrel between these two men except the fact that Trott had accused Beam of not giving him a fair deal in his designations of trips or hauls that Trott should make in Beam's entry, where he **worked.** In fact, it clearly appears from the record that this was the sole cause of their quarrel and ill-feeling toward each other, and that Beam met and passed Trott several times between the time of that quarrel and the day of **[***6]** the shooting without speaking to him.

The sole question presented for decision in this case is whether or not the injury upon which the award was based arose out of Trott's employment. It is the contention of plaintiff in error that the injury did not arise out of the employment; that there is no causal connection established between the shooting, resulting in the injury, and Trott's employment; that Beam was not an employee of the company when the shooting occurred; that his presence in the **[*27]** bath-house was not in connection with any employment nor in pursuance of any duty but was that of a mere trespasser; and that it does not appear that the shooting occurred as the result of any controversy in the bath-house or that it was the outgrowth of any act of Trott's in connection with the performance of any duty of his employment.

We think the evidence shows clearly that the injury in question arose out of Trott's employment. It was the direct and final result of the quarrel that the two employees had over the question of whether or not Beam was treating Trott fairly in designating the hauls or trips that Trott should make for him and on his run as a driver. This appears **[***7]** from the last words that were passed between them as Beam stood, with his coat and all his clothes on, under the shower while looking at Trott. When Trott told him to stand back or he would get his clothes wet, Beam replied that he could not get along with him "and he drawed his time," meaning thereby that he had quit the coal company because of his quarrel with Trott. Trott simply replied, "Not as long as you are trying to hand me a package like you are." Beam then said, "I will give you a little **[**500]** worse," and without any further explanation or further words he walked to the door, turned, and shot at Trott six times. In this final meeting when he was shot Trott was not the **aggressor** and had not done anything that would provoke a quarrel out of any reasonable man on that day and time. The whole evidence tends to show that Beam was still harboring malice against Trott that was engendered by reason of the quarrel over the question of the division of **work** a few days previous, and that he had quit the employment and received his final pay with the expectation and intention of taking his revenge on Trott, so that he could make his escape without having any further occasion **[***8]** to delay his

flight by collecting what was due him. The fact that Beam had just a few hours previous to the shooting severed his connection with the company does not in any way, so far as **[*28]** we can see, affect the question as to whether or not the injury arose out of the employment and by reason of it.

This court held in *Pekin Cooperage Co. v. Industrial Com.* 285 Ill. 31, that HN1 where one is injured by another employee because of a dispute about the manner of doing the **work** he was employed to do, the accident to the injured employee grows out of the employment and is compensable. In *Chicago, Rock Island and Pacific Railway Co. v. Industrial Com.* 288 Ill. 126, we held that where an employee was shot and killed by another employee with whom he had had a quarrel and a fight because the deceased, as a part of his duties, had reported the other's absence from **work,** the injury and death are an incident to and arise out of the employment, and that the deceased's wife and children were entitled to **compensation** under the **Workmen's Compensation** act. We said in that case that HN2 an injury arises out of the employment when there is apparent to the rational mind, upon consideration **[***9]** of all the circumstances, a causal connection between the condition under which the **work** is required to be performed and the resulting injury. Similar holdings have been made in the cases of *Swift & Co. v. Industrial Com.* 287 Ill. 564, and *Taylor Coal Co. v. Industrial Com.* 301 id. 548, in which cases injuries resulted from quarrels arising in the course of and out of the employment and resulting injuries were sustained by one of the employees. HN3 It is also a prerequisite in all the cases that the injured employee who seeks **compensation,** or whose representatives or wife and children seek **compensation** by reason of his death, shall not have been the **aggressor** in the fight or conflict in which he was injured, so that he may be said to be at fault or the cause of his injury at the time of the conflict. The case now in hand comes clearly within the rulings laid down in those cases and the court did not err in confirming the award.

The judgment of the court is affirmed.

*346 Ill. 609, *; 178 N.E. 886, **;*
*1931 Ill. LEXIS 1012, ****

THE TRIANGLE AUTO PAINTING AND TRIMMING COMPANY, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.* -- (FRANK KOLNIK, Defendant in Error.)

No. 20846.

Supreme Court of Illinois

346 Ill. 609; 178 N.E. 886; 1931 Ill. LEXIS 1012

December 17, 1931.

PRIOR HISTORY: **[***1]** WRIT OF ERROR to the Circuit Court of Cook county; the Hon. H. S. POMEROY, Judge, presiding.

DISPOSITION: *Judgment reversed and award set aside.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff in error employer sought review from a judgment of the Circuit Court of Cook County (Illinois), which affirmed a decision of the Industrial Commission awarding defendant in error employee **worker's compensation** benefits as a result of an injury alleged to have occurred while in the employer's employ.

OVERVIEW: The employee sustained injuries in a fight with a co-**worker.** For three months prior to the date of the injury, he had been **working** as a polisher and sprayer, using an instrument known as a spray gun for painting cars. About one year prior to the date of the injury, the employee and the same co-**worker** had engaged in another fight over a polishing job. As to the facts of the employee's injury, he testified that the employer's president had given to him the particular spray gun over which the dispute arose and told him to keep it in order and not to let anyone else use it, and that if he spoiled it he would have to have it repaired. The president testified that he did not tell the employee not to give it to anyone else. It appeared from the evidence that on the day of the injury the president directed the co-**worker** to use the particular gun in spraying cars. Although it was conceded that the injury occurred in the course of the employee's employment, the court held that the employee's injuries did not arise out of his employment. The court ruled that an injury received by a deliberate **aggressor** in an assault neither arises directly out of the employment nor was an incident thereto.

OUTCOME: The court reversed the judgment of the circuit court and set aside the award of the Commission.

CORE TERMS: aggressor, fight, injured employee, deceased, altercation, coal, gun, causal connection, assailant, quarrel, shot, injury arose, injury received, fellow-employee, barrel, killed, dispute arose, required to perform, claimant, assault, helper, struck, years prior, spray gun, entitled to compensation, required to work, past event, hereinbefore, prerequisite, foreseen

LEXISNEXIS® HEADNOTES Hide

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

HN1 An accident, to be within the Illinois **Workers' Compensation** act, must have had its origin in some risk of the employment; that in order that it arise out of the employment it is not necessary that the injury be one that ought to have been foreseen or expected, but it must be one which after the event can be seen to have had its origin in the nature of the employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN2 It is essential that the injury complained of arise out of as well as in the course of the employment. More Like This Headnote

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

HN3 An injury arising out of the employment does so arise when it is apparent to the rational mind, upon consideration of all the circumstances, that a causal connection exists between the condition under which the **work** is required to be performed and the resulting injury. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN4 An injury arises out of the employment when it occurs in the course of the employment and is a natural and necessary incident or consequence of it though not foreseen or expected, and that such an injury may arise either directly from the employment or as an incident to it or to the conditions and exposure surrounding it. More Like This Headnote

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

HN5 Injuries compensable are those arising out of the conditions under which the employee is required to **work** and may properly include injuries arising out of a fight in which the injured employee was not the **aggressor,** when the fight was about the employer's **work** in which the employees were then engaged, but it is not within the intent of the act that an employee be protected against the consequences of a fight in which he was the **aggressor** though the fight be over matters of his employer's **work** in which such employees are then engaged. The risk of injury in such a case can not be said to be incidental to the employment but rather the result of such employee's own rashness. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Simple Offenses > General Overview

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

HN6 An injury received by a deliberate **aggressor** in an assault neither arises directly out of the employment nor is an incident thereto. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: MOLONEY & POSTELNEK, (MATTHEW J. O'BRIEN, of counsel,) for plaintiff in error.

J. W. KOUCKY, for defendant in error.

OPINION BY: STONE

OPINION

[*610] [886]** Mr. CHIEF JUSTICE STONE delivered the opinion of the court:

Defendant in error, Frank Kolnik, filed an application for **compensation** against plaintiff in error for injuries alleged to have occurred while in the latter's employ. The cause was referred to the arbitrator, who recommended an award. The Industrial Commission confirmed the award on review and the circuit court of Cook county in turn confirmed the award of the commission. The cause is here on writ of error granted by this court.

The undisputed facts show that Kolnik's injury was received in a fight with a fellow-**workman;** that Kolnik was, and had been for more than two years prior to January 30, 1930, the date of the injury, employed by plaintiff in error. For three months prior to that date he had been **working** as a polisher and sprayer, using an instrument known as a "spray gun" for painting automobiles. His **[***2]** previous employment had been that of polisher. He was about thirty-eight years of age and was partially deaf by reason of illness some twenty years prior. About one year prior to the date of this injury Kolnik and one Duncan, from whom he received the injury here involved, had engaged in another fight over a polishing job. Concerning the facts of Kolnik's injury on January 30, 1930, the evidence is in dispute. He testified that John Klee, president of plaintiff in error, had given to him the particular spray gun over which the dispute arose and told him to keep it in order and not to let anyone else use it, and that if he spoiled it **[*611]** he would have to have it repaired. Klee testified that he did not tell Kolnik not to give it to anyone else. It appears from the evidence that on the day of the injury Klee directed Duncan to use the **[**887]** particular gun in spraying cars. At this time the gun was hanging on the wall back of a car which Kolnik was polishing. Duncan, on account of his difficulty with Kolnik, refused to take the gun unless Klee instructed Kolnik to let him have it. Klee testified that he went to Kolnik and stood on his right side and told him to **[***3]** let Duncan have the gun, but that he was not sure that Kolnik heard him because of his deafness in that ear. Kolnik did not state whether he heard Klee say to let Duncan take the gun. He did not deny that Klee came over to him and talked to him. As Duncan took the spray gun from the wall Kolnik approached and told him to let it alone. Duncan did not replace the gun and the two men engaged in an encounter, resulting in Kolnik's injury. Kolnik testified that he put his hand against Duncan's breast but did not strike him hard. Duncan, Klee and others testified that Kolnik sprang upon Duncan and caught him at the throat, striking him on the breast. All the testimony agrees that Duncan hit Kolnik over the head with the gun, resulting in the injury for which **compensation** is sought.

The only issue involved in the case is whether the injury upon which the award is based arose out of Kolnik's employment. It is admitted that it occurred in the course of the employment. It is the argument of plaintiff in error that where an injury arises out of a conflict or altercation between two employees in which the injured employee was the **aggressor** he is not entitled to **compensation.** Counsel **[***4]** on both sides cite the opinions of this court in this class of cases. Our decisions are not entirely in harmony in the deductions permissible therefrom. In *Pekin Cooperage Co. v. Industrial Com.* 285 Ill. 31, the applicant, Rasor, received an injury growing out of a fight with a fellow-employee, Miller. It appears that both Rasor and Miller were engaged **[*612]** in culling barrel staves to be used in making barrels. They were **working** with different co-employees known as "barrel raisers," who assembled the barrels. Miller took some staves from Rasor's rack and put them in his own, and this brought about a fight in which Miller was the **aggressor** and Rasor did no more than defend himself. This court there reviewed the cases dealing with injuries of like character and pointed out that all cases concur in the rule that HN1 the accident, to be within the **Compensation** act, must have had its origin in some risk of the employment; that in order that it arise out of the employment it is not necessary that the injury be one that ought to have been foreseen or expected, but it must be one which after the event can be seen to have had its origin in the nature of the employment. This **[***5]** court there said: "Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's **work** in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment. * * * The dispute was concerning the employer's **work** in which the men were both engaged, and there is evidence tending to show that the claimant was not responsible for the assault." The award was sustained.

In *Swift & Co. v. Industrial Com.* 287 Ill. 564, the injury to the applicant was received in a fight with another employee concerning a leaking water pipe. The main question there being whether the accident arose out of the employment the cases were again reviewed, and it was held that the quarrel having arisen out of a discussion over the business of the employer and not over a matter personal to either of the contestants the injury could be said to arise out of the employment. It appears that considerable discussion was had in the briefs as to who was the **aggressor** in the fight in which the applicant, Blum, was injured. This court there said: "While such question might **[***6]** have some bearing on whether the dispute arose out of and in the **[*613]** course of the employment or was purely a personal matter between the parties, we do not think it is necessarily decisive. * * * We think there is evidence in the record that justified the Industrial Board in finding that the altercation grew out of matters connected with Blum's **work,** and that

therefore the accident arose out of and in the course of his employment, and that the altercation was not purely a personal one entirely outside the scope of such employment." The award was sustained.

In *Chicago, Rock Island and Pacific Railway Co. v. Industrial Com.* 288 Ill. 126, a locomotive boiler-washer was killed by a fellow-employee as the result of an altercation arising over the fact that the deceased had informed their employer that his assailant, who was his helper, had quit **work** before it was time for him to leave. It appears that in the first altercation over this matter no one was injured, and that the assailant, Hunt, departed and later returned to the place where deceased was **working** with another helper and shot and killed him. It was held that as deceased required the assistance of a helper **[***7]** in his **work** and it was therefore necessary to inform his employer of Hunt's departure there was causal connection between the conditions under which the deceased was required to perform his **work** and the injury, and the injury therefore arose out of the employment. The assailant of the deceased was the **aggressor**, but the question of what, if any, influence that fact had in determining whether the injury arose out of the employment was not raised and not discussed.

[888]** In *Marion County Coal Co. v. Industrial Com.* 292 Ill. 463, an employee of the coal company killed another in a fight which grew out of a disagreement over the **work** of their employer in which the two employees had on the previous day been engaged. Deceased charged the other employee, Orrison, with unfairness on the previous day in the distribution of cars used by the miners in mining coal. Deceased became abusive, and Orrison picked up a club and **[*614]** told deceased if he did not desist he would hit him on the head. Deceased sprang at him as if to seize him and Orrison struck him on the head and killed him. It was there held by this court that the accident did not arise out of the employment; **[***8]** that the argument related to the employment of the day before but had no relation to the then present **work** of the parties; that deceased was not performing any duty or protecting property of his employer; that the interest of the employer was not being aided, and that the quarrel and consequent injury had no reasonable connection with any **work** then being done for plaintiff in error. After reviewing the cases hereinbefore discussed in which it was held that the injury arose out of the employment because there was causal connection between the injury and the conditions under which the employee was required to perform his **work,** this court stated: "None of these cases, in which the injured party was not the **aggressor** but was injured in the course of his employment, would justify upholding the award in this case, in which the quarrel was about a past event and in which Muzzarelli [the deceased] was the **aggressor**."

In *Taylor Coal Co. v. Industrial Com.* 301 Ill. 548, the claimant was shot in the arm by a fellow-employee in an altercation between them. The shooting occurred during the noon hour, when neither was employed, and arose over a penalty which had been imposed by the **[***9]** applicant upon the other employee, Sweet, some three weeks before. The applicant, Padgett, struck Sweet and then turned and ran toward the office of the coal company and Sweet shot him through the arm. It was held that the dispute arose out of and in the course of the employment. The dispute was not over **work** then being done by the employees but over a matter of their employment occurring three weeks before. Neither employee at the time of the altercation was actually engaged in the employer's **work** but both were going to the place where they usually ate their lunch. The effect of **[*615]** the fact that Padgett, the injured employee, was the **aggressor**, was not raised or discussed.

The last case coming to this court in which an injury of this character was involved is *Franklin Coal Co. v. Industrial Com.* 322 Ill. 23. In that case the injured employee, Trott, was shot by one Beam, who until just a few moments before the shooting had been a fellow-employee of Trott. It appears that six days before they had had some altercation over the method in which **work** had been assigned by Beam to Trott. The quarrel that then took place between them became very heated but no actual **[***10]** fighting took place. On the day of the injury Trott was under the shower in the bath-house. Beam came in and told him that he was leaving the employment of the coal company because he could not get along with him, Trott. Trott replied by referring to Beam's treatment of him in assigning **work** to him, and Beam said, "I will give you something a little worse," and walked to the door, turned, and shot six times at Trott, injuring him in the left side and leg. It was held that there was causal connection between the condition under which Trott's **work** was being performed and the injury and that the injury received by Trott arose out of the employment. It was not in that case contended that the injured employee was the **aggressor** but it is said in the opinion: "It is also a prerequisite in all the cases that the injured employee who seeks **compensation** * * * shall not have been the **aggressor** in the fight or conflict in which he was injured so that he may be said to be at fault or the cause of his injury at the time of the conflict." As there was no claim that Trott was an **aggressor** it is argued by counsel for defendant in error here that this statement is dictum.

The decisions of this **[***11]** court and others agree that [HN2]it is essential that the injury complained of arise out of as well as in the course of the employment. In this case the evidence satisfactorily establishes that the claimant, Kolnik, **[*616]** defendant in error, was the **aggressor** in the fight. It is also clear that the fight arose over a matter of the employment of Kolnik and Duncan at a time when they were employed in plaintiff in error's business, and the question is here directly presented whether the fact that the injured employee was the **aggressor** in the fight renders an injury received by him one not arising out of the employment, even where such injury is received in a fight over the method of doing the employer's **work** in which the participants of the fight were then engaged. If such fact does not influence the determination of the question whether the injury arose out of the employment the award in this case should be sustained.

Though expressions concerning such a state of facts appear in the opinions, the question has been discussed by the court only in *Swift & Co. v. Industrial Com. supra,* where it is stated that such fact might have some influence on the question whether the **[***12]** dispute arose out of the employment, but it was not in that case deemed to be necessarily decisive. The question as to who was the **aggressor** there appears to have been disputed **[**889]** and an award had been made. In *Pekin Cooperage Co. v. Industrial Com. supra,* it was evident that the injured employee was not the **aggressor**. This was likewise true in *Chicago, Rock Island and Pacific Railway Co. v. Industrial Com. supra,* and *Franklin Coal Co. v. Industrial Com. supra.* In the *Pekin Cooperage Co. case* attention is called to the fact, as shown by the record, that the injured employee was not the **aggressor**. In *Marion County Coal Co. v. Industrial Com. supra,* it was held that the *Pekin Cooperage Co.,* the *Swift & Co.* and the *Chicago, Rock Island and Pacific Railway Co. cases* did not apply to the case there under consideration, for the reasons, first, that the quarrel was about a past event in the employment, and second, that the injured employee was the **aggressor**. In *Taylor Coal Co. v. Industrial Com. supra,* the injured employee appears to have been the **[*617] aggressor** but the question of the effect of that fact is not **[***13]** discussed in the opinion. While in the *Franklin Coal Co. case* the injured employee was clearly not the **aggressor**, it is stated as a prerequisite to **compensation** that the injured person shall not be the **aggressor**. While this may be said to be dictum since the issue was not involved, it, with the *Marion County Coal Co. case,* may likewise be said to present the view of this court on that question. As hereinbefore stated, the issue involved is whether the injury arises out of the employment. [HN3]It does so arise when it is apparent to the rational mind, upon consideration of all the circumstances, that a causal connection exists between the condition under which the **work** is required to be performed and the resulting injury. Applying this test, nothing is shown concerning the condition under which Kolnik was required to perform his duties which may be said to have led to the injury in this case but his injury was traceable directly to his own actions as **aggressor** in the fight. It can scarcely be said that a causal connection exists between an injury and the conditions of the employment under such circumstances, since the conditions under which Kolnik was required to **work**

were **[***14]** neither the proximate nor a contributing cause of the injury, which arose out of an assault in which he was the **aggressor** and was an injury which he brought upon himself. As was said in *Pekin Cooperage Co. v. Industrial Com. supra*, it may ordinarily be inferred that an injury received in a disagreement over the employer's **work** in which the employees are then engaged arises out of the employment, but in no case has it been held that it makes no difference who is the **aggressor** in the fight. In this case it is clear that Kolnik was the **aggressor** and received the injury in a fight which he started.

We are able to find but few cases in which this matter has been directly passed upon. In *Shaw* v. *Wigan Coal and Iron Co.* 3 B.W.C. Cas. 81, one **workman** deliberately assaulted another, and the latter in trying to avoid **[*618]** falling over a rope in his effort to escape threw up his hand, in which he carried a hammer, and struck and injured the assailant. **Compensation** was denied the assailant. In *Lark v. Hancock Mutual Life Ins. Co.* 90 Conn. 303, 97 Atl. 320, it was held that HN4 an injury arises out of the employment when it occurs in the course of the employment **[***15]** and is a natural and necessary incident or consequence of it though not foreseen or expected, and that such an injury may arise either directly from the employment or as an incident to it or to the conditions and exposure surrounding it. This is the rule adopted in this State. *Central Illinois Service Co. v. Industrial Com.* 291 Ill. 256.

HN5 Injuries compensable are those arising out of the conditions under which the employee is required to **work** and may properly include injuries arising out of a fight in which the injured employee was not the **aggressor**, when the fight was about the employer's **work** in which the employees were then engaged, but it is not within the intent of the act that an employee be protected against the consequences of a fight in which he was the **aggressor** though the fight be over matters of his employer's **work** in which such employees are then engaged. The risk of injury in such a case can not be said to be incidental to the employment but rather the result of such employee's own rashness.

While it is the purpose of this court to give a liberal construction to the **Workmen's Compensation** act, to the end that the employee may receive its full benefit, yet **[***16]** we are of the opinion that it would be going beyond the letter and spirit of the act to hold that HN6 an injury received by a deliberate **aggressor** in an assault either arises directly out of the employment or is an incident thereto. We are of the opinion, therefore, that defendant in error is not entitled to **compensation** and that the circuit court erred in so holding. The judgment of that court is reversed and the award set aside.

*394 Ill. 126, *; 67 N.E.2d 172, **;*
*1946 Ill. LEXIS 358, ****

William A. Riley, Defendant in Error, v. The Industrial Commission et al. -- (The Fred A. Snow Company, Plaintiff in Error)

No. 29358

Supreme Court of Illinois

394 Ill. 126; 67 N.E.2d 172; 1946 Ill. LEXIS 358

May 21, 1946, Filed

PRIOR HISTORY: [*1]** Writ of Error to the Circuit Court of Cook county; the Hon. Harry M. Fisher, Judge, Presiding.

DISPOSITION: Judgment reversed; award set aside.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employer and industrial commission sought review of the decision Circuit Court of Cook County (Illinois), which reversed the finding of the industrial commission that reversed the decision of an arbitrator who awarded defendant claimant **compensation** under the **Workmen's Compensation** Act for injuries allegedly sustained during the course of his employment.

OVERVIEW: The claimant was a shift superintended **working** for the employer at his plant. While a guard was away, the claimant alleged that it was his duty as a shift superintendent to keep check on the time of the men during his shift. Another employee shot him after he attempted to remove the employee from the plant. On review, the court reversed and set aside his award. The court held that the claimant, in assuming the duties of a guard under such circumstances, was acting as a mere volunteer outside the scope of his employment by undertaking to remove the employee. The court found no evidence to justify the claimant's actions because there was no peril or an emergency that required the firing of the employee or his removal from the plant. His act in attacking the employee did not arise out of his employment and therefore, his injuries were the result of an altercation with a fellow employee in which he apparently was the **aggressor.** Finally, the court concluded that by approaching the employee with a gun, the claimant stepped out of the scope of his employment and accepted a danger that was in not incident to his employment.

OUTCOME: The court reversed the trial court's decision that reversed the commission's reversal of the arbitrator's grant of benefits to the claimant and set aside the award.

CORE TERMS: guard, gun, superintendent, plant, evict, discharged, shot, approached, emergency, trouble, foreman, arbitrator, platform, leveled, entitled to compensation, evening, struck, metals, clock, twice

LEXISNEXIS® HEADNOTES Hide

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

HN1 It is not sufficient that the injury occur in the course of the employment, but it is necessary that it arise out of the employment. More Like This Headnote

COUNSEL: Henry L. Kane, (Fay Warren Johnson, of counsel,) both of Chicago, for plaintiff in error.

Daniel H. Lewis, and Allan S. Gould, (Jack L. Sachs, of counsel,) all of Chicago, for defendant in error.

JUDGES: Mr. Justice Stone delivered the opinion of the court. Thompson, C.J., and Wilson, J., dissenting.

OPINION BY: STONE

OPINION

[*126] [173]** Mr. Justice Stone delivered the opinion of the court:

Defendant in error, William A. Riley, filed an application for adjustment of claim under the **Workmen's Compensation** Act, alleging certain injuries as arising out of and in the course of his employment with plaintiff in error company. The injury complained of was that he had been shot by another employee of plaintiff in error.

The matter was referred to an arbitrator who awarded **compensation.** On review before the Industrial Commission the arbitrator's decision was set aside with the finding that Riley did not sustain accidental injuries arising out **[*127]** of and in the course of his employment and so was not entitled to **compensation**. On **[***2]** *certiorari* the circuit court of Cook county reversed the finding of the Industrial Commission and entered an order embodying the finding of the arbitrator and giving judgment for costs of the record of proceedings before the commission.

Riley was what was known as a "shift superintendent" in plaintiff in error's plant. This company was, on March 30, 1943, engaged in the treatment of metals. Because of war-time regulations, each shift had its own guard, placed there by the Federal government, and also its separate superintendent. Riley's duty was to check the time of employees and the time consumed in each operation in the treatment of metals. He had the right to discharge employees who failed or refused to do their **work** but no power to hire. The power to evict discharged or troublesome employees had been delegated to the auxiliary police who acted as guards. It is clear that the superintendent of shifts did not have authority to use a gun in the eviction of an employee but was expected to summon one of the guards to perform such task.

On the evening of the injury, Riley, because of the temporary absence of the guard from the grounds, attempted to evict one Jack Cann, whom **[***3]** he had just previously discharged. Riley testified that it was his business to take the guard's place in the absence of the latter. This, however, is denied by the plant owner and no further evidence appears on the subject.

On the evening of March 30, Riley observed that Cann had come to **work** despite his order to the contrary. After Cann had **worked** about four hours and came to punch the time clock for lunch, which clock was located just outside Riley's office, Riley approached him and asked why he was **working,** to which Cann replied that Riley was not his boss and that he would take no orders from him. Riley testified that at this time Cann struck him in the **[*128]** face. The testimony of two other witnesses in the immediate vicinity, however, is to the effect that they saw no blows struck although they heard these parties talking. Riley told Cann he was discharged and to leave the plant and to come back for his check in the morning.

There is some dispute as to whether Riley suspected trouble and had sent out to have the guard returned before he, Riley, entered the encounter in which he was shot. Riley testified that when Cann had not left the premises as he had told him **[***4]** to do, he, Riley, strapped on a gun belonging to the day guard and went into the plant to evict **[**174]** Cann in the absence of the guard. Cann had gone to the office of one Travis, his immediate foreman, and Riley testified that he walked to the steps leading to the platform on which Travis's office was located, and called out to Cann saying, "I told you you were through here and to get out of here," and that thereupon Cann turned around exclaiming, "So I'm done," and immediately shot Riley twice. Other witnesses to the shooting testified that Riley approached the platform with a gun drawn and leveled and that Cann, turning around and seeing it, stated, "So you've got a gun," and drew his gun and shot Riley twice as he came up to the steps to the platform. The nature and extent of Riley's injuries are not contested.

The principal question in the case is whether the injury Riley received was one arising out of and in the course of his employment. *HN1* It is not sufficient that the injury occur in the course of the employment, but it is necessary also that it arise out of the employment. (*Vincennes Bridge Co.* v. *Industrial Com.* 351 Ill. 444; **[***5]** *Dietzen Co.* v. *Industrial Board,* 279 Ill. 11.) Riley's counsel say that the evidence showed that, in the absence of the guard, it was his duty to evict discharged employees and he had a right to carry firearms in order to effectively do so. They cite *Combes* v. *Industrial Com.* 352 Ill. 399, *Ohio Building* **[*129]** *Safety Vault Co.* v. *Industrial Board,* 277 Ill. 96, and other cases, in support of his claim that he was properly within the scope of his employment at the time of the injury. It appears clearly, however, that Riley's duty as "shift superintendent" was specifically to supervise the treatment of castings and to keep check on the time of the men on his shift. Generally, he was responsible for the preservation of property and order within the plant and for this purpose could call upon the guards in case of trouble. Some of the witnesses testified that in cases of trouble during the guard's absence they would look to the superintendent to maintain order. Snow, the owner of the plant, denied that a "shift superintendent" had or was expected to assume any of the guard's duties, although it would be logical to assume that the responsibility would fall on the "shift superintendent" **[***6]** if an emergency arose during the guard's absence. The facts in the record before us do not show that any emergency existed which threatened to disrupt the plant or destroy any property at the time Riley took his gun and went to evict Cann.

It is argued by defendant in error's counsel that since Cann did not immediately prepare to go home, it was the duty of Riley to evict him, by force if necessary. Cann was found at the office of his immediate foreman. It does not appear that Riley had informed this foreman of Cann's discharge. We are of the opinion that Riley, in assuming the duties of a guard under such circumstances, was acting as a mere volunteer outside the scope of his employment by undertaking to do that which he was not bound to do, and which he had not been in the habit of doing with his employer's knowledge. The evidence does not justify the conclusion that there was any peril requiring Riley to act as in a case of emergency. His act in accosting Cann in the manner shown by the evidence did not arise out of his employment. (**[*130]** *Kensington Steel Corp.* v. *Industrial Com.* 385 Ill. 504; *Mepham & Co.* v. *Industrial Com.* 289 Ill. 484.) His injuries **[***7]** were the result of an altercation with a fellow employee in which he apparently was the **aggressor.** The evidence indicates that he approached Cann with a drawn and leveled gun. His injury received as a result of deliberate aggression did not arise out of his employment nor was it incident thereto. By approaching Cann with a drawn gun Riley stepped out of the scope of his employment and accepted a danger that was in nowise incident to such employment. *Triangle Auto Painting and Trimming Co.* v. *Industrial Com.* 346 Ill. 609; *Franklin County Coal and Coke Co.* v. *Industrial Com.* 322 Ill. 23.

We are of the opinion that the circuit court erred in holding that Riley is entitled to **compensation**. The judgment of **[**175]** that court is reversed and the award set aside.

Judgment reversed; award set aside.

Thompson, C.J., and Wilson, dissenting.

- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

*397 Ill. 433, *; 74 N.E.2d 704, **;*
*1947 Ill. LEXIS 422, ***

Armour & Company, Plaintiff in Error, v. The Industrial Commission et al. -- (James H. Pleasant, Defendant in Error)

No. 30042

Supreme Court of Illinois

397 Ill. 433; 74 N.E.2d 704; 1947 Ill. LEXIS 422

September 18, 1947, Filed

PRIOR HISTORY: **[***1]** Writ of Error to the Circuit Court of Cook county; the Hon. Harry M. Fisher, Judge, Presiding.

DISPOSITION: Judgment reversed; award set aside.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff-in-error, the employer, challenged the judgment of defendant-in-error Industrial Commission which held that defendant-in-error employee was injured in the course and scope of his employment and thus was entitled to benefits under the **Workmen's Compensation** Act. The issue was whether the claimant's loss of an eye due to a blow from a fellow employee occurred while in the course and scope of his employment.

OVERVIEW: The claimant lost an eye when a fellow employee struck him with a small hatchet; the claimant argued that he was **working** at his job when the employee initiated the fight by striking him with the hatchet. However, three witnesses testified that the claimant initiated the hostilities by making a nasty remark to the employee and kicking or striking the employee with his foot. In addition, the court noted that the claimant had no supervisory function over the other employee, was not responsible for his conduct, and normally never associated with him but for that one day. When the claimant interposed in a dispute between the supervisor and the employee over the assignment of **work,** he was a mere volunteer acting outside the scope of his employment and authority. Moreover, the claimant's argument with the employee had nothing to do with how to do the employer's assigned jobs. On the whole the court concluded that the evidence on the record showed that the claimant was not only the **aggressor** but had stepped entirely out of the scope of his employment to engage in a controversy with the other employee.

OUTCOME: The court reversed the circuit court's judgment and set aside the award of the Industrial Commission.

CORE TERMS: claimant, shanty, hatchet, foreman, door, struck, checker, kicked, meat, foot, Compensation Act, handy-man, aggressor, doorway, pushed, opened, feet, belt, injuries received, supervision, unsupported, manifest, weigher, accidental injuries, conversation, arbitrator's, unloaded, stepped, stomach, finger

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Compensability > Course of Employment > Place & Time

HN1 The rule is that for a claimant to recover under the **Workmen's Compensation** Act for an injury, it must appear that the injury received arose out of, and also was received in the course of, his employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct

HN2 The mere fact that association in the same **work** gives opportunity for an altercation is not sufficient to justify an award to the injured party. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct

HN3 When an employee steps outside the scope of his employment, by reason of which he sustains injury, he cannot invoke the protection of the **Workmen's Compensation** Act. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Frederick R. Baird, John P. Doyle, and G. R. Herr, all of Chicago, for plaintiff in error.

Temple & Wimbish, (George N. Leighton, of counsel,) both of Chicago, for defendant in error.

JUDGES: Mr. Justice Stone delivered the opinion of the court.

OPINION BY: STONE

OPINION

[*434] **[**704]** Mr. Justice Stone delivered the opinion of the court:

Defendant in error, James H. Pleasant, filed application for adjustment under the **Workmen's Compensation** Act, alleging injuries received in the course of his employment with Armour & Company, the plaintiff in error, resulting in the loss of his right eye. On hearing, the arbitrator denied the application on the ground that the claimant did not sustain accidental injuries arising out of and in the course of his employment. On review, the Industrial Commission set aside the arbitrator's decision and entered an award, which the circuit court of Cook county confirmed. **[**705]** The cause is here on petition for review. It is agreed that the sole issue presented is whether or not Pleasant suffered an accidental **[***2]** injury which arose out of and in the course of his employment.

Pleasant was employed as a meat checker by plaintiff in error. As such, it was his duty to check the weights of meats shipped in or out of the plant. He **worked** in a scale shanty near the railroad tracks. The checker and the men who loaded and unloaded the cars **worked** under the same foreman, a man named Joseph Petullo.

On the morning of March 23, 1943, one of the men, **working** at loading the cars, took sick and went home. The foreman then sent for one Marcus Fykes, a carpenter's helper and handy-man, also employed by plaintiff in error, and told him to take the place of the car-loader who had gone home. Fykes did not want to help unload the car because he had a sore finger, but the foreman insisted that he do the job. During this conversation, Pleasant was standing in the doorway of the scale shanty ten or twelve feet away.

Claimant's version of what happened at this point is that he said to Fykes: "Why argue with the foreman about the job. If you don't want to do it, it is better to **[*435]** go home than to stand a chance of losing your job arguing with the boss." Whereupon Fykes walked toward claimant asking **[***3]** him what he had to do with it, mumbling other incoherent words and at the same time drawing out a hatchet which he wore on his belt. Pleasant testified that Fykes stopped about a foot and a half from where he stood in the doorway, and then struck him in the eye with the hatchet. On cross-examination he admitted that as Fykes neared him, he pushed Fykes away with his foot and ran into the scale shanty and shut the door; that he then intended to make a "get away," opened the door of the shanty to leave, and then was struck by the hatchet.

Petullo, the foreman, testified that Pleasant said to Fykes, "If you don't want to **work,** go on home;" that he did not hear any other conversation, although there was an argument; that as Fykes neared the claimant, claimant kicked or pushed him with his foot, stepped in the shanty and closed the door. He testified that it was not until then that Fykes took out his hatchet, and that as claimant opened the door of the shanty, Fykes struck him. The hatchet Fykes carried in his belt was used by him in his **work** as handy-man, and was always carried by him.

William Johnson, another employee of plaintiff in error, testified that he was within eighteen **[***4]** feet of the scale shanty; that he saw Pleasant kick Fykes in the stomach and that Fykes fell back five or six feet against a truck, and Pleasant disappeared into the shanty and closed the door, and that when he opened the door again and started out, Fykes struck him. He testified that Fykes did not draw his hatchet until after he had been kicked. On rebuttal Pleasant testified that Fykes had the hatchet in his hand as he first approached the shanty and that he, Pleasant, pushed him off with his foot because he had the hatchet in his right hand in a swinging motion.

Thomas Stroud, another employee of plaintiff in error, and one of the loaders on the car being unloaded, testified before the commission on review that when Fykes complained **[*436]** of his finger to the foreman claimant told Fykes if he could not **work** to punch his card and go home; that claimant was standing in the doorway of the shanty and suddenly kicked Fykes in the stomach; that Fykes fell back against some boxes, took his hatchet from his belt and struck claimant as the latter came out of the shanty. This was the evidence.

*HN1*The rule is, as conceded, that for a claimant to recover under the **Workmen's Compensation [***5]** Act for an injury, it must appear that the injury received arose out of, and also was received in the course of, his employment. (*Riley v. Industrial Com.* 394 Ill. 126; *Scholl v. Industrial Com.* 366 Ill. 588; *Vincennes Bridge Co. v. Industrial Com.* 351 Ill. 444). Here the claimant, Pleasant, was employed as a meat checker and weigher. There is no showing that he had supervision over Fykes or of the carloaders, nor does it appear that he had authority to assign men to **work.** There is evidence **[**706]** that both the claimant and Fykes were under the supervision of the foreman Petullo. When the claimant interposed in the dispute between Petullo and Fykes over the assignment of **work,** he was a mere volunteer acting outside the scope of his employment and authority.

Claimant contends that the injury arose out of his employment because the foreman ordered Fykes to **work** with him; because it was the subject of claimant's employment that caused Fykes to be angry; because claimant's employment was the subject of the chance remark he made to Fykes, and because it was his employment which caused him to come into contact with Fykes and required him to be at the spot **[***6]** where he was assaulted. Aside from the fact that most of this argument is unsupported by the evidence, it overlooks the fact that the employment and duties of the two men were different. Claimant was a meat checker and weigher, while Fykes was a handy-man. There was no quarrel over the proper manner of performing the **[*437]** employer's **work.** *HN2*The mere fact that association in the same **work** gives opportunity for an altercation is not sufficient to justify an award to the injured party. *City of Chicago v. Industrial Com.* 292 Ill. 406.

Pleasant's testimony as to the occurrence is wholly unsupported, while three witnesses testify to facts showing that Pleasant was not only the **aggressor** but stepped entirely out of the scope of his employment to engage in a controversy with Fykes.

The manifest weight of the evidence is that Pleasant's words to Fykes were antagonistic and bore no relation to the men's employment, and that they were not, as Pleasant contends, spoken only with the interest of the employer at heart. It is also evident that Pleasant followed his words with the first act of aggression when he kicked Fykes. *HN3*When an employee steps outside the scope of his employment, **[***7]** by reason of which he sustains injury, he cannot invoke the protection of the **Workmen's Compensation** Act. *Riley v. Industrial Com.* 394 Ill. 126; *Triangle Auto Painting and Trimming Co. v. Industrial Com.* 346 Ill. 609; *Franklin Coal and Coke Co. v. Industrial Com.* 322 Ill. 23.

Plaintiff in error also contends that the circuit court erred in admitting in evidence the record of criminal proceedings against Marcus

Fykes, since plaintiff in error was not a party to that proceeding. Defendant in error confesses the error but contends it was not prejudicial because its admission was limited only to its value in determining who was the **aggressor**. In view of our finding that the evidence establishes the claimant as the **aggressor**, further discussion of this point is unnecessary.

The judgment of the circuit court confirming the award was contrary to the manifest weight of the evidence and it is reversed and the award is set aside.

Judgment reversed; award set aside.

*401 Ill. 129, *; 81 N.E.2d 571, **;*
*1948 Ill. LEXIS 399, ****

Container Corporation of America, Plaintiff in Error, v. The Industrial Commission et al. -- (Wilma Silas, Defendant in Error)

No. 30518

Supreme Court of Illinois

401 Ill. 129; 81 N.E.2d 571; 1948 Ill. LEXIS 399

September 24, 1948, Filed

PRIOR HISTORY: **[***1]** Writ of Error to the Circuit Court of Cook County; the Hon. E. J. Schnackenberg, Judge, Presiding.

DISPOSITION: Judgment reversed; award set aside.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer sought review of the affirmance of an award of benefits by the Illinois Industrial Commission to appellee wife of the employee by the Circuit Court of Cook County (Illinois). The employer alleged that the employee's death did not arise out of or in the course of the employee's **work.**

OVERVIEW: The employee was under a large paper roll that fell on him when a co-employee got on top of the roll. The employees exchanged words but evidently had time to cool down. Later the employee allegedly pulled a knife on the co-employee and threatened him. The co-employee then pushed the employee, who hit his head on a machine and died. The Commission awarded the wife of the employee benefits under the Illinois **Workmen's Compensation** Act. The trial court affirmed the award. The court reversed the trial court's judgment and set aside the award. The court held that the employee's death did not arise out of or in the course of his employee where the employee had cooled down and neither the employee or the co-employee were engaged in the duties of their employment when they began the second fight. Indeed, the court found the employee's death did not have its origins in any risk peculiar to the employment of the employee.

OUTCOME: The court reversed the trial court's affirmance of **workmen compensation** benefits for the wife of the employee and set aside the award.

CORE TERMS: machine, dropped, assault, struck, Compensation Act, aggressor, minutes, hand truck, sheet, fellow employee, abusive manner, causal connection, altercation, connected, violence, stepped, throat, blow, arbitrator, approached, deceased, beneath, replied, drying, knife, roll, cool, fist

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Course of Employment > Place & Time
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN1 An employer is not an insurer of the safety of its employees at all times during the period of the employment. There must be a causal connection between the conditions existing on the employer's premises and the injury of the employee, and the accident must have had its origin in some risk connected with, or incidental to, the employment. An injury may be said to arise out of the employment when, upon consideration of all the circumstances, there is apparent to the rational mind a causal connection between the conditions under which the **work** is required to be performed and the resulting injury. The mere fact that an employee was present at the place of injury because of his employment will not suffice unless the injury itself is a result of some risk of the employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN2 Where a disagreement arises out of the employer's **work** in which the two men are engaged and as a result of it one injures the other, it may be inferred that the injury arose out of the employment. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Simple Offenses > Elements
Torts > Intentional Torts > Assault & Battery > General Overview

HN3 Mere words or threats, however provoking or insulting, do not constitute an assault without an actual offer of physical violence. More Like This Headnote

COUNSEL: Clarence S. Piggott, of Chicago, for plaintiff in error.

Lester B. Marshall, and Jacob Baskin, both of Chicago, for defendant in error.

JUDGES: Mr. Justice Daily delivered the opinion of the court.

OPINION BY: DAILY

OPINION

[*130] **[**572]** Mr. Justice Daily delivered the opinion of the court:

Defendant in error, Wilma Silas, filed application for adjustment of claim under the **Workmen's Compensation** Act against the Container Corporation of America, a corporation, plaintiff in error, seeking **compensation** for the death of her husband, Willie Silas, deceased, which it was alleged arose out of and in the course of his employment with plaintiff in error. The matter was referred to an arbitrator, who awarded **compensation.** On review before the Industrial Commission, at which no additional evidence was heard, the award of the arbitrator was sustained. On *certiorari,* the circuit court of Cook County affirmed the finding of the Industrial Commission. The Container Corporation now seeks to review the finding of the circuit court, contending **[***2]** that the death of Willie Silas did not arise out of or in the course of his employment.

The facts show that Willie Silas was **working** for the Container Corporation on the day that the injuries were sustained which resulted in his death. A roll of paper, which was threaded around the rolls of a large drying machine, broke. A fellow employee, Jim Lee Petty, and a foreman, Arthur Jackson, went to the top of the machine to start threading the broken paper through the rollers. Willie Silas was **working** beneath them. Petty, who had been **working** at that job only about three days, dropped the sheet and it fell on Willie Silas, who was about two and one-half feet beneath him. Silas yelled, "No G-- D-- body is carrying that sheet up there." Petty replied, "We all got to learn." Nothing more was said at that time.

Some thirty minutes later, after completing the job of winding the paper through the machine, Petty went over to a place some distance from the drying machine where the earlier incident occurred, and remained there to cool off. **[*131]** Silas approached Petty there, and in an abusive manner said he was going to cut his throat. When Silas said that, Petty struck him with his **[***3]** right fist and Silas fell down. Silas then got up and faced him again, and Petty again struck Silas with his fist. Silas went down again, and as he did so, his head struck against a machine, and as a result, he sustained head injuries which caused his death.

The evidence is silent as to whether or not Silas had a knife on his person with which to carry out his threat, but the witness, Petty, testified that he did not see a knife in Silas's hand when the threat was uttered. The evidence is undisputed that Silas and Petty had never previously had any trouble between them, nor was there any apparent animosity before the time that Petty dropped the sheet of paper on Silas.

The principal question presented is whether or not the death of Silas arose out of and in the course of his employment. (*Armour & Co. v. Industrial Com.* 397 Ill. 433; *Riley v. Industrial Com.* 394 Ill. 126; *Scholl v. Industrial Com.* 366 Ill. 588; *Vincennes Bridge Co. v. Industrial Com.* 351 Ill. 444.) We have repeatedly held that HN1 the employer is not an insurer of the safety of its employees at all times during the period of the employment. (**[***4]** *Chicago Hardware Foundry Co. v. Industrial Com.* 393 Ill. 294; *Illinois Country Club, Inc. v. Industrial Com.* 387 Ill. 484; *Mt. Olive & Staunton Coal Co. v. Industrial Com.* 374 Ill. 461; **[**573]** *Boorde v. Industrial Com.* 310 Ill. 62.) There must be a causal connection between the conditions existing on the employer's premises and the injury of the employee, and the accident must have had its origin in some risk connected with, or incidental to, the employment. We said in *Illinois Country Club, Inc. v. Industrial Com.* 387 Ill. 484, "An injury may be said to arise out of the employment when, upon consideration of all the circumstances, there is apparent to the rational mind a causal connection between the conditions under which the **work** is required to be performed and the **[*132]** resulting injury. The mere fact that an employee was present at the place of injury because of his employment will not suffice unless the injury itself is a result of some risk of the employment."

Counsel for defendant in error contends that the rule of law to apply in this case is the one adopted by this court in *Pekin Cooperage Co. v. Industrial Com.* 285 Ill. 31, as follows: "No fixed rule to determine **[***5]** what is a risk of employment has been established. Where men are **working** together at the same **work** disagreements may be expected to arise about the **work,** the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. HN2 Where the disagreement arises out of the employer's **work** in which the two men are engaged and as a result of it one injures the other, it may be inferred that the injury arose out of the employment."

We cannot agree that the facts in the instant case justify the application of that rule. At the time Petty dropped the paper on Silas, an incident might have occurred to which such rule would be applicable, but it did not. The men continued their **work** and completed their job. Petty went over to lean against a hand truck to cool off. From the time that he had replied, "We all got to learn," until Silas approached him at the hand truck some thirty minutes later, they had had nothing to say to each other. At the time the fatal injuries were inflicted, neither of the parties was engaged in the duties of his employment.

[*6]** The injuries which caused Silas's death did not have their origin in any risk peculiar to the employment. Silas was not then and there serving his employer's interest, and, therefore, there was no causal relation between the character of the employment and the injury. The risk of injury to himself was created by him at the time that he sought out Petty in the vicinity of the hand truck.

[*133] Counsel for defendant in error cites with approval our analysis in the case of *Triangle Auto Painting and Trimming Co. v. Industrial Com.* 346 Ill. 609, in which we discussed numerous cases involving altercations between fellow employees wherein the **aggressor** was precluded from recovery under the **Workmen's Compensation** Act for injuries resulting from his own assaults. They contend that, inasmuch as Petty struck the first blow, he was the **aggressor,** and rely on the fundamental principles of common law as they apply in cases of assault and battery. These principles are set forth in 5 Corpus Juris 617, which states: "Mere words do not amount to an assault. In accordance with the general rule that the violence offered must be physical, it is held that HN3 mere words or threats, however **[***7]** provoking or insulting, do not constitute an assault without an actual offer of physical violence."

In the instant case, Silas sought Petty out some thirty minutes after he, Petty, dropped the paper on Silas, and in a vile and abusive manner threatened to cut his throat. His words were antagonistic, and were such as might cause an altercation, whether justified or

not. By such action, he stepped outside of the scope of his employment, and by so doing he stepped outside the protection of the **Workmen's Compensation** Act. *Armour & Co. v. Industrial Com.* 397 Ill. 433; *Triangle Auto Painting and Trimming Co. v. Industrial Com.* 346 Ill. 609; *Franklin Coal and Coke Co. v. Industrial Com.* 322 Ill. 23.

We are of the opinion, therefore, that the deceased, Willie Silas, was the **aggressor** and that his quarrel with Petty was in no way connected with his employment, or in the manner of doing his **work.** The judgment of the circuit court of Cook County **[**574]** confirming the award was contrary to the manifest weight of the evidence, and it is reversed and the award set aside.

Judgment reversed; award set aside.

*408 Ill. 115, *; 96 N.E.2d 478, **;*
*1951 Ill. LEXIS 248, ****

Herman Fischer, Defendant in Error, v. The Industrial Commission et al. -- (Motor Cargo, Inc., Plaintiff in Error)

No. 31615

Supreme Court of Illinois

408 Ill. 115; 96 N.E.2d 478; 1951 Ill. LEXIS 248

January 18, 1951, Filed

PRIOR HISTORY: **[***1]** Writ of Error to the Superior Court of Cook County; the Hon. John A. Sbarbaro, Judge, Presiding.

DISPOSITION: Reversed and remanded, with directions.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant employer sought review of the decision from the Superior Court of Cook County (Illinois) that reversed the decision of defendant Industrial Commission that had denied **compensation** to plaintiff claimant for an injury that occurred at his **workplace** as the result of a fight.

OVERVIEW: The claimant was injured in a fight with his foreman during a **workday.** An arbitrator found that the claimant's injury was compensable and awarded **compensation** for temporary total incapacity and a 25 percent permanent loss of use of the left hand. Upon review, the Industrial Commission found that the injury did not arise out of and in the course of the claimant's employment and dismissed his application for adjustment of claim. Thereafter, the trial court reversed the Commission's decision and reinstated the arbitrator's award. The court reversed the decision of the trial court and remanded the cause with directions to confirm the decision of the Commission. The court held that there was substantial evidence that the claimant was the **aggressor** in the fight and that he brought his injury upon himself. The Commission was entitled to find that the injury did not arise out of the claimant's employment because even though the fight concerned **work,** the claimant was not entitled to **compensation** for an injury sustained in the role of **aggressor.**

OUTCOME: The court reversed the decision of the trial court an remanded the cause with directions to confirm the decision of the Industrial Commission that had denied the claimant **compensation** for his injury.

CORE TERMS: claimant's, truck, fight, chest, load, compensable, incidental, aggressor, dock hand, bills of lading, loading, struck, quarrel, loading dock, freight, minutes, hit, accidental injury, employer's business, causal connection, entitled to compensation, conducting, traceable, disputed, manifest, times, hand trucks, arbitrator, afternoon, knocking

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Coverage > Employment Relationships > General Overview

HN1 An employer operating under the **Workmen's Compensation** Act is not an insurer of the safety of his employees at all times during the employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries

HN2 Under the **Workmen's Compensation** Act, an accidental injury, to be compensable, must arise out of, as well as in the course of, the employment. In general, an injury may be said to arise out of the employment when, upon consideration of all the attendant circumstances, there is apparent to the rational mind a causal connection between the conditions under which the **work** was performed and the injury. The injury must have its origin in some risk connected with or incidental to the employment. On the other hand, where there is no causal connection between the injury and the character or conditions of the employment, or the employee is injured as a result of his stepping outside the scope of the employment, the protection of the Act cannot be invoked. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Gambling > Elements
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

HN3 Where a fight is a purely personal matter not growing out of a quarrel over the manner of conducting the employer's business, the resulting injuries to the disputants cannot be said to have arisen out of the employment and neither the **aggressor** nor his victim is entitled to **compensation.** More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Simple Offenses > General Overview

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

HN4 An injury in a fight between two employees arising out of a quarrel concerning the employer's **work** in which they were engaged is, as to the employee not responsible for the assault, a risk incidental to the employment and therefore compensable, but the injuries to the assailant, being traceable directly to his voluntary actions as **aggressor,** cannot be ascribed to the conditions of the employment or considered a risk incidental to the employment and, hence, are not compensable. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

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

Workers' Compensation & SSDI > Defenses > General Overview

HN5 The question as to whether an injury arises out of, and in the course of, the employment is one of fact, except, of course, where the evidence is uncontroverted. Findings of the Illinois Industrial Commission will not be set aside upon review unless contrary to the manifest weight of the evidence, and there must be something more than a mere conflict in the evidence to warrant the conclusion that a finding of fact is erroneous. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Thomas C. Angerstein, George W. Angerstein, Thomas K. Gifford, and Hassel B. Smith, all of Chicago, for plaintiff in error.

Theodore P. Nebel, and Owens, Owens & Rinn, both of Chicago, for defendant in error.

JUDGES: Mr. Justice Wilson delivered the opinion of the court.

OPINION BY: WILSON

OPINION

[*116] **[**479]** Mr. Justice Wilson delivered the opinion of the court:

Herman Fischer, hereafter referred to as the claimant, filed an application for adjustment of claim with the Industrial Commission, alleging that he sustained an accidental injury to his left wrist arising out of, and in the course of, his employment by Motor Cargo, Inc. An arbitrator found the injury was compensable and awarded **compensation** for temporary total incapacity and a twenty-five per cent permanent loss of use of the left hand. Upon review, the Industrial Commission found that the injury did not arise out of, and in **[**480]** the course of, the employment and dismissed the application for adjustment of claim. Thereafter, the superior court of Cook County reversed **[***2]** the decision of the Industrial Commission and reinstated the award made by the arbitrator. We have allowed the employer's petition for writ of error for a further review of the record.

Claimant, a dock hand, was injured in a fight with Paul Kimmel, his foreman, at about two-thirty in the afternoon on September 13, 1947. Claimant had two drinks of whiskey with his lunch and, after checking the cargo in a loaded truck, was given a number of bills of lading and instructed to load an empty truck with two men who had been **working** with him. Raymond Cuttill and two other dock hands were loading another truck in the same vicinity, and the freight and parcels for the two trucks were mixed together on the loading dock.

Other events preceding the injury are disputed. According to claimant, instead of loading his own truck, he assisted Cuttill in loading the other truck upon the theory **[*117]** that, once the freight for the other truck was removed, it would be easier to load his own truck. Claimant further testified that, while he was so engaged, Kimmel appeared and an argument ensued as to why he was not **working** on his own truck; that Kimmel used a swear word and grabbed the bills **[***3]** of lading from his hand; that he picked up some of the bills which had fallen to the floor and pushed them against Kimmel's chest but did not strike him; that, as he turned to leave, intending to quit **work** for the rest of the day, Kimmel punched him in the eye, knocking him over a low crate, and that he broke his wrist when he fell.

The testimony of Marshall Sigler, a dock hand who was **working** on the other side of the loading dock, differed only to the extent that he stated claimant and Kimmel had been arguing for some time prior to the fight and that claimant tapped Kimmel on the chest or arm three or four times just before claimant handed over the bills of lading and Kimmel struck him.

Kimmel testified that, about one-thirty in the afternoon, he noticed claimant was not **working;** that his truck was empty, and that, from time to time, he would stand on the blades of the two-wheel hand trucks used by Cuttill's men, sing, and, in general, obstruct and bother the dock hands trying to load the other truck. Although he asked claimant to **work** and repeated this request at intervals, claimant continued his horseplay, whereupon he asked for and received the bills of lading, told claimant **[***4]** to go home and come back the next **work** day, and started to load the truck assigned to claimant himself. About fifteen minutes later, claimant, who had not left the loading dock as instructed, approached him with threats, made fighting motions and finally struck him on the chest. He walked away and, upon his return a few minutes later and while he was bending over to load a piece of freight on a hand truck, claimant struck him twice in the chest. As he straightened up, he **[*118]** hit claimant a single blow, knocking him over a crate resulting in the injury to him and the end of the fight. It is undisputed that Kimmel was wearing glasses and did not remove them when he hit claimant.

Cuttill, the only other occurrence witness to testify, corroborated Kimmel in all material respects, particularly as to the facts that claimant was not helping him and was loading his own truck only intermittently; that the fight occurred about fifteen minutes after Kimmel received the bills from claimant, and that claimant threatened Kimmel, took a fighting stance and hit Kimmel twice in the chest before Kimmel struck his one and only blow.

Although the facts are somewhat conflicting, the law is **[***5]** clear. HN1 An employer operating under the **Workmen's Compensation** Act is not an insurer of the safety of his employees at all times during the employment. (*Container Corp. v. Industrial Com.* 401 Ill. 129; *Chicago Hardware Foundry Co. v. Industrial Com.* 393 Ill. 294.) HN2 Under our statute, an accidental injury, to be compensable, must arise out of, as well as in the course of, the employment. (*Armour & Co. v. Industrial Com.* 397 Ill. 433; *Math Igler's Casino, Inc. v. Industrial Com.* 394 Ill. 330.) In general, an injury may be said to arise out of the employment when, upon **[**481]** consideration of all the attendant circumstances, there is apparent to the rational mind a causal connection

between the conditions under which the **work** was performed and the injury. (*Jefferson Ice Co. v. Industrial Com.* 404 Ill. 290; *Illinois Country Club, Inc. v. Industrial Com.* 387 Ill. 484.) In short, the injury must have its origin in some risk connected with or incidental to the employment. (*Container Corp. v. Industrial Com.* 401 Ill. 129; *Olson Drilling Co. v. Industrial Com.* 386 Ill. 402.) On the other hand, where there is no causal connection **[***6]** between the injury and the character or conditions of the employment, or the employee is injured as a result of his stepping outside the scope of the employment, the protection of the **Workmen's [*119] Compensation** Act cannot be invoked. *Armour & Co. v. Industrial Com.* 397 Ill. 433; *Illinois Country Club, Inc. v. Industrial Com.* 387 Ill. 484.

The application of the foregoing general principles to injuries arising out of fights between employees has been the subject of frequent pronouncements by this court. HN3 Where the fight is a purely personal matter not growing out of a quarrel over the manner of conducting the employer's business, the resulting injuries to the disputants cannot be said to have arisen out of the employment and neither the **aggressor** nor his victim is entitled to **compensation**. (*Math Igler's Casino, Inc. v. Industrial Com.* 394 Ill. 330; *Chicago Hardware Foundry Co. v. Industrial Com.* 393 Ill. 294; *City of Chicago v. Industrial Com.* 292 Ill. 406; *Edelweiss Gardens v. Industrial Com.* 290 Ill. 459.) Likewise, it is equally well settled that HN4 an injury in a fight between two employees arising out of a quarrel concerning **[***7]** the employer's **work** in which they were engaged is, as to the employee not responsible for the assault, a risk incidental to the employment and therefore compensable, (*Scholl v. Industrial Com.* 366 Ill. 588; *Franklin Coal and Coke Co. v. Industrial Com.* 322 Ill. 23; *Chicago, Rock Island and Pacific Railway Co. v. Industrial Com.* 288 Ill. 126; *Pekin Cooperage Co. v. Industrial Com.* 285 Ill. 31,) but the injuries to the assailant, being traceable directly to his voluntary actions as **aggressor**, cannot be ascribed to the conditions of the employment or considered a risk incidental to the employment and, hence, are not compensable. *Armour & Co. v. Industrial Com.* 397 Ill. 433; *Triangle Auto Painting and Trimming Co. v. Industrial Com.* 346 Ill. 609.

Although the claimant and the employer in the case at bar disagree as to whether the injury sustained resulted from a fight growing out of an altercation concerning the employer's **work,** a concession that the fight arose out of a quarrel over the manner of conducting the employer's **[*120]** business does not aid claimant. Regardless of the origin or cause of the fight, there is very substantial **[***8]** evidence that claimant was the **aggressor** and that he brought his injury upon himself by threatening Kimmel and striking him until Kimmel was goaded into striking back in self-defense. While the facts are disputed, upon the record made the Industrial Commission was entitled to find that the injury did not arise out of the employment and, plainly, it cannot be said that the finding is contrary to the manifest weight of the evidence. HN5 The question as to whether an injury arises out of, and in the course of, the employment is one of fact, (*Peters Machinery Co. v. Industrial Com.* 346 Ill. 403; *Landon v. Industrial Com.* 341 Ill. 51,) except, of course, where the evidence is uncontroverted. (*Math Igler's Casino, Inc. v. Industrial Com.* 394 Ill. 330; *Illinois Country Club, Inc. v. Industrial Com.* 387 Ill. 484.) Findings of the Industrial Commission will not be set aside upon review unless contrary to the manifest weight of the evidence, and there must be something more than a mere conflict in the evidence to warrant the conclusion that a finding of fact is erroneous. (*Caterpillar Tractor Co. v. Industrial Com.* 397 Ill. 474; *Cinch* **[**482]** **[***9]** *Manufacturing Corp. v. Industrial Com.* 393 Ill. 131.) Even though the fight concerned the employer's **work,** claimant is not entitled to **compensation** for an injury sustained in the role of **aggressor**, as the risk of injury in a case of this character cannot be said to be incidental to the employment, but, rather, is traceable directly to the claimant's deliberate act of aggression. *Armour & Co. v. Industrial Com.* 397 Ill. 433; *Triangle Auto Painting and Trimming Co. v. Industrial Com.* 346 Ill. 609.

The judgment of the superior court of Cook County is reversed and the cause remanded, with directions to confirm the decision of the Industrial Commission.

Reversed and remanded, with directions.

*73 Ill. 2d 1, *; 382 N.E.2d 247, **;*
*1978 Ill. LEXIS 341, ***; 21 Ill. Dec. 883*

GENEVIEVE M. GIGANTI, Appellant, v. THE INDUSTRIAL COMMISSION et al. -- (Illinois Bell Telephone Co., Appellee)

No. 50439

Supreme Court of Illinois

73 Ill. 2d 1; 382 N.E.2d 247; 1978 Ill. LEXIS 341; 21 Ill. Dec. 883

September 19, 1978, Filed

SUBSEQUENT HISTORY: [*1]** *Rehearing Denied December 1, 1978.*

PRIOR HISTORY: Appeal from the Circuit Court of Sangamon County, the Hon. Simon L. Friedman, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employee sought review of a judgment from the Circuit Court of Sangamon County (Illinois), which affirmed a decision of the industrial commission denying her application for an adjustment of claim seeking **compensation** for injuries she allegedly received during an altercation on the premises of appellee employer.

OVERVIEW: The employee, who was a union representative, was allegedly injured by an investigator of the employer when she tried to enter a conference room where another union member was being questioned. The employee argued that as an employee who was acting, when injured, in furtherance of her union duties on behalf of both employer and employee under a collective bargaining agreement, she was entitled to **compensation.** Upon review, the court found that the employee's argument was without merit. There was no evidence that the employee was acting pursuant to authority under the collective bargaining agreement. The interview that gave rise to the conflict was not a meeting at which the employee's presence had been requested, or in which discipline was supposed to have been announced. The employer's investigator testified that he had no authority to impose discipline. It was clear that the industrial commission chose to accept the investigator's account of the occurrence, thereby rejecting the employee's contention that she had been struck by him. There was evidence that the employee was the **aggressor** and brought injury upon herself by pushing against the door.

OUTCOME: The court affirmed the judgment of the trial court, and held that the employee was not entitled to **compensation** because she was the **aggressor** and brought the injury upon herself.

CORE TERMS: claimant, investigator's, door, conference room, collective bargaining agreement, supervisor, struck, phone calls, interviewed, discipline, interview, opened, compensable, incidental, aggressor, manifest, union member, arbitrator, announced, arthritic, nuisance, shoulder, cervical, steward, knocked, wished, stood, foot, mild, pain

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN1 The Illinois Industrial Commission's finding resolving a question of fact will not be disturbed unless the finding is contrary to the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Simple Offenses > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN2 An injury in a fight between two employees arising out of a quarrel concerning the employer's **work** in which they were engaged is, as to the employee not responsible for the assault, a risk incidental to the employment and therefore compensable, but the injuries to the assailant, being traceable directly to his voluntary actions as **aggressor,** cannot be ascribed to the conditions of the employment or considered a risk incidental to the employment and, hence, are not compensable. More Like This Headnote

COUNSEL: Thomas F. Londrigan, of Londrigan & Potter, P.C., of Springfield (Alexandra de Saint Phalle, of counsel), for appellant.

Douglas F. Stevenson and Weston W. Marsh, of Rooks, Pitts, Fullagar & Poust, of Chicago, for appellee.

Harold A. Katz, Irving M. Friedman, Jerome Schur, and Warren E. Eagle, of Katz, Friedman, Schur & Eagle, Chartered, of Chicago, for *amicus curiae* Communications **Workers** of America, AFL-CIO.

JUDGES: Mr. CHIEF Justice WARD delivered the opinion of the court.

OPINION BY: WARD

OPINION

[*3] **[**248]** Genevieve Giganti filed an application for adjustment of claim with the Industrial Commission, seeking **compensation** for injuries she allegedly received during an altercation in Springfield on the premises of her employer, Illinois Bell Telephone Company (Bell). Her claim was denied by the arbitrator and by the Industrial Commission, and the Commission's action was confirmed by the circuit court of Sangamon County. She appealed directly to this court under our Rule 302(a) (58 Ill. **[***2]** 2d R. 302(a)).

On October 22, 1974, the date of the incident involved here, a recently adopted collective bargaining agreement was in effect between members of the union of which the claimant was a member and an officer and Bell, the respondent. Copies of the agreement had not yet been circulated to the respondent's union employees. The agreement provides in part:

> "23.04 At any meeting between a representative of the Company and an employee *in which discipline* (including warnings which are to be recorded in the personnel file, suspension, demotion or discharge for cause) *is to be announced*, a Union representative may be present *if the employee so requests*." (Emphasis added.)

The claimant was a vice-president and the chief clerical steward of her local. Her duties as steward included the handling of grievances and providing, under certain specified conditions, *e.g.*, as in 23.04 above, union representation to employees in her unit. She testified that prior to **[*4]** the incident here she had never represented a union member.

On October 22, 1974, the claimant learned that an employee in her office, who was a union member, was being interviewed by an **[***3]** internal investigator of the respondent. The investigator's inquiry related to nuisance phone calls originating from the respondent's office. According to the claimant's testimony before the arbitrator and her deposition which the respondent introduced, she wanted to ascertain whether the employee being interviewed was entitled to, or desired, union representation pursuant to the collective bargaining agreement. The claimant first asked her managing supervisor to call the investigator in the conference room and she did. The investigator told the supervisor that the claimant could see the employee when he had completed his interview. The supervisor refused to tell the claimant in which conference room the employee was being interviewed. The claimant then placed a call to the respondent's Chicago office and asked an official of Bell for an opinion as to whether she was entitled to be present at the interview. She was told he would call her back with the answer. Rather than wait for a response, the claimant decided to go to the conference room, the location of which had somehow become known to her.

The claimant testified that she knocked on the door and when it was partially **[***4]** opened by the investigator, an argument developed between them. What followed is in dispute. The claimant stated she asked the employee to step into the hall to speak with her, but the employee, who stayed within the room, told her, "I'll be all right, Gen." She testified that the investigator then struck her left shoulder with his left hand as she stood against the door and frame, and slammed the door in her face. She did not contend that she was struck by the door. She also testified that her medical expenses were paid under a **[*5]** company funded group insurance policy, and that she was compensated for time she lost from **work** under a seniority program provided by Bell.

The investigator's version of the incident differed substantially from that of the claimant. He testified that when he received the phone call in the conference room, he told the employee with whom he was discussing the nuisance phone calls that the claimant wished to speak with her. The employee, he said, expressed irritation that anyone other than her supervisor knew about the matter, which she wished to be kept confidential. Fifteen minutes later, the claimant knocked on the door. The investigator **[***5]** testified that he opened the **[**249]** door about 18 inches and stood at the opening, with his hand resting on the handle and his right foot against the door so it could not be opened further. The claimant, he said, was in a "very emotional and irate state * * * and demanded to come in." He told her she could not. During a brief dispute, in which, he testified, the claimant was "yelling," she tried to push the door open, using her left hand and shoulder. He kept his foot on the floor against the door until the claimant turned and left. He denied having touched her or having had any physical contact with her.

Two reports prepared by the claimant's treating physician, Dr. H.G. Woody, were received into evidence. Her condition was diagnosed as cervical sprain and mild arthritis, and Dr. Woody further noted:

> "[C]ertainly part of her problem deals with mental health and I don't think there is nearly as much wrong with her as she thinks and certainly the incident, I think, has been blown up in her mind because it apparently was degrading to her.
>
> * * * I had hoped that she would soon realize that this was more an anxiety reaction than anything else. I'm sure **[***6]** she does have some pain in her neck due to the fact that she does have some mild arthritic changes and most of us who do have arthritic changes in the cervical spine do **[*6]** have some pain but we live with it and I'm sure she could too."

The claimant argues that as an employee who was acting, when injured, in furtherance of her union duties on behalf of both employer and employee under a collective bargaining agreement, she was entitled to **compensation.** We need not consider the validity of that broad proposition, for there was no evidence that the claimant was acting pursuant to authority under the collective bargaining agreement. The interview giving rise to the conflict here was not a meeting at which the claimant's presence had been requested, or in which discipline was to be announced. The respondent's investigator testified that he had no authority to impose discipline.

The testimony of the claimant and that of Bell's investigator sharply conflicted. What actually happened at the conference room door was a question of fact for the Commission to resolve, and it is axiomatic that HN1 the Commission's finding resolving it will not be

disturbed unless the finding is contrary **[***7]** to the manifest weight of the evidence. (*Osborne v. Industrial Com.* (1978), 71 Ill. 2d 546, 550.) It is clear that the Commission chose to accept the investigator's account of the occurrence, thereby rejecting the claimant's contention that she had been struck by him. This court reviewed the compensability of injuries arising out of physical conflicts between employees in *Fischer v. Industrial Com.* (1951), 408 Ill. 115, and while the following expression by the court does not precisely fit the factual situation here, it is relevant:

> "Likewise, it is equally well settled that HN2 an injury in a fight between two employees arising out of a quarrel concerning the employer's **work** in which they were engaged is, as to the employee not responsible for the assault, a risk incidental to the employment and therefore compensable [citations], but the injuries to the assailant, being **[*7]** traceable directly to his voluntary actions as **aggressor**, cannot be ascribed to the conditions of the employment or considered a risk incidental to the employment and, hence, are not compensable. *Armour & Co. v. Industrial Com.* 397 Ill. 433; **[***8]** *Triangle Auto Painting and Trimming Co. v. Industrial Com.* 346 Ill. 609." (408 Ill. 115, 119.)

See also *Triangle Auto Painting & Trimming Co. v. Industrial Com.* (1931), 346 Ill. 609, 618.

As in *Fischer*, there was evidence that the claimant was the **aggressor** and brought injury upon herself by pushing against the door. The finding of the Commission in favor of Bell was not contrary to the manifest weight of the evidence. The judgment of the circuit court of Sangamon County confirming the decision of the Industrial Commission is accordingly affirmed.

Judgment affirmed.

Source: Legal > States Legal - U.S. > Illinois > Find Cases > IL State Cases, Combined
Terms: work! and compensation and aggressor (Edit Search | Suggest Terms for My Search)

Select for FOCUS™ or Delivery

*74 Ill. 2d 18, *; 383 N.E.2d 954, **;*
*1978 Ill. LEXIS 374, ***; 23 Ill. Dec. 83*

JUAN LABOY, Appellant, v. THE INDUSTRIAL COMMISSION et al. -- (Gold Eagle Products, Inc., Appellee)

No. 50318

Supreme Court of Illinois

74 Ill. 2d 18; 383 N.E.2d 954; 1978 Ill. LEXIS 374; 23 Ill. Dec. 83

December 4, 1978, Filed

PRIOR HISTORY: **[***1]** Appeal from the Circuit Court of Cook County, the Hon. Richard Curry, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employee filed an action for **workers' compensation** benefits for injuries sustained in an altercation with another employee. The arbitrator found that the employee had failed to prove that the injuries arose out of a hazard peculiar to the employment. Appellee Illinois Industrial Commission affirmed the arbitrator's order. The Circuit Court of Cook County (Illinois) confirmed the Commission's decision. The employee sought review.

OVERVIEW: The employee filed criminal charges against the other employee, claiming that the other employee had attacked him with a pipe. At the preliminary hearing in the criminal case, the other employee testified that the employee had originally attacked the other employee. The arbitrator admitted the other employee's preliminary hearing testimony in the employee's action for benefits. The employee argued that the admission of the testimony was improper. The court found that the testimony was improperly admitted, as the employee did not have the opportunity to cross-examine the other employee as to the truth of his preliminary hearing testimony. However, the court found that the improper admission of the testimony did not warrant reversal because the other employee's testimony established the employee as the **aggressor;** however, such a determination was not necessary because the evidence clearly showed that the quarrel was not related to the employment. A third employee testified that the quarrel was over lottery tickets and the use of profanity. The employee's injuries were not compensable, as the assault grew out of a personal quarrel and was not related to the employer's **work.**

OUTCOME: The court affirmed the judgment, which confirmed the Commission's denial of **workers' compensation** benefits to the employee.

CORE TERMS: locker room, industrial, fight, arbitrator, assault, supervisor, production line, aggressor, manifest, quarrel, preliminary hearing, morning, floor, pipe, petitioner testified, civil action, cross-examination, altercation, claimant's, hazard, struck, angry, threw, boxes, petitioner's testimony, injury arose, criminal prosecution, criminal proceedings, insurance policy, former testimony

LEXISNEXIS® HEADNOTES Hide

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

HN1 Even though a fight between two employees may concern the employer's **work,** the claimant is not entitled to **compensation** for an injury sustained in the role of **aggressor,** as the risk of injury in a case of such character cannot be said to be incidental to the employment, but, rather, is traceable directly to the claimant's deliberate act of aggression. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

HN2 In cases where the evidence is conflicting, the question of whether or not the injury arose out of and in the course of the employment is one of fact to be decided by the Illinois Industrial Commission. Its determination will not be disturbed unless contrary to the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Simple Offenses > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct

The fact that an injury occurs at the place of employment is not sufficient in itself to establish that the injury arose out of

HN3 the employment. There must be a further showing that the injury resulted from some hazard or risk inherent in the employment situation. The burden of establishing that the assault was related to a risk inherent in or incidental to his employment duties rests on the petitioner. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct

HN4 Although injuries resulting from a quarrel concerning the employer's **work** may be compensable, it has consistently been held that where the fight is purely personal in nature, the resulting injuries cannot be said to have arisen out of the employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Bruce B. Cole, of Chicago (Goldstein, Goldberg & Fishman, of counsel), for appellant.

Gifford, Detuno & Gifford, of Chicago (Thomas W. Gifford, of counsel), for appellee.

JUDGES: Mr. Justice RYAN delivered the opinion of the court. Mr. Justice CLARK, dissenting.

OPINION BY: RYAN

OPINION

[*20] **[**955]** This is an appeal from the circuit court of Cook County, which confirmed the decision of the Industrial Commission, which had affirmed an order of the arbitrator denying a claim for **compensation.** The arbitrator had found that the petitioner, Juan Laboy, had failed to prove that the injuries sustained arose out of a hazard peculiar to the employment.

This claim for **compensation** stems from an assault upon the petitioner by a fellow employee. The petitioner testified that on Saturday, August 10, 1974, he was employed by the respondent, Gold Eagle Products, Inc., and was a supervisor running a production line that boxed cans of paint or oil. On that day, Felix Pegan, a co-employee, was assigned to **work** on petitioner's production line. During the normal **[***2]** **work** week Pegan was also a supervisor. Petitioner testified that Pegan was angry when he came to **work** that morning about 8:10 a.m., and that he threw down several cans and boxes on the floor. Petitioner admonished Pegan to take it easy and Pegan called the petitioner a bastard. Petitioner further testified that following **work** that afternoon, while he was in the locker room cleaning up, Pegan struck him several times with a rod or pipe.

Following the assault in the locker room, petitioner signed a criminal complaint against Pegan, and at a preliminary hearing he testified as to the altercation. Pegan also testified at the preliminary hearing and stated that when he went to the locker room, petitioner came in **[*21]** with a pipe and struck him and that he took the pipe away from the petitioner and struck the petitioner with it, causing the injuries for which **compensation** is now sought. At the hearing before the arbitrator, the respondent **[**956]** represented that it was unable to locate Pegan, who had returned to Puerto Rico. The arbitrator, over the objection of the petitioner, permitted the transcript of Pegan's testimony at the preliminary hearing to be introduced **[***3]** into evidence. The petitioner contends that Pegan's testimony at the preliminary hearing should not have been admitted into evidence before the arbitrator. We agree with this contention.

The petitioner, citing *McInturff v. Insurance Co. of North America* (1910), 248 Ill. 92, argues that it was error to admit the testimony of a witness given at a prior criminal prosecution. In *McInturff* the plaintiff, insured, brought an action to recover under his insurance policy for a loss of property by fire. The insurer sought to introduce evidence given by a witness, Blay, at the insured's criminal prosecution for the felonious burning of the building covered by the insurance policy. Blay had been killed prior to the trial of the civil action. The trial court denied the admission of this evidence and this court held that the prior testimony was not admissible, primarily because of a lack of identity of parties in the two proceedings. Relying on *People v. Jackson* (1968), 41 Ill. 2d 102, the respondent contends that the former testimony was properly admitted.

The holding in *McInturff* has been severely criticized as "a flagrant sacrifice of justice on the altar of technicalism." **[***4]** (McCormick, Evidence sec. 256, at 619 n.36 (2d ed. 1972). See also Comment, 6 Ill. L. Rev. 136 (1911); 5 Wigmore, Evidence sec. 1387, at 93 n.1 (Chadbourn rev. ed. 1974).) It is important to note that in *McInturff* the evidence was offered in the civil action against a party who had been the defendant in the criminal trial. As a **[*22]** defendant in the criminal proceedings he would have had full opportunity to test the veracity of the testimony through cross-examination and the difference of the alignment and of the identity of the parties in the two proceedings would not have been significant. Under modern authority it would appear that evidence offered in *McInturff* should have been admitted. See 5 Wigmore, Evidence sec. 1388, at 111 (Chadbourn rev. ed. 1974); McCormick, Evidence sec. 256, at 619 (2d ed. 1972).

In the present case, however, the party against whom the evidence was offered in the civil proceedings was not the defendant in the criminal case. He was only the complaining witness and as such had no right or opportunity to cross-examine Pegan, whose testimony was offered in evidence against him in the civil action. The nature and scope of the cross-examination **[***5]** of Pegan in the criminal proceeding was completely within the control of the prosecution. The petitioner had no opportunity to subject Pegan's testimony to the truth-testing process of cross-examination and it therefore should not have been admitted as evidence in the proceeding before the arbitrator.

We do not find that the erroneous admission of Pegan's testimony requires a reversal and a remandment to the Industrial Commission. Pegan's testimony concerning the altercation in the locker room would have established the petitioner as the **aggressor**. This fact is significant only if the claimant's injuries can be said to have arisen out of the employment. HN1 "Even though the fight concerned the employer's **work,** claimant is not entitled to **compensation** for an injury sustained in the role of **aggressor**, as the risk of injury in a case of this character cannot be said to be incidental to the employment, but, rather, is traceable directly to the claimant's deliberate act of aggression." (*Fischer v. Industrial Com.* (1951), 408 Ill. 115, 120.) In our case it is not necessary to find that the petitioner was **[*23]** the **aggressor** in order to defeat his claim because the evidence clearly **[***6]** shows that the quarrel was not related to the employment.

As noted above, petitioner testified that Pegan was angry when he came to **work** in the morning; that he said he was not going to do

the **work** they told him to do; that he threw some cans and boxes on the floor and called the petitioner a bastard. This all occurred before 9:30 in the morning. The petitioner also testified that Pegan acted **[**957]** angry during the remainder of the day but that there was no further argument between them prior to the locker room incident.

Angelo Martinez, another employee and the only other employee **working** on the line that day besides the petitioner and Pegan who spoke Spanish, testified for the respondent. He stated that he was **working** beside Pegan and he did not remember what was said between petitioner and Pegan during the morning and he did not see Pegan throw any cans or boxes of cans on the floor. He testified that following the noon break for lunch, when they returned to **work,** an argument between petitioner and Pegan developed over lottery tickets and over the use of profanity by the petitioner when discussing his failure to win. Pegan told petitioner to shut up or there **[***7]** would be some fighting. Following an additional exchange of words, petitioner picked up a piece of pipe and swung at Pegan, whereupon Pegan jumped on the petitioner and knocked him to the floor. After the men resumed **work,** petitioner told Pegan that he was "going to catch it outside." The two men then threw some cans at one another and a supervisor stopped the line and the employees left. Martinez did not witness the incident in the locker room.

The testimony of the petitioner would tend to show that the argument was **work** related, whereas the testimony of Martinez shows that the argument which preceded the assault did not concern the employer's **work, [*24]** but grew out of a purely personal matter. HN2 In cases where the evidence is conflicting, the question of whether or not the injury arose out of and in the course of the employment is one of fact to be decided by the Industrial Commission. Its determination will not be disturbed unless contrary to the manifest weight of the evidence. *Huddleston v. Industrial Com.* (1963), 27 Ill. 2d 446, 449.

HN3 The fact that an injury occurs at the place of employment is not sufficient in itself to establish that the injury arose out of **[***8]** the employment. There must be a further showing that the injury resulted from some hazard or risk inherent in the employment situation. (Thurber v. Industrial Com. (1971), 49 Ill. 2d 561.) The burden of establishing that the assault was related to a risk inherent in or incidental to his employment duties rests on the petitioner. *Malco, Inc. v. Industrial Com.* (1976), 65 Ill. 2d 426; *Schroeter v. Industrial Com.* (1976), 62 Ill. 2d 284.

Since we have held that Pegan's testimony given at his criminal hearing is not admissible in this proceeding, the petitioner's testimony concerning the locker room altercation stands uncontroverted. That testimony, however, is relevant only to the question of who was the **aggressor** in the locker room. But Martinez's testimony shows that the continuing dispute during the afternoon from the time the employees returned from lunch until the supervisor stopped the operation of the line shortly before the assault in the locker room was not related in any manner to the employer's **work.** HN4 Although injuries resulting from a quarrel concerning the employer's **work** may be compensable, this court has consistently held that where the fight is purely personal **[***9]** in nature, the resulting injuries cannot be said to have arisen out of the employment. *Huddleston v. Industrial Com.*; *Math Igler's Casino, Inc. v. Industrial Com.* (1946), 394 Ill. 330; *Chicago Hardware Foundry Co. v. Industrial Com.* (1946), 393 Ill. 294.

The arbitrator found that the petitioner had failed to **[*25]** prove that the injuries sustained arose out of a hazard peculiar to the employment. This finding is supported by the testimony of Martinez, which clearly shows that the assault grew out of a personal quarrel between the petitioner and Pegan, and was not related to the employer's **work** or the manner of its performance. We conclude that the finding of the Industrial Commission is not contrary to the manifest weight of the evidence and we therefore affirm the judgment of the circuit court of Cook County.

Judgment affirmed.

DISSENT BY: CLARK

DISSENT

[958]** MR. JUSTICE CLARK, dissenting:

I dissent. I agree that the transcript of Felix Pegan's testimony was erroneously admitted into evidence before the arbitrator, but I do not agree that, in the absence of that evidence, the arbitrator and the Industrial Commission necessarily would have found "that **[***10]** the quarrel was not related to the employment." (74 Ill. 2d at 23.) Accordingly, I would vacate the judgment and order below and remand the cause to the Industrial Commission with directions to grant the petitioner a new hearing on this question.

While I agree that a fight which is purely personal in nature is not **work** related (*e.g., Huddleston v. Industrial Com.* (1963), 27 Ill. 2d 446, 449), I do not agree that the Industrial Commission necessarily would have found this fight to have been purely personal. The fight at issue here occurred in a factory locker room, between a supervisor of one of the factory's production lines, and one of the employees under his supervision. While the parties to and location of a fight are not dispositive of its "**work** relatedness," the Industrial Commission would take notice of the tensions inherent in the relationship between an industrial foreman and one of the employees under his supervision. Given petitioner's testimony that the fight **[*26]** arose out of a production-line dispute, the Industrial Commission would have found that, while not the sole cause, the assembly-line dispute was a sufficiently contributing factor to render compensable **[***11]** the injuries in question. See generally *Converters, Inc. v. Industrial Com.* (1975), 61 Ill. 2d 218, 223-24 (finding of **work** relatedness not against the manifest weight of the evidence). *Cf. Huddleston v. Industrial Com.* (1963), 27 Ill. 2d 446, 448 (contrary finding not against the manifest weight of the evidence).

Here petitioner testified that the dispute arose over Felix Pegan's conduct on the production line. I think that petitioner's testimony established at least as strong a connection between his employment and the fight as the connection this court has found to exist between a Christmas party and employment (*Mid Central Tool Co. v. Industrial Com.* (1978), 72 Ill. 2d 569), and between a golf outing and employment (*Lybrand, Ross Bros. & Montgomery v. Industrial Com.* (1967), 36 Ill. 2d 410).

Nor can I agree that the harm caused by the erroneous admission of Pegan's former testimony was limited to the question of who started the fight. Rather, the record clearly demonstrates that Pegan testified not only that petitioner started the fight, but also that it first broke out on the assembly line, not the locker room, and that petitioner had expressed personal animosity **[***12]** toward him on the assembly line. This testimony therefore could have seriously undercut petitioner's credibility, and particularly so with regard to his theory of the motive for the fight. I therefore would direct that petitioner be given a new hearing on this question, untainted by the erroneously admitted transcript.

Source: Legal > States Legal - U.S. > Illinois > Find Cases > IL State Cases, Combined
Terms: work! and compensation and aggressor (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Friday, June 4, 2010 - 9:08 AM EDT

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

Source: Legal > States Legal - U.S. > Illinois > Find Cases > IL State Cases, Combined
Terms: work! and compensation and aggressor (Edit Search | Suggest Terms for My Search)

Select for FOCUS™ or Delivery

*78 Ill. 2d 260, *; 399 N.E.2d 1280, **;*
*1980 Ill. LEXIS 257, ***; 35 Ill. Dec. 752*

FORD MOTOR COMPANY, Appellee, v. THE INDUSTRIAL COMMISSION et al. (D. D. Kennedy, Appellant)

No. 51492

Supreme Court of Illinois

78 Ill. 2d 260; 399 N.E.2d 1280; 1980 Ill. LEXIS 257; 35 Ill. Dec. 752

January 23, 1980, Filed

PRIOR HISTORY: **[***1]** Appeal from the Circuit Court of Cook County, the Hon. Arthur L. Dunne, Judge, presiding.

DISPOSITION: Judgment reversed; award reinstated.

CASE SUMMARY

PROCEDURAL POSTURE: Claimant employee filed a petition for **workmen's compensation** after he was injured as the result of a fracas with a co-employee. An arbitrator held that the employee failed to prove that his injuries arose out of his employment. The Industrial Commission set aside the arbitrator's decision. The Circuit Court of Cook County (Illinois) held that the Commission erred and reinstated the arbitrator's decision denying benefits. The employee appealed.

OVERVIEW: On appeal, the court held that the findings of the Industrial Commission were based on uncontroverted facts and were not against the manifest weight of the evidence. The court held that the general rule was that, in the case of an injury resulting from an altercation between employees, the employee who was not responsible for the aggression would be entitled to **workmen's compensation** benefits. The court held that the trial court erred in finding that the employee failed to prove that his injuries arose out of and in the course of his employment. The court therefore reversed the finding of the trial court and reinstated the Commission's award of **workmen's compensation** benefits.

OUTCOME: The court held that there was sufficient evidence on which the Commission could base an award for the employee. The court therefore reversed the judgment entered by the trial court.

CORE TERMS: claimant, aggressor, aggression, arbitrator, welding, foreman, compensated, confronted, manifest, workmen's, stepped, struck, series of acts, sheet-metal, reinstated, rushed, skull

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Place & Time
Workers' Compensation & SSDI > Compensability > Injuries > Statutory Offenses

HN1 Generally, when an injury results from physical combat between two employees over the employer's **work,** the employee who was not responsible for the aggression may be compensated. Injuries sustained by the **aggressor,** being traceable to his own voluntary acts, are not within the scope of employment and are not compensable. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Statutory Offenses

HN2 The fact that one employee made the first physical contact is not decisive in determining which party is the **aggressor.** The totality of the circumstances must be examined to determine whose behavior amounted to aggression. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN3 A finding of the Industrial Commission will not be set aside unless contrary to the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Baskin & Baskin, of Chicago (Richard W. Baum, of counsel), for appellant.

William P. Landon, of Chicago for appellee.

JUDGES: Mr. Justice Moran delivered the opinion of the court.

OPINION BY: MORAN

OPINION

[*261] **[**1281]** Claimant, D. D. Kennedy, filed for **workmen's compensation** benefits after he sustained injuries as a result of a physical encounter with a coemployee. An arbitrator found that the claimant had failed to prove that such injuries arose out of and in the course of claimant's employment. The Industrial Commission set aside the decision of the arbitrator and held that Ford Motor Company, the employer, owed claimant for 24 weeks total disability at $ 108 per week, 60 weeks at $ 86.10 for a statutory skull fracture (Ill. Rev. Stat. 1973, ch. 48, par. 138.8(d)), and $ 545 for medical expenses. The circuit court of Cook County found the Commission's decision to be in error as a matter of law and reinstated the decision of the arbitrator.

Claimant asserts that the Commission's finding, which was based on uncontroverted **[***2]** facts, was not against the manifest weight of the evidence, and that his injuries arose out of and in the course of his employment.

[*262] In early August of 1973, claimant and Wayne Simmons **worked** together briefly to weld a guard on a conveyor. The claimant, a sheet-metal man, performed the sheet-metal **work,** and Simmons, a welder, performed the welding. The next day, the foreman called claimant to his office and asked who had done the welding job. Claimant replied that it was Simmons. A day or two later, Simmons confronted Kennedy and accused him of "turning him in on the welding job." After this incident, Simmons would regularly go to claimant's **work** area, make critical remarks concerning claimant's **work** and call him an unskilled **worker.**

[1282]** On August 22, 1973, shortly after a lunch break, Simmons came to an area in which claimant was **working** and said to the claimant, "You will have to grind that," referring to the gate on which claimant was **working.** Claimant told Simmons that he knew his job and asked him to leave him alone. Simmons then rushed up to the claimant. The claimant gave him a shove back and turned away. Simmons went after him, and **[***3]** a scuffle ensued. Claimant was hospitalized and underwent surgery to insert a plate in his skull. He returned to **work** on February 1, 1974, and was on light duty for six months. He now complains of frequent headaches, neck soreness and blurred vision in the left eye.

Clearly, the instant dispute arose out of and in the course of the claimant's employment. The conversation which prompted the August 22 confrontation concerned the quality of claimant's **work** and was the culmination of a series of acts by Simmons which followed his having been reported to the foreman.

There remains, however, the question of who was the **aggressor.** HN1 Generally, when an injury results from physical combat between two employees over the employer's **work,** the employee who was not responsible for the aggression may be compensated. (*Fischer v. Industrial Com.* (1951), 408 Ill. 115, 119; *Franklin Coal & Coke Co. v. Industrial Com.* (1926), 322 Ill. 23, 27; *Pekin Cooperage Co. v. Industrial* **[*263]** *Com.* (1918), 285 Ill. 31, 35.) Injuries sustained by the **aggressor,** being traceable to his own voluntary acts, are not within the scope of employment and are not compensable. **[***4]** *Armour & Co. v. Industrial Com.* (1947), 397 Ill. 433, 436; *Triangle Auto Painting & Trimming Co. v. Industrial Com.* (1931), 346 Ill. 609, 618; *Fischer v. Industrial Com.* (1951), 408 Ill. 115, 119.

In *Container Corp. of America v. Industrial Com.* (1948), 401 Ill. 129, a new employee, Jim Lee Petty, accidentally dropped a roll of paper from the top of a machine and it fell on Willie Silas, a fellow employee. A half hour later, Silas approached Petty and said, in an abusive tone, that he was going to cut his throat. Petty responded by striking Silas, who fell to the ground. He got up, again confronted Petty, was struck a second time, and fell. In the second fall, he sustained an injury to his head which caused his death. In a claim filed by Silas' widow, the court refused to accept the argument that Petty was the **aggressor** because he struck the first blow. Instead, the court ruled that Silas was the **aggressor** in that "[h]is words were antagonistic, and were such as might cause an altercation, whether justified or not. By such action, he stepped outside of the scope of his employment, and by so doing he stepped outside the protection of the **Workmen's Compensation** Act." *Container Corp. of* **[***5]** *America v. Industrial Com.* (1948), 401 Ill. 129, 133.

We find, as did the court in *Container Corp.*, that HN2 the fact that one employee made the first physical contact is not decisive in determining which party is the **aggressor.** The totality of the circumstances must be examined to determine whose behavior amounted to aggression. Here, Simmons taunted and antagonized the claimant, daily, in an apparent attempt to retaliate for claimant having earlier identified Simmons' inferior **workmanship** to the foreman. Simmons' course of conduct was a series of acts of aggression which led to the August 22 incident. When, at that time, Simmons criticized and rushed up to claimant, the latter's reflex reaction to the aggressive behavior was to **[*264]** push Simmons away. Since the facts support the claimant's contention that he was not the **aggressor,** he may be compensated for the injuries he sustained.

HN3 The finding of the Industrial Commission will not be set aside unless contrary to the manifest weight of the evidence. (*Swift & Co. v. Industrial Com.* (1919), 287 Ill. 564, 573; *Fischer v. Industrial Com.* (1951), 408 Ill. 115, 120.) We hold that there was sufficient evidence on **[***6]** which the Commission could **[**1283]** base an award for the claimant. We therefore reverse the finding of the circuit court and reinstate the award of the Commission.

Judgment reversed; award reinstated.

- Citation information available
* Click on any *Shepard's* signal to *Shepardize*® that case.

*95 Ill. 2d 166, *; 447 N.E.2d 186, **;*
*1983 Ill. LEXIS 313, ***; 68 Ill. Dec. 928*

TRINIDAD RODRIGUEZ, Appellee, v. THE INDUSTRIAL COMMISSION et al. (Wikstrom-Higner Company, Appellant)

No. 55439

Supreme Court of Illinois

95 Ill. 2d 166; 447 N.E.2d 186; 1983 Ill. LEXIS 313; 68 Ill. Dec. 928

January 24, 1983, Filed

SUBSEQUENT HISTORY: [*1]** Rehearing Denied April 8, 1983.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County, the Hon. James Murray, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellee employee brought an action under the **Workmen's Compensation** Act, Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1977), for injuries sustained when a co-**worker** hit him. The Industrial Commission adopted the findings of the arbitrator that the injuries had not arisen out of **work.** The Circuit Court of Cook County (Illinois) reversed and remanded. The Commission then found for the employee and the employer appealed.

OVERVIEW: The employer argued that because the incident was spontaneous and based solely on the co-**worker's** dislike of Mexicans it was not a **work**-related injury. The court affirmed the circuit court's decision to confirm the Industrial Commission's ruling in favor of the employee. The court held that 1) injuries occasioned by an assault by a co-employee in the **workplace** during **working** hours were compensable in Illinois if the assault arose in the course of a dispute that was **work** related; 2) injuries suffered in assaults with unexplained motives were not compensable if the motive for the assault was personal; and 3) neutral assaults were compensable without any further showing of a causal link between the employment and the assault. The court held that because a person had to bring their ethnic heritage, over which they had no control, the assault fell under the caption of a "neutral assault."

OUTCOME: The court affirmed the circuit court's decision to confirm the order of the Industrial Commission finding for the employee.

CORE TERMS: assault, claimant, co-employee, assailant, motive, workplace, compensable, aggressor, ethnic, workmen's compensation, unexplained, generator, manifest, insane, irrational, assigned, theory of recovery, arbitrator, dislike, public places, positional-risk, co-worker, violence, heritage, delusion, lunch, pool, spontaneous, slur, injuries resulting

LEXISNEXIS® HEADNOTES Hide

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Proof > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

HN1 Injuries occasioned by an assault by a co-employee in the **workplace** during **work** hours are compensable in Illinois if the assault arose in the course of a dispute involving the conduct of the **work,** provided that the claimant is not the **aggressor.** Such injuries are not compensable as to either the **aggressor** or the victim where the dispute was purely personal between the two employees. In addition, injuries suffered in assaults the motives for which are unexplained are not compensable if there is evidence to sustain a finding by the Industrial Commission that the motive was personal to the victim rather than **work** related or if claimant cannot demonstrate a reason for the assault. Where the assailant's identity is known and there is no evidence of personal motive, an award is proper despite a claimant's inability to give a reason for the assault. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN2 A claimant must bring something from his private life to the scene of an assault by a co-employee for the assault to be considered personally motivated. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Simple Offenses > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

HN3 A "neutral" assault is compensable without any further showing of a specific causal link between the employment and the assault. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Simple Offenses > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

HN4 Assaults by co-employees in the **workplace** that are motivated by general racial or ethnic prejudice are best treated as compensable "neutral" risks arising out of the employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Kane, Doy & Harrington, Ltd., of Chicago (Samuel J. Doy, of counsel), for appellant.

Joseph P. Storto, P.C., of Bensenville (Joseph P. Storto, of counsel), for appellee.

JUDGES: JUSTICE SIMON delivered the opinion of the court. CHIEF JUSTICE RYAN, dissenting. UNDERWOOD and MORAN, JJ., join in this dissent.

OPINION BY: SIMON

OPINION

[*167] **[**187]** Petitioner, Trinidad Rodriguez, seeks **compensation** under the **Workmen's Compensation** Act (Ill. Rev. Stat. 1977, ch. 48, par. 138.1 *et seq.*) for injuries sustained **[*168]** while at **work** when a co-**worker** struck him over the head with a two-by-four. The co-**worker**, Roger Knoll, had no provocation for the assault; his only apparent motive was prejudice against petitioner because he was Mexican.

The arbitrator found that petitioner's injuries did not arise out of and in the course of the employment and denied **compensation.** He did not make any specific finding, however, as to what triggered the assault. The Industrial Commission adopted the findings of the arbitrator **[***2]** without hearing additional evidence and without making additional findings of fact. The circuit court of Cook County reversed and remanded the cause to the Industrial Commission for determination of the nature and extent of the injury and computation of an award. On the remand, the Industrial Commission awarded petitioner $ 24,882.54, an amount covering medical expenses, none of which had been paid by the employer, and **compensation** based on 20 weeks' temporary total incapacity and 60 weeks' permanent partial incapacity due to skull fracture. The award was confirmed by the circuit court. This is an appeal by the employer, Wikstrom-Higner Company, from that circuit court order.

The employer, a builder of homes, employed petitioner as a carpenter. His job was to construct frames for various portions of houses, a job which was being performed on the site. He had been an employee of Wikstrom-Higner for only three months at the time of the assault. On the day of the incident petitioner was **working** on the deck of a house separated by one other structure from the house on which Roger Knoll was **working.** The relative location of the houses was such that petitioner had to pass the place **[***3]** where Knoll was **working** on his way to his own **work** site from the lunch area and the parking lot. This had been the arrangement for three days prior to the incident, but petitioner and Knoll had **[*169]** not known each other and apparently had no conversation until the day of the assault.

Sometime during the morning, petitioner was passing Knoll's **workplace** when Knoll greeted him with an ethnic slur. Petitioner ignored the slur and went back to the structure to which he was assigned. On his way back from lunch he passed Knoll again, whereupon Knoll made another ethnic slur and petitioner asked him why he talked to him like that. According to petitioner's testimony before the arbitrator, Knoll replied, "Because I don't like Mexicans. And I [*sic*] gonna kill you," to which petitioner said, "You crazy [*sic*]," and started to walk away. Knoll then hit petitioner in the leg with a two-by-four. Petitioner threw it back in Knoll's direction and returned to his station. While petitioner was attempting to resume his **work** Knoll sneaked up behind him and hit him over the head with another two-by-four, knocking him unconscious and fracturing his skull.

Petitioner's explanation **[***4]** for the incident was that Knoll's daughter had been married **[**188]** to and divorced from a man of Mexican descent and was currently dating other Mexican-Americans, and that Knoll harbored a dislike for Mexicans and people of Mexican descent which erupted into violence on this one particular occasion. The only witness other than the petitioner to testify, an accident investigator called in by the employer, indicated in direct testimony and again on cross-examination that the malfunctioning of a generator which Knoll was using at **work** that day could have precipitated the assault. This was based on a statement which the investigator had elicited from another employee who had been on the scene at the time that Knoll had been trying without success to start the generator when petitioner came by and Knoll, according to the other employee, exclaimed in petitioner's direction, "This stupid thing must have been made in Mexico, too."

[*170] Both sides recognize that there is a factual dispute as to whether the assault was spontaneous or was triggered by the failure of a generator to function properly. The employer argues before this court that the arbitrator and the **[***5]** Industrial Commission found that it was spontaneous and grounded only in Knoll's dislike of Mexicans and asserts that this finding is supported by the evidence. Although petitioner contends that the assault was Knoll's reaction to the difficulty he was having with the generator, he also maintains, and we agree, that the injury is compensable even if the assault was spontaneous and motivated solely by Knoll's dislike of Mexicans.

HN1 Injuries occasioned by an assault by a co-employee in the **workplace** during **work** hours are compensable in Illinois if the assault arose in the course of a dispute involving the conduct of the **work,** provided that the claimant is not the **aggressor.** (*Ford Motor Co. v. Industrial Com.* (1980), 78 Ill. 2d 260 (dispute involved the quality of claimant's **work**); *Franklin Coal & Coke Co. v. Industrial Com.* (1926), 322 Ill. 23 (dispute involved the division of labor between **aggressor** and claimant); *Pekin Cooperage Co. v. Industrial Com.* (1918), 285 Ill. 31 (dispute concerned **aggressor's** taking of barrel staves needed by claimant to do his job).) Such injuries are not compensable as to either the **aggressor** or the victim where the dispute was purely personal **[***6]** between the two employees. (*Interstate United Corp. v. Industrial Com.* (1976), 65 Ill. 2d 434 (dispute concerned the alleged breaking of **aggressor's** car antenna by victim); *Malco, Inc. v. Industrial Com.* (1976), 65 Ill. 2d 426 (dispute concerned a betting pool within the **workplace** which did not further the **work** and which was not supervised in any way by the employer); *Huddleston v. Industrial Com.* (1963), 27 Ill. 2d 446 (dispute concerned a parking space and was two months old when the assault occurred); *City of Chicago v. Industrial Com.* (1920), 292 Ill. 406 **[*171]** (dispute arose when claimant refused **aggressor** permission to drink from his drinking can).) In addition, this court has held that injuries suffered in assaults the motives for which are unexplained are not

compensable if there is evidence to sustain a finding by the Industrial Commission that the motive was personal to the victim rather than **work** related or if claimant cannot demonstrate a reason for the assault. (*Greene v. Industrial Com.* (1981), 87 Ill. 2d 1 (identity of **aggressor** unknown; permissible inference as to motive drawn in employer's favor); **[***7]** *Laboy v. Industrial Com.* (1978), 74 Ill. 2d 18 (identity of **aggressor** known, but same result); *Thurber v. Industrial Com.* (1971), 49 Ill. 2d 561 (insufficient evidence as to motive); *American Brake Shoe Co. v. Industrial Com.* (1960), 20 Ill. 2d 132 (same); *Math Igler's Casino, Inc. v. Industrial Com.* (1946), 394 Ill. 330 (**aggressor** was a friend of claimant and no explanation could be given for the attack); *Chicago Hardware Foundry Co. v. Industrial Com.* (1946), 393 Ill. 294 (identity of **aggressor**, and hence his motive, unknown).) The latter four cases were eroded by *Health & Hospitals Governing Com. v. Industrial* **[**189]** *Com.* (1975), 62 Ill. 2d 28, in which this court decided that where the assailant's identity was known and there was no evidence of personal motive, an award was proper despite the claimant's inability to give a reason for the assault.

Neither the cases relating to injuries resulting from personal antagonisms nor those relating to unexplained assaults are relevant to this appeal. The facts in this case show that the encounter did not result from a personal quarrel. Knoll and the claimant had no previous contact; they had never spoken to each other prior to the day **[***8]** of the assault, and the claimant did nothing to antagonize or arouse Knoll. The motive for the assault is not unexplained; the evidence demonstrated that the incident occurred because of Knoll's general hostility toward **[*172]** Mexicans.

We find unpersuasive the employer's argument that the ethnic motive for the attack must be characterized as "personal" notwithstanding the absence of any dispute between the attacker and his victim: the cases relied on by the employer (*Pazara v. Industrial Com.* (1980), 81 Ill. 2d 76; *Interstate United Corp. v. Industrial Com.* (1976), 65 Ill. 2d 434; *Huddleston v. Industrial Com.* (1963), 27 Ill. 2d 446) and their predecessors all involved either a dispute of at least some duration or with a cooling-off period, or an assault to which no motive could be ascribed. Prior to the day of the assault against the petitioner, there was no connection whatever between his private life and his assailant. We believe that HN2 a claimant must bring *something* from his private life to the scene of an assault by a co-employee for the assault to be considered personally motivated. Here, the most petitioner could be said to have brought to the **workplace** **[***9]** was his ethnic heritage, over which he of course had no control.

Professor Larson describes a category of "neutral assaults" to account for those assaults which are neither personal nor clearly occupational in origin. This category includes "those assaults which are in essence equivalent to blind or irrational forces" (1 A. Larson, **Workmen's Compensation** sec. 11.31, at 3 -- 224 (1978)), and comprises but is not limited to assaults by insane or drunken co-employees and assaults the motive for which is unexplained although the identity of the assailant is known. (1 A. Larson, **Workmen's Compensation** secs. 11.32-11.34 (1978).) We believe that racial or ethnic prejudice directed by an employee against his co-employee belongs in this category inasmuch as it is an unreasoning emotion, although the Larson treatise cites no cases in which the assault was motivated solely by such prejudice and there have been no such cases in Illinois.

In discussing assaults on claimants by insane, **[*173]** drunken or irresponsible co-employees and unexplained assaults by identifiable co-employees, Professor Larson concludes with approval that a "demonstrably larger body" to a "great majority" of decisions **[***10]** from the various States hold the injuries thus suffered to be compen sable (1 A. Larson, **Workmen's Compensation** secs. 11.32(a), 11.33 (1978); see *Health & Hospitals Governing Com. v. Industrial Com.* (1975), 62 Ill. 2d 28, 33). The theory behind the decisions in the irrational co-employee cases is that when a co-employee suffers from a delusion or some similar condition which causes him to erupt into violence, his presence in the **workplace** in his state is a condition under which his victim is employed and must perform his **work,** just as a defective machine or ceiling in the **workplace** would be, and in that sense is a risk peculiar to the employment and not shared by the world at large. (*Anderson v. Security Building Co.* (1924), 100 Conn. 373, 377, 123 A. 843, 844-45; 40 A.L.R. 1119, 1121 (1926); see also, *e.g.*, *Cedar Rapids Community School v. Cady* (Iowa 1979), 278 N.W.2d 298 (insane delusion); *Pacific Employers Insurance Co. v. Industrial Accident Com.* (1956), 139 Cal. App. 2d 260, 293 P.2d 502 (same); *Crotty v. Driver-Harris Co.* (1957), 45 N.J. Super. 75, 131 A.2d 578 (robbery motivated assault); **[***11]** *Wakefield v. World-Telegram* (1937), 249 App. Div. 884, 292 N.Y.S. 588, *aff'd mem.* **[**190]** (1937), 274 N.Y. 517, 10 N.E.2d 527 (intoxication); *Perez v. Fred Harvey, Inc.* (1950), 54 N.M. 339, 224 P.2d 524 (same); *Cleland Simpson Co. v.* ***Workmen's Compensation*** *Appeal Board* (1975), 16 Pa. Commw. 566, 332 A.2d 862 (insane delusion that claimant had broken several dates with assailant).) We have found no Illinois decisions holding squarely to the contrary. (*Cf.* *Belden Hotel Co. v. Industrial Com.* (1970), 44 Ill. 2d 253 (assailant was not a co-employee of victim; hence, the risk of his going insane was not a risk inherent in the employment).) Moreover, in *Health & Hospitals* **[*174]** *Governing Com. v. Industrial Com.* (1975), 62 Ill. 2d 28, 33, this court indicated that HN3 a "neutral" assault of this general type is compensable without any further showing of a specific causal link between the employment and the assault. In that case, the claimant was injured when a co-employee with whom she had not previously spoken pulled a chair out from under her for no apparent reason: **compensation** was allowed on alternative theories of negligence and unexplained intentional assault. We note that petitioner in the instant case has **[***12]** succeeded in demonstrating a specific, nonpersonal motive for the assault on him, and thus presents a stronger case than the claimant in *Health & Hospitals*, who made no such showing.

We believe that HN4 assaults by co-employees in the **workplace** that are motivated by general racial or ethnic prejudice are best treated as compensable "neutral" risks arising out of the employment. Prejudice of this sort does not usually result in physical attacks in the world at large: it would be incorrect to say that people run the everyday risk of assault on the street or in public places because of their Mexican heritage. However, when an assault by a co-employee rooted solely in ethnic prejudice occurs in the **workplace**, as here, it is presumably the result of an irrational human impulse toward violence which is as much a part of the victim's **work** environment as a defective tool would be. The victim may be unaware of the danger, but encounter it he must if the **work** to which he is assigned is to be completed. It is legitimately a hazard presented by the **work.** This is particularly true in our polyglot society in which employers are now required by Federal law to hire qualified racial minorities. **[***13]** (42 U.S.C. sec. 2000e -- 2(a) (1976); see *United Steelworkers of America v. Weber* (1979), 443 U.S. 193, 61 L. Ed. 2d 480, 99 S. Ct. 2721.) With more minorities in the **workplace**, the potential for ethnic or racial friction **[*175]** is likely to increase. It would be anomalous for the law to address the problems of bigotry and lack of opportunity in society by requiring employers to hire qualified members of minority groups while not also requiring them to make the **workplace** as safe for minorities so hired as for other **workers.** (See Ill. Rev. Stat. 1977, ch. 48, par. 851 (declaration of public policy referring to the need to utilize the productive capacities of all individuals to the fullest extent possible regardless of ancestry and to insure that **workers** have resources sufficient to maintain a reasonable standard of living without resort to public charity).) We believe that, in the absence of anything that would personalize the incident, a bigoted and violence-prone co-**worker** is as much a risk inherent in employment in an integrated or ethnically mixed **workplace** as a defective machine or ceiling might be.

Respondent asserts that employers in Illinois are not insurers of **[***14]** the safety of their employees at all times and argues that to affirm the decision of the circuit court here would be equivalent to accepting the positional-risk doctrine of compensability, a

doctrine which has been rejected by this court. (*Campbell "66" Express, Inc. v. Industrial Com.* (1980), 83 Ill. 2d 353; *Spiller v. Industrial Com.* (1928), 331 Ill. 401; see 1 A. Larson, **Workmen's Compensation** sec. 11.40 (1978).) We do not agree that an affirmance here means adoption of the positional-risk doctrine. That doctrine holds that an injury may be compensable whenever it was suffered on the **work** premises during **work** hours, regardless of whether the conditions or nature of the employment increased or contributed to the risk which led to the injury. (*Campbell "66" Express,* **[**191]** *Inc. v. Industrial Com.* (1980), 83 Ill. 2d 353, 355.) Taken to its extreme, it would render compensable an injury resulting from a personal dispute or a natural disaster common to the world at large, once the claimant shows that the employment caused him to occupy what **[*176]** turned out to be a place of danger. (1 A. Larson, **Workmen's Compensation** sec. 10.00 (1978).) Neither **[***15]** our rejection of that sweeping doctrine, nor our continued adherence to the maxim that injuries are not compensable if they arise out of a personal dispute or from a risk common to people generally, requires us to deny **compensation** in this case.

For the foregoing reasons, we believe that the circuit court correctly confirmed the order of the Industrial Commission and that no further findings of fact are necessary. The decision of the circuit court is affirmed.

Judgment affirmed.

DISSENT BY: RYAN

DISSENT

CHIEF JUSTICE RYAN, dissenting:

The first and most glaring error in the opinion of my colleagues is that it misconstrues the nature of the review of the case. The decision of the Industrial Commission that must now be reviewed *did not* hold in favor of the claimant, but found that the claimant's injuries *did not* arise out of and in the course of employment. However, the last paragraph of the opinion treats the case as one in which the Industrial Commission had found in favor of the claimant. The award of the Industrial Commission which the last paragraph of the opinion embraces was made only after the circuit court had reversed the original finding of the Commission and remanded **[***16]** the case. Therefore, the test that must now be applied by this court is whether that original finding in favor of the *employer* is against the manifest weight of the evidence.

It is well established that the resolution of disputed questions of fact is primarily the function of the Industrial Commission, which must hear and judge the credibility of the witnesses, sift the evidence, determine where the preponderance lies, and then, upon such determination, render its decision. On review, the function of this court is limited to a determination of whether the **[*177]** findings of the Commission are against the manifest weight of the evidence. If the evidence is conflicting or permits the reasonable drawing of different inferences, we will not set aside the decision solely because we might have made a finding different from that made by the Commission or because we might have drawn different inferences. These well-established principles were restated by this court in another assault case, *Convertors, Inc. v. Industrial Com.* (1975), 61 Ill. 2d 218, 223.

In our case, applying these principles, the original holding of the Industrial Commission that the injury did *not* arise **[***17]** out of and in the course of the employment must be affirmed unless that holding is against the manifest weight of the evidence. However, the opinion never mentions manifest weight of the evidence, nor does it apply that test to the finding of the Industrial Commission. Instead, after a philosophical discussion concerning bigotry, the opinion adopts a new theory of recovery in Illinois, the "neutral assault" theory. However, even to bring this case within this new theory, it is necessary to expand it into a new area. Usually, this theory of recovery has been applied to assaults by drunks and lunatics, and "assaults which are in essence equivalent to blind or irrational forces." (1 A. Larson, **Workmen's Compensation** sec. 11:31, at 3 -- 224 (1978).) The opinion acknowledges that the "neutral assault" theory was suggested by Professor Larson's text on **workmen's compensation** (1 A. Larson, **Workmen's Compensation** sec. 11:31 (1978)). It acknowledges, however, that Larson's treatise cites no case in which the assault was motivated solely by ethnic prejudice and that there have been no such cases in Illinois. Thus, not only does the opinion make new law in Illinois, but it extends the "neutral **[***18]** assault" theory, upon which it rests, to a class of cases in which it has not previously been applied.

[192]** In sum, the majority simply does not agree with the **[*178]** findings of the Industrial Commission and the inferences it has drawn and has taken it upon itself to devise this new theory of recovery to permit claimant to recover. To accommodate this new theory, the majority makes its own findings of fact and draws its own inferences and concludes that the injury was caused by the ethnic prejudice of the assailant and that the danger of injury from such prejudice was also peculiar to the employment and not shared by the public at large.

The holding of the majority is based on a theory entirely different from that on which the case was tried. The claimant's case is based on the contention that the assault was incidental to the employment because it stemmed from problems the assailant had been having with the employer's faulty generator. The assailant had stated his dislike for Mexicans and had also stated that this generator must have been made in Mexico. Claimant's theory of the case was that the assailant's frustration with the faulty generator culminated **[***19]** in his attack, thus making the assault **work** related. This was claimant's theory of recovery before the Industrial Commission and in this court. The Commission did not agree and held against the claimant.

The opinion relies on *dicta* in *Health & Hospitals Governing Com. v. Industrial Com.* (1975), 62 Ill. 2d 28, as allowing **compensation** on the theory of unexplained intentional assault. I wish to point out that in that case the *Industrial Commission had awarded* ***compensation*** and on review this court affirmed that award. In *Schroeter v. Industrial Com.* (1976), 62 Ill. 2d 284, this court noted that the *dicta* in the *Health & Hospitals* case should not be construed as permitting an award in every instance where the record fails to demonstrate unambiguously that the motive for the assault was based on personal reasons. Again relying on *Schroeter*, the court stated that it is the Commission's function to consider **[*179]** the propriety of the award and that this court will not substitute its judgment for that of the Commission unless the findings are contrary to the manifest weight of the evidence.

Laboy v. Industrial Com. (1978), 74 Ill. 2d 18, is another **[***20]** case in which the claimant was assaulted by a co-employee and the assault occurred on the employer's premises. The Industrial Commission *denied* recovery and this court affirmed. In that case there was evidence which would have supported a conclusion that the assailant was angry because of his **work** and thus the assault was **work** related. He stated that he would not do the **work** he was assigned to do. He threw boxes and cans on the floor and he called the claimant, with whom he was assigned to **work,** a bastard. Throughout the course of the day, heated exchanges occurred

between the claimant and the assailant and there were instances of physical combat. After **work** in the washroom, the assailant struck the claimant, injuring him. However, there was also some evidence that there had been a dispute between the two concerning lottery tickets during the lunch break. This court again deferred to the finding of the Industrial Commission that the injury did not arise out of employment since there was evidence from which such an inference could legitimately be drawn. These co-employee assault cases consistently have held that the claimant must prove not only that the assault occurred **[***21]** in the course of the employment, but also that it arose out of the employment. These cases also hold that the court will not reverse the holding of the Industrial Commission on this question unless it is against the manifest weight of the evidence. Above all, we will not substitute our conclusions and inferences for those of the Commission simply because we may disagree.

The majority opinion in our case makes a finding that just does not conform to the facts of life. It states:

> **[*180]** "Prejudice of this sort does not usually result in physical attacks in the world at large: it would be incorrect to say that people run the everyday risk of assault on the street or in public places because of **[**193]** their Mexican heritage." 95 Ill. 2d at 174.

I do not know the source of this amazing insight. I dare say, however, that there are thousands who are capable of disproving this "verity" by a display of their scars and bruises. The assailant could just as readily have given vent to his prejudice by whacking the claimant over the head with a pool cue in a pool hall, or with a beer bottle in a tavern, or by assaulting him in any public place where they **[***22]** would have been brought into close proximity. In addition to being contrary to the facts of life, this statement is obviously a finding that was not made by the Industrial Commission. This constitutes an independent finding of fact and drawing of inferences and is not a review of the findings of the Commission.

Finally, insofar as assaults by co-employees are concerned, the majority opinion, in spite of its protestations to the contrary, has fairly well established the positional-risk doctrine in Illinois. It essentially eliminates the necessity of proving that the assault arose out of the employment if it occurred in the course of the employment.

I dissent.

*97 Ill. 2d 338, *; 454 N.E.2d 632, **;*
*1983 Ill. LEXIS 428, ***; 73 Ill. Dec. 535*

MARIA T. CASTANEDA, Appellant, v. THE INDUSTRIAL COMMISSION et al. (Congress Linen Supply, Appellee)

No. 56959

Supreme Court of Illinois

97 Ill. 2d 338; 454 N.E.2d 632; 1983 Ill. LEXIS 428; 73 Ill. Dec. 535

September 23, 1983, Filed

PRIOR HISTORY: **[***1]** Appeal from the Circuit Court of Cook County, the Hon. James C. Murray, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant claimant sought review of a decision by the Circuit Court of Cook County (Illinois), which confirmed the decision of appellee state industrial commission which denied the claimant's request for **workmen's compensation** benefits under the **Workmen's Compensation** Act, Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1979).

OVERVIEW: The claimant's finger was injured during an altercation with two co-**workers.** The claimant sought benefits under the **Workmen's Compensation** Act, Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1979). The lower court sustained the state industrial commission's decision to deny the requested benefits, finding that claimant had failed to prove that her injuries arose out of and in the course of her employment with respondent employer. Upon appeal, the court affirmed, holding that the testimony indicated that the claimant's injuries arose from a purely personal dispute and did not, therefore, arise out of and in the course of her employment. The fact that the injury occurred at the place of employment was not sufficient in itself to prove that the injury arose out of the employment.

OUTCOME: The court affirmed the judgment against the claimant, denying her **workmen's compensation** benefits.

CORE TERMS: claimant's, injuries arose, co-worker, shut, manifest, finger, inferences drawn, resulting injury, altercation, assault, interpreter, tablecloths, responded, assaulted, talking, sister, threw, fight

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
HN1 It is **workmen's compensation** claimant's burden to establish that her injuries arose out of and in the course of her employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Injuries > General Overview
HN2 The fact that an injury occurs at the place of employment is not sufficient in itself to prove that the injury arose out of the employment. An injury may be said to arise out of the employment when, upon consideration of all of the circumstances, there is apparent to the rational mind a causal connection between the conditions under which the **work** is to be performed and the resulting injury. Where a physical confrontation is purely personal in nature, the resulting injuries cannot be said to have arisen out of the employment. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: McCoy & Morris, of Chicago (Jeffrey M. Morris and Gilbert C. Schumm, of counsel), for appellant.

Sweeney & Riman, Ltd., of Chicago (Richard Sawislak, of counsel), for appellee.

JUDGES: JUSTICE UNDERWOOD delivered the opinion of the court.

OPINION BY: UNDERWOOD

OPINION

[*339] **[**633]** Claimant, Maria T. Castaneda, sought benefits under the **Workmen's Compensation** Act (Ill. Rev. Stat. 1979, ch. 48, par. 138.1 *et seq.*) for injuries sustained to her left ring finger during a physical altercation with two co-**workers**. The Industrial Commission reversed its arbitrator's award, finding that claimant had failed to prove that her injuries arose out of and in the course of her employment with respondent, Congress Linen Supply. The circuit court of Cook County confirmed the Commission, and claimant now brings this direct appeal pursuant to our Rule 302(a)(2) (87 Ill. 2d R. 302(a)(2)), urging **[*340]** that the Commission's decision is against the manifest weight of the evidence.

Claimant testified at the arbitration hearing, through an interpreter, that **[***2]** she had been employed by respondent for approximately six years on August 29, 1979. On that morning, as she was talking to a co-**worker** while performing her customary duties of folding aprons, a co-**worker**, Gracelia Perez, told her to shut up. Claimant responded that she would not shut up or be quiet, at which point Gracelia slapped her in the face. Claimant then threw a package of tablecloths at Gracelia, and the two women began fighting. Shortly thereafter, Gracelia's sister, Gloria Loera, with whom claimant had quarreled the day before, joined her sister, and together they assaulted claimant and stepped on her finger. Two mechanics intervened and broke up the fight, and claimant was later treated for a serious finger injury.

The only other relevant testimony was that of Alberto Amato Trejo, cousin to Gracelia and Gloria, who testified on behalf of respondent. Alberto testified, also through an interpreter, that it was he and claimant who exchanged words, the nature of which are not entirely clear from the record, although it appears that claimant was insulting him and commenting on his problems. After claimant apparently characterized Alberto and his family with a vulgar expression, **[***3]** Gracelia responded with words and a clenched fist. Claimant told Gracelia that she would not shut up, threw the tablecloths, and the fight ensued.

The Industrial Commission found that neither account of the incident would sustain a finding that claimant's injuries arose out of and in the course of her employment. Alberto's version established that claimant was the **aggressor,** which, as the Commission noted, would preclude an award of **compensation.** (*E.g.*, Ford Motor Co. v. Industrial Com. (1980), 78 Ill. 2d 260, 262-63.) Similarly, **[*341]** the Commission found that claimant's version established simply that her injuries arose from a purely personal dispute and did not, therefore, arise out of and in the course of her employment. (*E.g.*, Laboy v. Industrial Com. (1978), 74 Ill. 2d 18, 24.) **[**634]** The Commission rejected her contention that the August 29 dispute originated the previous day with Gloria when the two had an argument concerning claimant's time card which Gloria had apparently altered. The Commission found, however, no evidence connecting the two incidents.

Claimant argues here that there was sufficient evidence in the record from which the **[***4]** Commission could find that the two arguments were connected since she testified that she was talking to a co-**worker** on August 29 "about what had happened the day before" when Gracelia told her to shut up and assaulted her. Even if we were to assume that the August 28 argument between claimant and Gloria was **work** related, we must, under the circumstances here, sustain the Commission's finding that claimant's injuries on August 29 were the result of a purely personal dispute in view of the finding that no connection existed between those injuries and the August 28 episode.

*HN1*It is claimant's burden to establish that her injuries arose out of and in the course of her employment (Jones v. Industrial Com. (1983), 93 Ill. 2d 524, 526; Malco, Inc. v. Industrial Com. (1976), 65 Ill. 2d 426, 430), and it is axiomatic that this court will not disregard or reject permissible inferences drawn by the Commission merely because other inferences might be drawn, nor will we substitute our judgment for that of the Commission unless its findings are against the manifest weight of the evidence. (Greene v. Industrial Com. (1981), 87 Ill. 2d 1, 5; **[***5]** Schroeter v. Industrial Com. (1976), 62 Ill. 2d 284, 287.) *HN2*The fact that the injury occurs at the place of employment is not sufficient in itself to prove that the injury **[*342]** arose out of the employment: "An injury may be said to arise out of the employment 'when, upon consideration of all of the circumstances, there is apparent to the rational mind a causal connection between the conditions under which the **work** is to be performed and the resulting injury.'" (Pazara v. Industrial Com. (1980), 81 Ill. 2d 76, 83, quoting Brewster Motor Co. v. Industrial Com. (1967), 36 Ill. 2d 443, 449.) Where a physical confrontation is purely personal in nature, the resulting injuries cannot be said to have arisen out of the employment. Laboy v. Industrial Com. (1978), 74 Ill. 2d 18, 24; Huddleston v. Industrial Com. (1963), 27 Ill. 2d 446, 448.

The Commission's conclusion here that claimant's injuries resulted from a purely personal dispute cannot be said to be against the manifest weight of the evidence. It is apparent, based upon the reasonable inferences drawn by the Commission from the record, that the physical altercation on August 29 was the result of a purely personal dispute precipitated by a verbal exchange **[***6]** which was completely unrelated to the employer's **work.** We note, too, that no argument is made that there existed a risk of assault inherent in or incidental to the performance of claimant's employment duties (see, *e.g.*, Malco, Inc. v. Industrial Com. (1976), 65 Ill. 2d 426, 431; Huddleston v. Industrial Com. (1963), 27 Ill. 2d 446, 448), or that the assault was motivated by the type of ethnic differences this court deemed sufficient in Rodriguez v. Industrial Com. (1983), 95 Ill. 2d 166.

The circuit court's judgment affirming the Commission's decision is accordingly affirmed.

Judgment affirmed.

*167 Ill. App. 3d 1041, *; 522 N.E.2d 128, **;*
*1988 Ill. App. LEXIS 221, ***; 118 Ill. Dec. 673*

GRAPHIC GROUP & KLW, INC., Appellant, v. THE INDUSTRIAL COMMISSION et al. (Mark Londinski, Appellee)

No. 1-87-1235WC

Appellate Court of Illinois, First District, Industrial Commission Division

167 Ill. App. 3d 1041; 522 N.E.2d 128; 1988 Ill. App. LEXIS 221; 118 Ill. Dec. 673

March 2, 1988, Filed

SUBSEQUENT HISTORY: [***1] Rehearing Denied May 16, 1988.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County; the Hon. Alexander White, Judge, presiding.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer sought review of the judgment of the Circuit Court of Cook County (Illinois), which awarded affirmed the determination of appellee industrial commission awarding benefits to appellee employee.

OVERVIEW: The employer hired the painter to paint and plaster their offices. The painter hired the employee and another man for one night to paint the offices. The employee and the painter got into an altercation and the employee's leg was broken. The painter was destitute and did not carry **worker's compensation** insurance. An arbiter found that the employer was a statutory employer and awarded **compensation** to the employee. The industrial commission affirmed the arbiter's decision. The circuit court affirmed the industrial commission's determination. On appeal, the court affirmed finding that the employee's injury was compensable because it arose out of the course of his employment and he was not the **aggressor** in the assault. The court found that the employer was a statutory employer because the **work** being done on the office contributed to the revenues of the business.

OUTCOME: The court affirmed.

CORE TERMS: claimant, graphic, paint, leg, altercation, compensable, assault, pay compensation, sub-contractor, arbitrator, contractor, spilled, clean, Act Ill, matter of law, compensation insurance, evidence supports, course of employment, intoxication, intoxicated, incidental, indirectly, assaulted, aggressor, plaster, drank, beers, painting, painter, broken

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Place & Time

HN1 If an injury occurs during **working** hours, at a place where an employee can reasonably be expected to be in the performance of his duties and while he is performing those duties or something incidental thereto, the injury is said to have occurred in the course of employment. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Simple Offenses > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Horseplay

HN2 In order to prove that an assault by a co-employee arose out of one's employment, it must be shown that the motive for the attack was **work** related rather than personal. However, injuries sustained by an **aggressor** which are traceable to his own solitary acts are not within the scope of employment and are not compensable. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Horseplay
Workers' Compensation & SSDI > Compensability > Injuries > Intoxication

HN3 In order for **compensation** to be denied on the basis that an employee was intoxicated, the employee must be so intoxicated, as shown by the evidence, that the court can say, as a matter of law, that the injury arose out of his drunken condition and not out of his employment. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers

HN4 The **Workers' Compensation** Act, Ill. Rev. Stat. ch. 48, par. 138.1 et seq. (1981), provides that any one engaging in any business or enterprise referred to in subsections 1 and 2 of Section 3 of this Act who undertakes to do any **work** enumerated therein, is liable to pay **compensation** to his own immediate employees in accordance with the provisions of this Act, and in addition thereto if he directly or indirectly engages any contractor whether principal or sub-contractor to do any such **work,** he is liable to pay **compensation** to the employees of any such contractor or sub-contractor unless such contractor or sub-contractor has insured, in any company or association authorized under the laws of this State to insure the liability to pay **compensation** under this Act, or guaranteed his liability to pay such **compensation.** Ill. Rev. Stat. ch. 48, par. 138.1(a)(3) (9181). The provisions of this Act hereinafter following shall apply automatically and without election to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely the erection, maintaining, removing, remodeling, altering or demolishing of any structure. Ill. Rev. Stat. ch. 48, par. 138.3 (1981). More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Sweeney & Riman, Ltd., of Chicago, for appellant.

Leonard L. Leon, of Chicago, for appellee.

JUDGES: JUSTICE CALVO delivered the opinion of the court. BARRY, P.J., and McCULLOUGH, McNAMARA, and WOODWARD, JJ., concur.

OPINION BY: CALVO

OPINION

[*1042] **[**129]** Claimant, Mark Londinski, filed an application for adjustment of claim under the **Workers' Compensation** Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.1 *et seq.*), alleging that William Dorsch and Graphic Group were financially responsible for a broken leg he sustained while employed as a painter. After reviewing evidence, an arbitrator awarded claimant $ 133.33 per week for 130 weeks of temporary total disability (Ill. Rev. Stat. 1981, ch. 48, par. 138.8(b)), and $ 18,000 in reasonable and necessary medical expenses (Ill. Rev. Stat. 1981, ch. 48, par. 138.8(a)). The arbitrator further found that Graphic Group was a statutory employer under section 1(a)(3) of the Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.1(a)(3)), thereby making it liable for the payment of benefits. On review, the Industrial Commission affirmed the **[***2]** arbitrator. The circuit court confirmed the Industrial Commission determination. Graphic Group appeals. The facts are as follows.

In early October 1981 William Dorsch, an individual engaged in carpentry, drywall, and painting, was employed by Graphic Group, a partnership whose business was graphic design, to paint and plaster their office on the 32nd floor of an office building located in Chicago, Illinois. It is not indicated whether Graphic Group owned or leased this office space, or even if they were going to use it themselves. The agreed price for the painting portion of the job was $ 1,200. On October 6, 1981, Dorsch employed claimant and two other men to paint on this project for one day only, commencing at 10:30 that night. **[**130]** Dorsch testified that he agreed to pay these men $ 5 per hour. At approximately 4:30 a.m. on October 7, 1981, while **working** at the Graphic Group office, claimant sustained fractures to his lower left leg during an altercation with Dorsch.

Claimant testified that while he was **working** he kicked over a can of paint, which Dorsch instructed him to clean up. Claimant testified that Dorsch was not satisfied with claimant's cleanup job and told claimant **[***3]** to leave. Claimant refused to leave without payment for the **work** he had done, which made Dorsch angry. Dorsch then grabbed claimant, criss-crossed his legs around claimant's left leg, and forced all of his weight down upon it. At this point claimant testified that he felt unbelievable pain. Claimant admitted that while on the job he drank six or eight beers.

Dorsch testified that he became angry with claimant because he **[*1043]** was a poor painter and because he did not clean up the paint he spilled. Dorsch testified that after he cleaned up the spilled paint, he told claimant to help the others. Claimant refused, so Dorsch told him to leave. Claimant then demanded payment. Dorsch refused because he only had $ 30 on his person at the time. Claimant then shoved Dorsch and Dorsch shoved back, knocking claimant to the floor. Dorsch then picked claimant off the ground and "shook him like a rag doll because he is so small, and I'm quite a bit bigger." Dorsch did not carry **workers' compensation** insurance and testified at the time of the arbitration hearing that he was unemployed.

David Leon testified that he observed the entire altercation between Dorsch and claimant. Leon **[***4]** testified that claimant's attempt to clean up the spilled paint did not meet with Dorsch's approval, so Dorsch told claimant to leave. Claimant refused to leave until he was paid and Dorsch refused to pay. Claimant's repeated insistence on payment prompted Dorsch to grab claimant, throw him to the ground, and hold him there. After claimant stated that he thought his leg was broken, Leon called an ambulance. Leon stated that claimant did not strike Dorsch during this altercation.

Graphic Group raises two issues on appeal: (1) that claimant's injuries were caused by claimant's intoxication and were therefore not compensable; and (2) that Graphic Group cannot be held responsible for claimant's injuries because it was not engaged in the business of maintaining a structure.

HN1 If an injury occurs during **working** hours, at a place where an employee can reasonably be expected to be in the performance of his duties and while he is performing those duties or something incidental thereto, the injury is said to have occurred in the course of employment. (*Schultheis v. Industrial Comm'n* (1983), 96 Ill. 2d 340, 345-46, 449 N.E.2d 1341, 1343.) In the instant case **[***5]** claimant was at the **work** site at the time Dorsch assaulted him. Although at the time of the assault claimant's employment had been terminated by Dorsch, claimant's act of demanding payment immediately after his termination for services rendered was an act incidental to his employment. Consequently, the evidence supports a finding that the injury occurred in the course of employment.

HN2 In order to prove that an assault by a co-employee (while Dorsch was claimant's employer, this makes no difference in the analysis) arose out of one's employment, it must be shown that the motive for the attack was **work** related rather than personal. (See 96 Ill. 2d at 346-47, 449 N.E.2d at 1344.) However, injuries sustained by an **aggressor** which are traceable to his own solitary acts are not within the **[*1044]** scope of employment and are not compensable. (*Ford Motor Co. v. Industrial Comm'n* (1980), 78

Ill. 2d 260, 263, 399 N.E.2d 1280, 1282.) In the instant case there was sufficient evidence to support a finding that Dorsch assaulted claimant over what Dorsch perceived to be poor **work** performance. Moreover, the evidence indicates that **[***6]** claimant was not the **aggressor**. Consequently, the evidence supports a finding that the injury arose out of the employment.

[131]** HN3 In order for **compensation** to be denied on the basis that an employee was intoxicated, the employee must be so intoxicated, as shown by the evidence, that the court can say, as a matter of law, that the injury arose out of his drunken condition and not out of his employment. (*District 141, International Association of Machinists & Aerospace **Workers** v. Industrial Comm'n* (1980), 79 Ill. 2d 544, 557, 404 N.E.2d 787, 792.) Although the instant claimant drank several beers prior to the altercation, the cause of claimant's injuries was Dorsch's assault, not claimant's drunkenness. Thus, claimant's intoxication did not as a matter of law cause claimant's injuries. We therefore conclude that claimant's injury is compensable.

Sections 1 and 3 of the Act provide in pertinent part:

> HN4 "Any one engaging in any business or enterprise referred to in subsections 1 and 2 of Section 3 of this Act who undertakes to do any **work** enumerated therein, is liable to pay **compensation** to his own immediate employees in accordance with the provisions of **[***7]** this Act, and in addition thereto if he directly or indirectly engages any contractor whether principal or sub-contractor to do any such **work,** he is liable to pay **compensation** to the employees of any such contractor or sub-contractor unless such contractor or sub-contractor has insured, in any company or association authorized under the laws of this State to insure the liability to pay **compensation** under this Act, or guaranteed his liability to pay such **compensation** * * *." (Ill. Rev. Stat. 1981, ch. 48, par. 138.1(a)(3).)
>
> The provisions of this Act hereinafter following shall apply automatically and without election to * * * all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely:
>
> 1. The erection, maintaining, removing, remodeling, altering or demolishing of any structure * * *." Ill. Rev. Stat. 1981, ch. 48, par. 138.3.

In the instant case Graphic Group engaged Dorsch to paint and plaster its office. Dorsch, in turn, hired claimant to help paint **[*1045]** Graphic Group's office. Although there is no evidence that Graphic Group owned the premises, this is not determinative **[***8]** of whether the offices were a capital asset of the business. As Graphic Group states, "[The] issue is not whether the use of the structure contributes revenue to the business; rather, the question is whether the structure is integral to the generation of revenue." (See *Fefferman v. Industrial Comm'n* (1978), 71 Ill. 2d 325, 330, 375 N.E.2d 1277, 1279.) Since it could be inferred that Graphic Group's office centralized and made more efficient the operation of its business, the Commission properly found that the "offices indirectly contributed to the revenue received from the business." (See 71 Ill. 2d at 330, 375 N.E.2d at 1279.) Thus, Graphic Group was maintaining a "structure" within the meaning of the "statutory employer" provisions of the Act. (Ill. Rev. Stat. 1981, ch. 48, pars. 138.1(a)(3), 138.3.) Since Dorsch was destitute and did not carry **workers' compensation** insurance, Graphic Group was properly found to be a statutory employer. The circuit court's judgment confirming the Industrial Commission's determination that Graphic Group is liable for the payment of **compensation** must therefore be affirmed.

Affirmed.

*216 Ill. App. 3d 1048, *; 575 N.E.2d 1240, **;*
*1991 Ill. App. LEXIS 1313, ***; 159 Ill. Dec. 180*

R.A. CULLINAN AND SONS, Appellant, v. THE INDUSTRIAL COMMISSION et al. (William L. Cooper, Jr., Appellee)

No. 3-90-0684WC

Appellate Court of Illinois, Third District, Industrial Commission Division

216 Ill. App. 3d 1048; 575 N.E.2d 1240; 1991 Ill. App. LEXIS 1313; 159 Ill. Dec. 180

July 30, 1991, Filed

NOTICE: [*1]** Released for Publication September 3, 1991.

PRIOR HISTORY: Appeal from the Circuit Court of Tazewell County; the Hon. William H. Young, Judge, presiding.

DISPOSITION: Judgment Affirmed in Part; Remanded in Part.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer appealed from the Circuit Court of Tazewell County (Illinois), which confirmed the decision of the Industrial Commission, which awarded appellee claimant temporary total disability benefits and necessary medical expenses.

OVERVIEW: Claimant filed an application for adjustment of claim following an altercation with a co-**worker** in which head, neck, shoulder and back injuries were sustained during the course of his employment with the employer. The claimant sought temporary total disability and medical benefits. The arbitrator found that claimant initiated the altercation and denied his claim. Upon review the Industrial Commission (commission) reversed the decision of the arbitrator, holding that the altercation was instigated by claimant's co-**worker,** and awarded him temporary total disability benefits and necessary medical expenses. The circuit court confirmed the decision of the commission. On appeal, the court affirmed the judgment awarding claimant temporary total disability and medical benefits, but reversed that portion of the order which pertained to claimant's average weekly wage for recalculation. The court found it was error for the commission to have included claimant's overtime wages in its average weekly wage calculation. The commission's decision that claimant's present condition was the result of the **work**-related altercation was adequately supported by the evidence.

OUTCOME: The court affirmed in part and reversed in part and remanded the decision awarding claimant temporary total disability benefits and necessary medical expenses.

CORE TERMS: claimant's, truck, altercation, syndrome, average weekly wage, arbitrator's, pipe, post-traumatic, diagnosed, struck, aggressor, manifest, parking area, post-concussion, season, blow, fight, cervical, temporary, overtime, seasonal, total disability, hours per week, psychological, depression, suffering, opined, times, brain, pit

LEXISNEXIS® HEADNOTES Hide

Governments > Legislation > Statutes of Limitations > Time Limitations
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN1 50 Ill. Adm. Code § 7020.80(b)(4)(D) (Supp. 1986) provides in relevant part: (D) The Commission shall file its decision no more than 90 days after the filing of the Petition for Review, and not later than 180 days from the filing of the Petition under Section 19(b --), whichever is sooner. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN2 Injuries occasioned by an assault by a co-employee in the **work** place during **work** hours are compensable in Illinois if the assault arose in the course of a dispute involving the conduct of the **work,** provided that the claimant is not the **aggressor.** More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof
Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN3 In determining whether the claimant has met his burden of proof on an issue, the Industrial Commission is not bound by the arbitrator's findings and may properly determine the credibility of witnesses, weigh their testimony and assess the

weight to be given to the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN4 It is well established that if undisputed facts upon any issue permit more than one reasonable inference, the determination of such issues presents a question of fact, and the conclusion of the Commission will not be disturbed on review unless it is contrary to the manifest weight of the evidence. The court will not discard permissible inferences drawn by the Industrial Commission based upon competent evidence merely because other inferences might be drawn by us. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN5 The question of causation is one of fact for the Industrial Commission and the court not be overturned unless the finding is against the manifest weight of the evidence. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

HN6 48 Ill. Comp. Stat. § 138.10 (1985) provides that the **compensation** rate for temporary total incapacity shall be equal to 66 2/3% of the employee's average weekly wage, as computed in accordance with section 10. That section provides in relevant part: The **compensation** shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he was **working** at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. More Like This Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Claim Procedures

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Credits

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN7 Overtime wages, bonuses and unemployment **compensation** are not considered in calculating average weekly wages, even though as a practical matter they account for a significant part of many seasonal **workers'** annual incomes which benefit the employer. Offsetting those deductions is the lost-time deduction, which allows the Industrial Commission to calculate average weekly wages using a denominator of only those weeks actually **worked,** to the benefit of the employee. More Like This Headnote

COUNSEL: Patrick W. Martin, of Quinn, Johnston, Henderson & Pretorius, of Peoria, for appellant.

Jeffrey B. Rock, of Hasselberg & Rock, of Peoria, for appellee.

JUDGES: Justice McNamara delivered the opinion of the court. McCullough, P.J., Woodward, Stouder, and Lewis, JJ., concur.

OPINION BY: McNAMARA

OPINION

[*1049] [1241]** JUSTICE McNAMARA delivered the opinion of the court:

Claimant, William L. Cooper, Jr., filed an application for adjustment of claim following an altercation with a co-**worker** in which head, neck, shoulder and back injuries were sustained during the course of his employment with R.A. Cullinan & Sons. Claimant filed a petition for immediate hearing pursuant to section 19(b -- 1) of the **Workers' Compensation** Act (Ill. Rev. Stat. 1987, ch. 48, par. 138.19) seeking temporary total disability and medical benefits. The arbitrator found that claimant initiated the **[**1242]** altercation and denied his claim. Upon review the Industrial Commission **[***2]** (Commission) reversed the decision of the arbitrator, holding that the altercation was instigated by **[*1050]** claimant's co-**worker,** and awarded him temporary total disability benefits in the amount of $ 554.27 per week for a period of 31 4/7 weeks, and $ 4,921.49 for necessary medical expenses. The circuit court of Tazewell County confirmed the decision of the Commission. Employer appeals.

Claimant, age 40, was employed as a truck driver hauling dirt in an earth-moving truck for road construction. Claimant **worked** approximately 58 hours per week from September 1987 until the onset of inclement weather in the last part of November 1987, earning between $ 16 and $ 18 per hour. Claimant had no other employment between the time he stopped **working** for employer in the previous **working** season until he began again in April 1988. Claimant testified that he again **worked** 58 hours per week during the current construction season.

On April 21, 1988, claimant was **working** in a borrow pit. As he left the pit at 7 a.m. with his truck loaded with dirt, he passed his coworker, Ralph Black, who was also driving a truck. According to claimant, Black refused to yield the right-of-way to his loaded **[***3]** truck, and claimant had to slow down and move over to the side of the road as Black passed by him. No words were exchanged at that time. (Claimant indicated that he had no previous problems with Black.)

Approximately 10 minutes later, claimant again encountered Black as he continued into the site to unload his truck. Black stopped his truck in the middle of the road, thereby preventing claimant from crossing the road, and made an obscene gesture.

Claimant reported the incident to his foreman, Luther Leesman, and requested his assistance as he could not continue **working** under such conditions. Later that day, he found Black waiting for him at the exit to the pit. Black ordered him to pull his truck into a parking area so that he could talk to claimant. As claimant left his truck, Black entered the parking area and pulled to the right of his truck.

Claimant further testified that Black approached him and appeared to be concealing something in his right hand. When Black was approximately two feet in front of claimant, he threatened to kill claimant. At that moment, Black produced a 20-inch steel pipe. Claimant attempted to block the blow with his left hand, but the pipe struck **[***4]** him along the left eye and temple. Claimant then struck Black and wrestled him to the ground in an attempt to get the pipe away from him; however, he was struck in the head several more times. Eventually he was able to wrestle the pipe away from Black. He positioned the pipe over Black's throat and chest and held Black to the ground. Leesman drove into the parking area and ordered claimant to **[*1051]** get off Black and get rid of the pipe.

Leesman testified that claimant had spoken to him about Black's actions. Leesman attempted to talk to Black about it, but Black was too angry to talk to Leesman. Black just stated that he would do something about it. Leesman further testified that as he came upon the scene, he found claimant and Black on the ground in front of their trucks. Both claimant and Black were bleeding from abrasions and lacerations to the head. According to Leesman, claimant "looked like he was going to collapse, * * * weak-kneed * * * shaky from shock" and speaking in incoherent phrases. (Claimant and Black were terminated as a result of this incident; however, claimant was reinstated after filing a grievance hearing with the union.) Black did not seek reinstatement.

[*5]** Black testified that claimant made an obscene gesture at him through the windshield of his truck while they were in the borrow pit. Leesman confronted him with claimant's accusation that Black had run him off the road. Black informed Leesman that the opposite had occurred and that claimant had tried to run him off the road.

Black further testified that he motioned for claimant to pull into the parking area, and that he came out of his truck carrying the short metal pipe beside his right leg **[**1243]** because he did not know what he would encounter when he met claimant. (Claimant weighed approximately 295 pounds, while Black weighed 170 pounds.) According to Black, claimant struck the first blow with his fist near Black's right eye, and they both went down on the ground. Black testified that claimant tried to gouge his right eye out with his thumb and threatened to kill him. Black received 11 stitches as a result of the altercation. Black stated that claimant had never previously threatened him or anyone else on the jobsite.

Claimant testified that upon his arrival in the hospital emergency room he was scared, extremely disoriented, and on the verge of losing **[***6]** consciousness. Claimant sustained multiple contusions and received several stitches in the back of his head for lacerations. A CT scan revealed no intracranial abnormalities. After the altercation, claimant complained of problems with headaches, blurred vision, confusion, depression, shoulder and low back pain.

Claimant's wife testified that since the accident, claimant has experienced slight memory loss at different times; he forgets things and sleeps a lot as a result of his medication.

On April 22, 1988, claimant was treated by Dr. William Baisier. Dr. Baisier opined that claimant suffered mostly from soft tissue injury, and diagnosed his condition as a contusion and sprain of the cervical **[*1052]** and lumbosacral spine, and headaches.

On May 13, 1988, claimant was examined by Dr. Edward Trudeau upon Dr. Baisier's referral. The electrodiagnostic tests Dr. Trudeau performed on claimant were normal. Dr. Trudeau potentially diagnosed claimant's condition as post-traumatic cervical syndrome or post-concussion syndrome. Dr. Trudeau further testified that although the electrodiagnostic tests were normal, it does not preclude claimant from suffering from either of the aforementioned **[***7]** conditions. Post-traumatic cervical syndrome and post-concussion syndrome can be caused by one or several blows to the head or neck region; further, both of these conditions can occur simultaneously.

Dr. Baisier referred claimant to Dr. Betsill for headache treatment. On May 10, 1988, Dr. Betsill found no evidence of significant neurologic injury and diagnosed claimant's condition as post-traumatic headache. On June 15, 1988, Dr. Betsill recommended a psychiatric evaluation by Dr. Bornstein for his complaints of depression.

Mr. Kenneth Imhoff, a clinical psychological tester, examined claimant on August 3, 1988, at the request of Dr. Bornstein. Imhoff holds bachelor's and master's degrees in psychology and had been performing psychological testing since 1969.

Imhoff administered a battery of standard psychological and intelligence tests. Imhoff opined that claimant had a dual handicap, with the primary diagnosis as organic brain syndrome and the secondary diagnosis as marked depression and anxiety. According to Imhoff, the injuries sustained by claimant during the altercation with Black had a direct relationship to his organic brain syndrome. Imhoff stated that he believed **[***8]** that claimant was sincere in his effort during the tests. Imhoff further stated that it was doubtful that claimant would return to **work** as a truck driver because of his inadequate spatial relationship skills.

Dr. Gregg Helgeson, a counseling psychologist, reviewed for the employer claimant's medical records, the tests conducted by Imhoff, the medical reports of Drs. Trudeau and Baisier, as well as claimant's junior high school grades. Dr. Helgeson opined that the results are inconclusive as to whether claimant suffered brain impairment. He found that claimant appears to be functioning at the same level of performance as he did in seventh, eighth and ninth grades, and that he did not have a higher premorbid I.Q. It was his opinion that claimant was not suffering from either post-concussion or post-traumatic cervical syndrome.

The arbitrator concluded claimant failed to prove that his injuries arose out of and in the course of his employment. The arbitrator **[*1053]** based his decision on his finding that claimant was the **aggressor** in the fight with Black. The Commission reversed the **[**1244]** decision of the arbitrator, concluding that Black was the **aggressor [***9]** and that claimant's injuries arose out of and in the course of his employment.

On appeal, employer argues that the Commission did not have jurisdiction because it failed to render its written decision within the time period set forth in section 7020.80(D) of the Illinois Administrative Code (50 Ill. Adm. Code § 7020.80(b)(4)(D) (Supp. 1986)). Employer also maintains that the Commission's decision finding that claimant was not the **aggressor** in the altercation, and that claimant's condition of ill-being was the result of the **work**-related accident, is against the manifest weight of the evidence. Employer also contends that claimant's weekly wage was erroneously computed.

We turn first to employer's contention that the Commission did not have jurisdiction because it failed to render its written decision in a timely manner as provided by HN1 section 7020.80(D) of the Illinois Administrative Code. That section provides in relevant part:

> "(D) The Commission *shall* file its decision no more than 90 days after the filing of the Petition for Review, and not later than 180 days from the filing of the Petition under Section 19(b --), whichever is sooner." (Emphasis added.)

[*10]** 50 Ill. Adm. Code § 7020.80(b)(4)(D), at 1436 (Supp. 1986).

Claimant filed the petition for immediate hearing with the Commission pursuant to section 19(b -- 1) on February 21, 1989. The predecision memorandum was issued by the Commission on October 11, 1989, followed by the entry of the full decision on December 29, 1989. Thus, employer contends that the Commission's failure to comply with its own regulations and file its decision within 180 days after the filing of the petition renders its decision invalid.

This court has recently analyzed the language of section 7020.80(D) in *Nelson v. Industrial Comm'n* (1990), 194 Ill. App. 3d 10, 550 N.E.2d 1047. We held that the time limits for rendering a decision on a **workers' compensation** claim are "directory" rather than "mandatory," and thus, the Commission does not lose its jurisdiction to modify the arbitrator's award by failing to enter a written decision within the statutory time period. In addition, the *Nelson* court found no evidence in the record suggesting that the Commission's actions were intended to be dilatory, or that the claimant suffered any injury due to the 15-day delay in filing the Commission's written decision.

Similarly, **[***11]** in *Orkin Pest Control v. Industrial Comm'n* (1989), 187 Ill. App. 3d 269, 543 N.E.2d 149, this court was presented with the issue of whether the Commission would lose jurisdiction when a decision **[*1054]** and opinion on review were entered 209 days after claimant filed a petition for immediate hearing. After considering the sudden death of the arbitrator, and the failure of the employer to posit any evidence that it was injured in any way by that delay, this court found that an extended delay did not warrant reversal.

We apply the principles set forth in *Nelson* and *Orkin Pest Control* in the resolution of the issue in the present case. We do not find that the 249-day delay in the Commission's entry of its decision on December 29, 1989, constitutes dilatory tactics, in itself, sufficient to warrant a denial of jurisdiction. Any ruling that the deadlines are mandatory could well deprive both employers and employees of the right to Commission review of decisions of the arbitrators through mere inaction, however, legitimate or inadvertent. (*Nelson*, 194 Ill. App. 3d at 17, 550 N.E.2d at 1051.) Moreover, employer has failed to submit any evidence that the delay occasioned **[***12]** by the Commission caused it any injury.

Employer next asserts that the Commission's decision finding that claimant was not the **aggressor** in the fight with Black was against the manifest weight of the HN2 evidence. Injuries occasioned by an assault by a co-employee in the **work** place during **work** hours are compensable in Illinois if the assault arose in the course of a dispute involving the conduct of the **work,** provided that the claimant is not the **aggressor**. **[**1245]** *Rodriguez v. Industrial Comm'n* (1983), 95 Ill. 2d 166, 447 N.E.2d 186, citing *Ford Motor Co. v. Industrial Comm'n* (1980), 78 Ill. 2d 260, 399 N.E.2d 1280.

HN3 In determining whether the claimant has met his burden of proof on an issue, the Commission is not bound by the arbitrator's findings and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. *Anderson Clayton Foods v. Industrial Comm'n* (1988) 171 Ill. App. 3d 457, 526 N.E.2d 844, citing *Rambert v. Industrial Comm'n* (1985), 133 Ill. App. 3d 895, 477 N.E.2d 1364.

After claimant initially encountered Black, he reported the incident to Leesman and requested his assistance. **[***13]** Black told claimant to drive into the parking area, and left his truck concealing a 20-inch steel pipe; conversely, claimant was not carrying any type of weapon. Claimant testified that Black threatened to kill him and struck the first blow. We also note that claimant filed a grievance hearing after he was terminated as a result of the fight and received reinstatement.

HN4 It is well established that if undisputed facts upon any issue permit more than one reasonable inference, the determination of such issues presents a question of fact, and the conclusion of the Commission **[*1055]** will not be disturbed on review unless it is contrary to the manifest weight of the evidence. (*Caterpillar Tractor Co. v. Industrial Comm'n* (1989), 129 Ill. 2d 52, 541 N.E.2d 665.) We will not discard permissible inferences drawn by the Commission based upon competent evidence merely because other inferences might be drawn by us. *Orsini v. Industrial Comm'n* (1987), 117 Ill. 2d 38, 509 N.E.2d 1005.

Upon careful review of the record, we find ample support for the Commission's determination that Black struck the first blow and that claimant was not the **aggressor** in the altercation.

Employer **[***14]** also contends that there is no causal connection between claimant's condition of ill-being and the **work**-related accident.

During the altercation, claimant was struck in the head approximately five or six times with a 20-inch steel pipe. Leesman testified that when he arrived in the parking area immediately following the fight, claimant appeared to be on the verge of collapse; that he was shaky from shock and spoke incoherently. Claimant sustained multiple contusions and received several stitches in the back of his head for lacerations sustained during the course of the fight, and complained of problems with headaches, blurred vision and confusion. Shortly after the incident, Dr. Betsill diagnosed claimant's condition as post-traumatic headache. In addition, claimant's wife testified that her husband has experienced bouts of slight memory loss at different times since the injury.

The Commission evaluated the medical testimony of Dr. Trudeau, who diagnosed claimant's condition as post-traumatic or post-concussion syndrome. Employer contends that claimant could not have post-concussion syndrome because he was not diagnosed as having a concussion when he was initially seen in the **[***15]** emergency room. However, Dr. Trudeau opined that claimant could be suffering from either of those conditions in view of the severe blows he sustained to his head, despite the normal results of the electrodiagnostic tests.

Imhoff, who performed psychological testing on claimant, diagnosed his condition as organic brain syndrome and marked depression and anxiety, which was directly related to the injuries sustained during the altercation with Black. Dr. Helgeson countered that claimant was not suffering from either post-concussion or post-traumatic cervical syndrome.

HN5 The question of causation is one of fact for the Commission and will not be overturned unless the finding is against the manifest weight of the evidence. (*Interlake, Inc. v. Industrial Comm'n* (1987), 161 Ill. App. 3d 704, 515 N.E.2d 202.) A reviewing court may overturn the Commission's factual determinations only when they are **[*1056]** against the manifest weight **[**1246]** of the evidence. (*Anderson Clayton Foods v. Industrial Comm'n*, 171 Ill. App. 3d at 459, 526 N.E.2d at 846.) Based upon the facts in this

case, the Commission's decision that claimant's present condition is the result of **[***16]** the **work**-related altercation with Black is adequately supported by the evidence.

Employer finally contends that the Commission's finding of average weekly wage was against the manifest weight of the evidence.

HN6 Section 8(b)(1) of the Act provides that the **compensation** rate for temporary total incapacity shall be equal to 66 2/3% of the employee's average weekly wage, as computed in accordance with section 10. That section provides in relevant part:

> "The **compensation** shall be computed on the basis of the 'Average weekly wage' which shall mean the actual earnings of the employee in the employment in which he was **working** at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement *excluding overtime*, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted." (Emphasis added.) Ill. Rev. Stat. 1985, ch. 48, par. 138.10.

[*17]** In claimant's amended request, he stated that his average weekly wage is $ 929.16. Claimant testified at the arbitration hearing that he earned between $ 16 and $ 18 per hour, and that he **worked** 58 hours per week in the current construction season prior to his injury in April 1988. Claimant **worked** a similar number of hours in the previous construction season ending in November 1987. The Commission determined that claimant was entitled to $ 554.27 per week for a period of 31 4/7 weeks, representing the maximum weekly rate for temporary total disability benefits. Thus, it is apparent that the Commission included claimant's 58 hours per week in calculating the average weekly wage.

HN7 Under section 10, overtime wages, bonuses and unemployment **compensation** are not considered in calculating average weekly wages, even though as a practical matter they account for a significant part of many seasonal **workers'** annual incomes which benefit the employer. (*Illinois-Iowa Blacktop, Inc. v. Industrial Comm'n* (1989), 180 Ill. App. 3d 885, 536 N.E.2d 1008.) Offsetting those deductions is the **[*1057]** lost-time deduction, which allows the Commission to calculate average weekly wages using **[***18]** a denominator of only those weeks actually **worked,** to the benefit of the employee. *Illinois-Iowa Blacktop*, 180 Ill. App. 3d at 893, 536 N.E.2d at 1014.

This court most recently interpreted section 10 in *Edward Hines Lumber Co. v. Industrial Comm'n* (1990), 215 Ill. App. 3d 659. That case is factually distinguishable from this case, for it concerns a nonseasonal **worker** who **worked** under a union contract that provided that he had to **work** whatever hours the employer demanded, with the minimum number of hours set at approximately 10 per day six days a week. However, this court reiterated the principles set forth in *Illinois-Iowa Blacktop*, finding that with respect to seasonal **workers,** overtime wages are not considered in calculating average weekly wages.

It is undisputed that the claimant in this case was a seasonal **worker.** Claimant **worked** from September through November 1987, until the onset of inclement weather halted the construction season. Claimant held no other job until he resumed employment during the spring of 1988 when the current construction season began.

Applying the principles set forth in *Illinois-Iowa Blacktop* for seasonal **workers** such as the claimant **[***19]** in this case, we find that it was error for the Commission to have included claimant's overtime wages in its average weekly wage calculation. Therefore, we remand the cause for determination **[**1247]** of claimant's average weekly wage based upon his non-overtime hours.

For the foregoing reasons, the judgment of the circuit court of Tazewell County awarding claimant temporary total disability and medical benefits is affirmed. That portion of the order which pertains to claimant's average weekly wage is reversed for recalculation pursuant to these holdings. Judgment affirmed in part; remanded in part.

Judgment affirmed in part; remanded in part.

McCULLOUGH, P.J., WOODWARD, STOUDER, and LEWIS, JJ., concur.

Source: Legal > States Legal - U.S. > Illinois > Find Cases > IL State Cases, Combined
Terms: work! and compensation and aggressor (Edit Search | Suggest Terms for My Search)

Select for FOCUS™ or Delivery

*250 Ill. App. 3d 240, *; 621 N.E.2d 150, **;*
*1993 Ill. App. LEXIS 1147, ***; 190 Ill. Dec. 281*

VILLAGE OF WINNETKA, Appellant v. THE INDUSTRIAL COMMISSION et al. (Fisher, Appellee.)

No. 1-92-4423WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, INDUSTRIAL COMMISSION DIVISION

250 Ill. App. 3d 240; 621 N.E.2d 150; 1993 Ill. App. LEXIS 1147; 190 Ill. Dec. 281

July 30, 1993, Decided

PRIOR HISTORY: **[***1]** Appeal from Circuit Court of Cook County. No. 92-L-50313. Honorable Mary M. Conrad, Judge Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer sought review from a judgment of the Circuit Court of Cook County (Illinois), which affirmed the lower court's decision to confirm appellee Industrial Commission's (commission) award of **workers' compensation** benefits to an employee who was injured by a co-employee's assaultive attack.

OVERVIEW: The employee **worked** as a trash collector and was attacked by a fellow employee, resulting in injuries that required surgery. The arbitrator in the **workers' compensation** proceeding made an award based on an average of the wages that the employee earned, both at the trash collecting job as well as at his second job. The employer sought further review from the confirmed award, contending that it was error for the arbitrator to have determined that the injuries arose out of the course of the employment. The court affirmed the award, holding that the commission's findings were not against the manifest weight of the evidence. The court held that it was reasonable to infer that the employer's last minute reassignment of the employee on the day of the assault contributed to his injuries, as well as that the co-employee's ongoing behavioral problem created an added risk to the employee. The court noted that injuries caused by an assault from a co-**worker** at the **workplace** during **work** hours were compensable if the assault arose in the course of a dispute involving the conduct of the **work** and the employee was not the **aggressor.** The calculation of the award was appropriate.

OUTCOME: The court affirmed the decision that awarded the employee **workers' compensation** benefits for injuries that occurred during the course of his employment when he was assaulted by a co-**worker,** as well as the calculation of the award based on an average of the earnings from the two jobs that the employee had.

CORE TERMS: claimant's, village, route, assault, average weekly wage, weekly, calculation, arrive, manifest, scheduled, ongoing, earning, truck, fight, work-related, compensable, earned wages, arbitrator, supervisor, behavioral, scheduling, limousine, started, garbage, surgery, driver, finish, adding, salary, divide

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN1 Where the facts in a case present more than one reasonable inference, the determination of the issue presents a question of fact and the decision of the Industrial Commission will not be disturbed on review unless it is contrary to the manifest weight of the evidence. A court will not disregard permissible inferences drawn by the Industrial Commission merely because other inferences might be drawn from the same evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN2 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.** However, injuries suffered by an employee as a consequence of an assault are not compensable if the motive was personal to the victim rather than **work**-related. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN3 Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed. When the employee is **working** concurrently with two or more employers and the employer has

knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for **compensation.** Ill. Rev. Stat. ch. 48, para. 138.10 (1991). More Like This Headnote

COUNSEL: Jack M. Shanahan, of Johnosn, Drozdzik, Van Driska & Andros, Ltd., of Chicago, for appellant.

Richard J. Barr, Jr., of Lannon, Lannon & Barr, Ltd., of Chicago, for appellee.

JUDGES: SLATER, McCULLOUGH, RAKOWSKI, WOODWARD, RARICK

OPINION BY: SLATER

OPINION

[*241] [151]** JUSTICE SLATER delivered the opinion of the court:

Claimant, William Fisher, brought a **workers' compensation** claim against his employer, the Village of Winnetka, for injuries sustained on April 21, 1989. The arbitrator granted the claimant's petition finding that his injuries occurred within the course of his employment. On review, the Industrial Commission (Commission) affirmed the award and the circuit court confirmed the decision of the Commission. The employer appeals. We affirm.

The claimant had **worked** for the village as a trash collector for approximately four years prior to the incident giving rise to this claim. During that time, his regular partner was George Schladt. Employees were scheduled to arrive at **work** at 7 a.m., although the village allowed its trucks to leave on their routes as early as 6:30 a.m. When **[***2]** the route was completed, the employees were allowed to leave early. Even though the claimant's route could be completed within four to six hours, the village paid for a full eight hours. The claimant and Schladt both had second jobs as limousine drivers with Lois Limo.

On April 21, 1989, the claimant came to **work** at 6:45 a.m. Originally he was not scheduled to go on a trash collecting route because he had been sick. However, he had been rescheduled to go on the route with Schladt. When the claimant saw Schladt, Schladt started yelling at him and calling him names. Schladt told the **[*242]** claimant that he should have been there at 6:30 a.m. because Schladt wanted to finish the route so he could go home early. As they started their route, Schladt continued to call him names. After picking up the garbage at one stop, Schladt came up behind the claimant, kicked him, and called him a "son of a bitch." Schladt then punched him four times in the face, put him in a headlock, and asked, "Do you want to fight?" After he was released, claimant began walking back to the yard and was picked up by another truck. He testified that his face hurt and blood was coming from his nose.

The claimant **[***3]** told his supervisor, Bill Willins, about the fight. Willins then brought Schladt and Fisher into his office. Schladt told Willins that Fisher had "screwed me up" because he was not at **work** by 6:30 a.m. and Schladt needed to get to his second job.

The claimant described Schladt as grumpy and always mad at people. On one prior occasion, Schladt had thrown and hit Fisher with a tennis ball because he did not drive the truck in the right spot.

After the attack, claimant saw Dr. Stephen Yeh, who noted that Fisher had a blocked nasal passage and a nasal fracture coupled by troubled breathing. Dr. Yeh performed surgery, and a second surgery was performed by Dr. David Randolph.

At the time of the attack, the claimant's average weekly wage with the employer was $ 540.90. He was also **working** a second job as a limousine driver for Lois Limo from which he made a total of $ 1,662.64 in nine weeks.

The arbitrator awarded the claimant 4-6/7 weeks of temporary total disability at a rate based on an average weekly wage of $ 725.64. The average weekly wage was determined by adding the claimant's average weekly wage with the employer to the average weekly wage from Lois Limo.

On appeal, the **[***4]** village argues that the circuit court erred in finding the claimant's **[**152]** injuries arose out of the course of his employment. It initially argues that the standard for review on this issue is not whether the Commission's decision is against the manifest weight of the evidence, but whether the decision was correct as a matter of law.

While the facts in the instant case may be undisputed, HN1 where they present more than one reasonable inference, the determination of the issue presents a question of fact and the decision of the Commission will not be disturbed on review unless it is contrary to the manifest weight of the evidence. (*R.A. Cullinan & Sons v. Industrial Comm'n* (1991), 216 Ill. App. 3d 1048, 575 N.E.2d 1240, 159 Ill. Dec. 180.) A **[*243]** court will not disregard permissible inferences drawn by the Commission merely because other inferences might be drawn from the same evidence. *Orsini v. Industrial Comm'n* (1987), 117 Ill. 2d 38, 509 N.E.2d 1005, 109 Ill. Dec. 166.

In the case *sub judice,* the Commission could have reasonably inferred that the employer's last minute re-assignment of the claimant on the day of the assault contributed **[***5]** to his injuries. Moreover, the Commission could infer that Schladt had an ongoing behavioral problem which created an added risk to the claimant.

HN2 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.** (*Rodriquez v. Industrial Comm'n* (1982), 95 Ill. 2d 166, 447 N.E.2d 186, 68 Ill. Dec. 928.) However, injuries suffered by an employee as a consequence of an assault are not compensable if the motive was personal to the victim rather than **work**-related. *Schultheis v. Industrial Comm'n* (1983), 96 Ill. 2d 340, 449 N.E.2d 1341, 70 Ill. Dec. 737.

The employer claims that it merely "acquiesced" to the scheduling policy that allowed **workers** to leave early, and, therefore, the assault was not **work**-related. However, the employer created the policy, and it was this scheduling policy which was the cause of Schladt's assault on the claimant. The supervisor changed the claimant's schedule and instructed him to go on the garbage route with Schladt. Schladt wanted to start **[***6]** **work** at 6:30 a.m. so he could finish early and go to his second job. Shortly after starting

their route, Schladt assaulted the claimant because the claimant did not arrive at 6:30 a.m., although he was not scheduled until 7 a.m. Given the foregoing facts and inferences, it cannot be said that the Commission's decision was against the manifest weight of the evidence.

The village contends that the circuit court's decision is based on facts and inferences not found by the Commission. It takes exception to the circuit court's finding that the fight involved "**work** activities." While the Commission does not use this specific language, it stated that the village "created the situation which gave rise to the assault by allowing the employees to start **work** early so they could leave early." These two findings are reasonably analogous.

The village also takes exception to the circuit court's finding that Schladt had an "ongoing behavioral problem," while the Commission found that Schladt hid in "ongoing pattern of aggressive behavior." Again, although the two findings are worded differently, **[*244]** the results ire analogous. As such, the circuit court's findings ire consistent with those of the **[***7]** Commission.

The village next argues that the Commission erred in its calculation of the claimant's average weekly wage. The claimant made $ 28,126.80 in the prior year **working** for the village, a stipulated average of $ 540.90 per week. He also made $ 1,662.64 in nine weeks **working** for a second employer, Lois Limo.

The Commission calculated claimant's average weekly wage by adding the average weekly pay of 52 weeks from the village to the average weekly pay earned by the claimant from Lois Limo. In other words, the Commission added the $ 540.90 to Lois Limo's average of $ 184.74 to arrive at an average weekly salary of $ 725.64.

[153]** The employer argues that the correct calculation should have been to add the $ 1,662.64 total made at Lois Limo to the $ 28,126.80 total made the previous year from the employer, and then divide that total of $ 29,789.44 by 52 weeks for an average weekly salary of $ 572.87. Both parties concede there is no case law on point. The statutory basis for computing average weekly pay is as follows:

> "*HN3*Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number **[***8]** of weeks and parts thereof during which the employee actually earned wages shall be followed. * * * When the employee is **working** concurrently with two or more employers and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for **compensation.**" Ill. Rev. Stat. 1991, ch. 48 par. 138.10.

Based on the language of the statute, we find the Commission was correct in its calculation. In cases of concurrent employment "wages * * * shall be considered as if earned from the employer liable for **compensation.**" To calculate the employer's wages for a period of less than 52 weeks "earnings during that period" must be divided by the "number of weeks * * * during which the employee actually earned wages."

We note that the statutory computation is somewhat ambiguous. It could be construed that "wages from all such employers shall be considered as if earned from the employer liable for **compensation**" means simply to add the total of the two wages together and then divide by 52 weeks to arrive at the weekly average. However, such a calculation in the instant case would lead to **[***9]** a second Job average **[*245]** of only $ 31.97. We believe this figure does not fairly represent the claimant's earning power at the time of his injury.

The judgment of the circuit court of Cook County is affirmed.

Affirmed.

McCULLOUGH, P.J., and RAKOWSKI, WOODWARD & RARICK, JJ., concurring.

*263 Ill. App. 3d 835, *; 635 N.E.2d 770, **;*
*1994 Ill. App. LEXIS 734, ***; 200 Ill. Dec. 431*

'CHICAGO PARK DISTRICT, Appellant, v. INDUSTRIAL COMMISSION OF ILLINOIS and EUGENE DECHTER, Appellee.

No. 1-93-2076WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, INDUSTRIAL COMMISSION DIVISION

263 Ill. App. 3d 835; 635 N.E.2d 770; 1994 Ill. App. LEXIS 734; 200 Ill. Dec. 431

May 13, 1994, Decided

SUBSEQUENT HISTORY: [***1] Released for Publication July 14, 1994.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County. No. 92 L 50046. Honorable John A. Ward, Judge Presiding.

DISPOSITION: Affirmed in part, reversed in part and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer sought review of a decision of the Circuit Court of Cook County (Illinois), which affirmed a decision of appellee commission in favor of appellee claimant in the claimant's application for **compensation** pursuant to the **Workers' Compensation** Act (the Act), Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1985).

OVERVIEW: In his application for **workers compensation,** the claimant alleged that he was attacked by his superior during an argument and suffered from post-traumatic stress disorder. An arbitrator found that the claimant was permanently and totally disabled as a result of attack and both the commission and the trial court affirmed. The court found that there was sufficient evidence for the commission to conclude that the claimant was not the **aggressor** in the altercation with his superior and that therefore the claimant's injuries were within the scope of his employment. The court also found that the evidence, which showed that the claimant's injuries were traceable to the time and place of the attack, clearly supported the commission's findings that the claimant's psychological problems were causally related to the incident with his superior. However, the court found that the commission's finding that the claimant was totally and permanently disabled was against the manifest weight of the evidence because the medical evidence did not indicate that the claimant's injuries were permanent and because a person of claimant's experience and education was qualified for a wide variety of jobs.

OUTCOME: The court affirmed in part and reversed in part the decision of the trial court against the employer in the employer's action for review of a decision of the commission in the claimant's application for **workers' compensation** and remanded to the commission to determine the extent of the claimant's disability.

CORE TERMS: claimant, manifest, disability, disorder, psychological, trauma, aggressor, impaired, general counsel, symptoms, hit, permanently disabled, totally disabled, real estate, totally, psychiatrist, altercation, handicapped, experienced, arbitrator's, concentration, compensable, speculation, permanency, confirmed, emotional, gainful, strides, post-traumatic, psychiatric

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Coverage > Actions Against Employers > Intentional Misconduct

HN1 Injuries arising from 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.** Where the party seeking **compensation** was the **aggressor,** however, his acts are not within the scope of employment and are not compensable. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Standards of Review
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN2 A reviewing court cannot disregard permissible inferences drawn by the Industrial Commission of Illinois merely because different inferences may be drawn from the same set of facts. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Place & Time
Workers' Compensation & SSDI > Compensability > Injuries > Psychological Injuries

HN3 An employee who suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury has suffered an accident within the meaning of the **Workers' Compensation** Act, Ill. Rev. Stat. ch.

48, para. 138.1 et seq. (1985), even where no physical trauma or injury was sustained. More Like This Headnote

Administrative Law > Judicial Review > Standards of Review
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Causation

HN4 The question of whether there is a causal connection between a claimant's injury and his employment is uniquely within the province of the Industrial Commission of Illinois, and its decision will not be disturbed on review unless it is against the manifest weight of the evidence. A finding is not against the manifest weight of the evidence unless an opposite conclusion is clearly evident. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Benefit Determinations > Permanent Total Disabilities

HN5 A person is totally disabled for the purposes of the **Workers' Compensation** Act, Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1985), when he cannot perform services except those that are so limited in quantity, quality or dependability that there is no reasonably stable market for them. Where, however, an employee is qualified for and capable of obtaining employment without seriously endangering his health or life, he is not totally and permanently disabled. In arriving at a determination of an award for permanent and total disability, the Industrial Commission of Illinois should consider the extent of the claimant's injury, the nature of his employment, his age, experience, training and capabilities. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Inferences & Presumptions > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Burdens of Proof
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN6 Under the **Workers' Compensation** Act, Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1985), a claimant has the burden of proving the extent and permanency of his injury by a preponderance of the evidence; liability cannot be premised upon imagination, speculation or conjecture. The extent and permanency of a claimant's disability are questions of fact, and the factual determinations of the Industrial Commission of Illinois will not be overturned unless they are against the manifest weight of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Sweeney & Riman, Ltd., of Chicago (Gerald O. Sweeney, of counsel), for appellant.

Phillip Johnson, of Chicago, for appellee.

JUDGES: SLATER, McCULLOUGH, WOODWARD, RARICK, EGAN

OPINION BY: SLATER

OPINION

[*837] **[**772]** JUSTICE SLATER delivered the opinion of the court:

Claimant Eugene Dechter filed an application for adjustment of claim pursuant to the **Workers' Compensation** Act (the Act) (Ill. Rev. Stat. 1985, ch. 48, par. 138.1 *et seq.)* alleging that he was injured as a result of an altercation. The arbitrator found that claimant was permanently and totally disabled as a result of an accident which arose out of and in the course of his employment. On review, the Industrial Commission (the Commission) affirmed the arbitrator's decision. The circuit court confirmed the Commission and the employer, Chicago Park District, appeals.

Claimant began **working** for the employer in 1961 as an assistant general attorney. His duties included preparing ordinances and contracts and dealing with bond issues and condemnations. **[***2]** He was eventually promoted to second assistant general attorney. In 1982 claimant began **working** under Rick Halprin, who was then employer's general counsel. Prior to that time, claimant had never received a reprimand or criticism of his **work.** Halprin found claimant's **work** unsatisfactory, however, and his written evaluations of claimant were well below average. According to claimant, Halprin would occasionally refer to other attorneys in the office in a derogatory manner and at one time he indicated that he expected claimant to testify that a particular attorney was incompetent. Claimant indicated that he would not do so and Halprin became angry. Thereafter, Halprin changed his **work** assignments and gave him duties that were usually performed by law clerks or paralegals.

On September 19, 1985, Halprin came into claimant's office to discuss a children's museum permit agreement. According to claimant, Halprin threw the agreement on his desk, cursed at him, and told him to redo the agreement and not to put in any provision regarding handicapped access. Forty-five minutes later, claimant found a memorandum from the Federal government indicating that the handicapped provision was necessary. **[***3]** He walked into Halprin's office and told him it would be necessary to put in the provision for the handicapped. Halprin began screaming and using profanity toward him and claimant then screamed back at him, saying, "You're not a lawyer. You think you're a lawyer." Halprin told claimant to "get the hell out" and then he punched claimant in the chest. According to claimant, Halprin kept slapping him and hitting him as he tried to leave the room. Halprin pursued him as he left the office and kept hitting him around the body, and claimant then felt like he blacked out. Bob Donovan, the first assistant general attorney, grabbed Halprin away from claimant and directed him back to his office.

Paramedics were called and claimant went home after a couple **[*838]** of hours. He saw his physician the next day and returned to **work** on the following Monday, September 23. After he returned he had difficulty concentrating and he would get physically sick when he saw Halprin. He eventually went to a psychiatrist, Dr. Bloch, in November of 1985. **[**773]** Claimant continued **working** while receiving psychiatric care from Dr. Bloch. Claimant tried to limit his contact with Halprin whenever possible. In February of 1986, **[***4]** Halprin left and Michael Hennessey became general counsel. Claimant still experienced psychological difficulties after Halprin left, but he was "able to do a little more" and felt he was "getting back on [his] feet." Halprin would come into the office periodically and claimant became agitated whenever this occurred or when he thought it might occur.

In June of 1986, claimant and Bob Donovan were having lunch when Donovan mentioned that Halprin was in the office and it was rumored that he would be returning as general counsel. Claimant became extremely upset, left the restaurant and went to employer's medical department. Claimant informed the company doctors he was ill and he did not return to **work** after that date. Employer's personnel records show claimant was on sick leave as of July 1, 1986.

On October 20, 1986, George Gallard, employer's acting general counsel, advised claimant that his position had been written out of the 1987 budget and that his employment would be terminated as of January 1, 1987. Claimant filed a **Workers' Compensation** claim after he received this notification. Claimant received his last psychiatric treatment from Dr. Bloch on December 9, 1986. He did not obtain **[***5]** any further care from Dr. Bloch because of financial difficulties.

On cross-examination, claimant testified that at the time of the incident he was five feet nine inches tall and he weighed approximately 225 pounds. Halprin weighed considerably less, perhaps 160 pounds. Claimant stated that he did not attempt to hit Halprin. He acknowledged that someone had written a "D-minus" on a letter that he had prepared and he was irritated by it. This was the document that Halprin had thrown on his desk. Claimant identified joint Exhibits 1 through 26 as representing his signature on **work** which he had performed subsequent to September 19, 1985, and he verified his signature on the documents, including correspondence and other legal forms and exhibits. When asked to describe his activities on a typical day, claimant stated that he would "eat, watch television and sulk." He would also do errands such as going to the grocery store and bank and he could perform household chores and repairs. Although claimant testified that he was unable to **work,** he admitted that he had not looked for **work.**

Rick Halprin testified that he was general counsel for the Chicago **[*839]** Park District between July of 1982 and **[***6]** February of 1986. He regarded claimant's **work** as unsatisfactory. On September 19, 1985, claimant appeared at his door shouting in a loud voice something like, "D-minus, D-minus, that is what you think of my **work?**" Halprin asked him to calm down and finally asked him to leave his office, but he refused to leave and, instead, came further into the office and moved toward him with his hands up even with his shoulders. Halprin grabbed claimant by the shirt and slapped him twice and claimant ran from the office screaming that Halprin had struck him. According to Halprin, it was Jack Matthews, the treasurer of the Park District, who had written "D-minus, not acceptable" on claimant's document. Halprin stated that at the time of the altercation he was wearing a full body cast as a result of a spinal fusion. He did not intend to hit claimant but he was trying to protect himself and he felt that claimant was going to shove him. He denied that the altercation was related to inserting a handicapped access provision into the museum permit. He also denied that he changed claimant's assignments after the altercation. Halprin noticed nothing unusual about claimant after the incident. Claimant's duties **[***7]** and performance did not change before or after September 19, 1985, and he did not at any time urge claimant to testify regarding the alleged incompetence of a lawyer in the department.

Priscilla Hallberg, the office nurse, examined the claimant shortly after the incident. She did not observe any bruises or redness, but claimant complained of tingling in his hand and soreness in his shoulder. Claimant's blood pressure was slightly elevated, but an EKG was normal. Claimant told Hallberg that he had been attacked by Halprin, who struck him, pushed him and attempted to strangle him.

[774]** Bob Donovan testified that on the day of the incident he heard loud talking coming from Halprin's office. When claimant and Halprin came out of the office, claimant had his arms by his side and Halprin had his fists clenched and was circling around claimant. Donovan did not see Halprin hit claimant. Donovan grabbed Halprin and walked him into his office.

Judith Somogyi, Rick Halprin's secretary, testified that her desk was located within six feet of Halprin's office. On September 19, 1985, claimant walked rapidly past her and into Halprin's office. Claimant looked upset and he was red in the face. Somogyi **[***8]** heard yelling back and forth and she then heard claimant say, "You hit me." Claimant backed out of Halprin's office, clutching his neck. Somogyi did not see Halprin strike claimant.

Carolyn Bates, a stenographer, was taking dictation from Bob Donovan on the date of the incident. Claimant entered Halprin's office **[*840]** and Bates heard yelling followed by claimant's statement, "You hit me." Claimant came out of Halprin's office holding his throat, and Halprin also came out. Bates did not see any blows exchanged.

The medical reports of Dr. Arthur H. Bloch, a psychiatrist who first examined claimant on November 12, 1985, were admitted into evidence. According to Bloch's April 30, 1986, report, immediately following the incident claimant experienced acute anxiety symptoms such as tachycardia (rapid heart rate), dizziness, hyperventilation and palpitations. Claimant contacted Dr. Bloch because these symptoms persisted and he was unable to **work.** Claimant experienced chills, feverishness, shaking, headaches and stomachaches when he thought about going to **work.** Other symptoms included insomnia, an inability to concentrate, impaired memory, nightmares and avoidance of activities that might arouse **[***9]** recollection of the incident. Dr. Bloch diagnosed claimant as suffering from post-traumatic stress disorder, and he noted that claimant was "technically in the chronic phase of treatment." Bloch felt that the success of claimant's treatment during the acute phase was demonstrated by his ability to remain employed during that period. Bloch concluded that treatment was still required "to deal with the psychological sequelae of the acute episode."

In a second report dated February 3, 1987, Dr. Bloch noted that the medication he had prescribed for claimant had helped "only to a limited degree" and psychotherapy was "minimally successful." Overall, claimant had made some strides in treatment, although Bloch felt that he "may never be able to function successfully in the environment in which the original trauma occurred."

Claimant saw Dr. Henry Conroe for a psychiatric evaluation at employer's request on July 29, 1988. At that time claimant was 53 years old. Dr. Conroe noted that claimant had recurrent dreams about the September 19 incident and he feared seeing Halprin on the street. Claimant experienced a loss of interest in activities he previously enjoyed, a loss of libido, periodic insomnia, **[***10]** suicidal ideation and decreased self-esteem. Dr. Conroe diagnosed claimant as suffering from post-traumatic stress disorder and dysthymic disorder, a mood disorder characterized by depression and loss of interest in one's usual activities. In Conroe's opinion, claimant's relationship with Halprin, culminating in the September 19 incident, led to the development of these disorders. Conroe concluded that claimant "continues to be unable to sustain gainful **work** activities."

Dr. Bloch re-examined claimant on August 15, 1989. Claimant exhibited symptoms of depression, including a depressed affect, psychomotor retardation, isolation, reduced energy levels, weight gain **[*841]** and impaired memory and concentration. Symptoms of post-traumatic stress disorder included recurrent nightmares, lack of motivation, poor concentration and an irrational fear that if claimant went downtown Halprin would kill him. Claimant felt that he would have committed suicide if he had been forced to stay on the job. In Bloch's opinion, claimant needed treatment, and his condition "seriously impaired his daily, let alone professional functioning, and has resulted in a significant depression."

Two detectives hired by employer **[***11]** testified regarding their surveillance of claimant on **[**775]** October 31 and November 1, 5 and 6 of 1990. Claimant met with a man and woman and went with them to a title insurance office, where they remained for approximately two hours. Claimant was also observed driving his wife to a clinic, depositing some trash bags into a dumpster, going to the cleaners, a convenience store, a savings and loan and a jeweler.

Claimant testified that he participated in a real estate closing on October 31, 1990, as a favor to a former associate, Mr. Ash, who was ill. He took valium and other medications before the closing and he did not feel capable of performing other closings. According to Dr. Conroe's report, however, claimant told him that he was at three real estate closings in 1987 and one in 1988.

As indicated earlier, the arbitrator found that claimant was totally and permanently disabled as a result of an accident which arose out of and in the course of his employment. The Commission affirmed the arbitrator's decision and the circuit court confirmed the Commission. On appeal, employer contends that claimant failed to prove that he sustained accidental injuries which arose out of and in the course **[***12]** of his employment. Specifically, employer maintains that claimant was the **aggressor**, and that the events of September 19, 1985, were not an accidental injury as defined by Illinois law.

HN1 Injuries arising from 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.** (*Rodriguez v. Industrial Comm'n* (1982), 95 Ill. 2d 166, 447 N.E. 2d 186, 68 Ill. Dec. 928; *Village of Winnetka v. Industrial Comm'n* (1993), 250 Ill. App. 3d 240, 621 N.E. 2d 150, 190 Ill. Dec. 281.) Where the party seeking **compensation** was the **aggressor**, however, his acts are not within the scope of employment and are not compensable. *Ford Motor Co. v. Industrial Comm'n* (1980), 78 Ill. 2d 260, 399 N.E.2d 1280, 35 Ill. Dec. 752.

Employer asserts that the only reasonable inferences raised by the evidence are that claimant harbored anger and resentment against Halprin, that his anger was increased by the D-minus "grade" on his **work,** that he went **[***13]** to Halprin's office in a fit of rage and that **[*842]** Halprin merely took reasonable and necessary steps to protect himself and to calm claimant when he approached in a threatening manner. Employer notes that the fact that one party made the first physical contact is not decisive in determining who was the **aggressor**; such a determination depends upon the totality of the circumstances. See *Ford Motor Co.*, 78 Ill. 2d 260, 399 N.E.2d 1280, 35 Ill. Dec. 752.

While we agree that the inferences drawn by employer are not completely unreasonable, HN2 a reviewing court cannot disregard permissible inferences drawn by the Commission merely because different inferences may be drawn from the same set of facts. (*Martin v. Industrial Comm'n* (1992), 227 Ill. App. 3d 217, 591 N.E.2d 108, 169 Ill. Dec. 228.) Even under Halprin's version of the incident, the Commission could have concluded that Halprin overreacted and acted inappropriately. Moreover, in rejecting employer's argument that claimant was the **aggressor**, the Commission specifically found that claimant's testimony concerning the incident **[***14]** was credible. It is the province of the Commission to resolve any conflicts in the testimony and to choose between conflicting inferences. (*Dexheimer v. Industrial Comm'n* (1990), 202 Ill. App. 3d 437, 559 N.E.2d 1034, 147 Ill. Dec. 694.) We find that the Commission's determination that claimant was not the **aggressor** was supported by the evidence.

The employer also makes a somewhat disjointed argument in which it appears to contend that the physical trauma suffered by claimant was insufficient to cause his psychological condition. Employer relies on *Chicago Board of Education v. Industrial Comm'n* (1988), 169 Ill. App. 3d 459, 523 N.E.2d 912, 120 Ill. Dec. 1, in which the court held that, to be compensable under the Occupational Diseases Act, mental disorders *not resulting from trauma* must arise from something other than the daily emotional strain and tension that all employees experience. *Chicago Board of Education* is clearly inapposite to this case, in which claimant's psychological problems were traceable to a **[**776]** particular incident involving both physical **[***15]** and emotional trauma. In *Pathfinder Co. v. Industrial Comm'n* (1976), 62 Ill. 2d 556, 343 N.E.2d 913, the court held that HN3 an employee who suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury has suffered an accident within the meaning of the Act, even where no physical trauma or injury was sustained. The court noted that it had previously allowed claimants to recover for psychological disability or injury where there was minor physical contact and injury. (*Pathfinder*, 62 Ill. 2d at 564, 343 N.E.2d at ; see also *Olin Industries, Inc. v. Industrial Comm'n* (1946), 394 Ill. 202, 68 N.E.2d 259; **[*843]** *Marshall Field & Co. v. Industrial Comm'n* (1922), 305 Ill. 134, 137 N.E. 121.) HN4 The question of whether there is a causal connection between a claimant's injury and his employment is uniquely within the province of the Commission (*Organic Waste Systems v. Industrial Comm'n* (1993), 241 Ill. App. 3d 257, 608 N.E.2d 1243, 181 Ill. Dec. 769), **[***16]** and its decision will not be disturbed on review unless it is against the manifest weight of the evidence (*Cognato v. Industrial Comm'n* (1993), 242 Ill. App. 3d 50, 609 N.E.2d 783, 182 Ill. Dec. 249). A finding is not against the manifest weight of the evidence unless an opposite conclusion is clearly evident. (*Hicks v. Industrial Comm'n* (1993), 251 Ill. App. 3d 320, 621 N.E.2d 293, 190 Ill. Dec. 424.) In this case the evidence clearly supported the Commission's finding that claimant's psychological problems were causally related to the September 19 incident.

Employer's final contention is that the Commission's finding that claimant was permanently and totally disabled is against the manifest weight of the evidence. Employer notes that after the September 19, 1985, incident, claimant continued to **work** until June of 1986. Employer also points out that claimant was able to participate in real estate closings in 1987, 1988 and 1990. Employer also argues that the psychiatrists' reports were based entirely on claimant's subjective complaints, and contain no scientifically **[***17]** verifiable objective findings. Employer further maintains that the psychiatrists did not specifically find that claimant was totally and permanently disabled.

HN5 A person is totally disabled when he cannot perform services except those that are so limited in quantity, quality or dependability that there is no reasonably stable market for them. (*A.M.T.C. of Illinois, Inc. v. Industrial Comm'n* (1979), 77 Ill. 2d 482, 397 N.E. 2d 804, 34 Ill. Dec. 132.) Where, however, an employee is qualified for and capable of obtaining employment without seriously endangering his health or life, he is not totally and permanently disabled. (*E. R. Moore Co. v. Industrial Comm'n* (1978), 71 Ill. 2d 353, 376 N.E. 2d 206, 17 Ill. Dec. 207.) "In arriving at a determination of an award for permanent and total disability, the Commission should consider the extent of the claimant's injury, the nature of his employment, his age, experience, training and capabilities." *A.M.T.C.*, 77 Ill. 2d at 489, 397 N.E. 2d at 807.

HN6 A claimant has **[***18]** the burden of proving the extent and permanency of his injury by a preponderance of the evidence; liability cannot be premised upon imagination, speculation or conjecture. (*A.M.T.C.*, 77 Ill. 2d 482, 397 N.E. 2d 804, 34 Ill. Dec. 132.) The extent and permanency of a claimant's disability are questions of fact, and the Commission's factual determinations will not be overturned unless they are against the manifest weight of the evidence. *Amoco Oil Co. v. Industrial Comm'n* (1991), 218 Ill. App. 3d 737, 578 N.E. 2d 1043, 161 Ill. Dec. 397.

[*844] In this case, we find that claimant failed to meet his burden of proof. Although Dr. Conroe concluded that claimant "continues to be unable to sustain gainful **work** activities", neither he nor Dr. Bloch indicated that claimant's condition was permanent. Indeed, Dr. Bloch's February 3, 1987, report stated that claimant had "made some strides" in treatment, although he "may never be able to function successfully *in the environment in which the original trauma occurred.*" (Emphasis added.) This suggests that claimant would be able to **[***19]** function in some other, less threatening, setting. In addition, a person with claimant's experience and education would appear qualified for a wide variety of jobs, both legal and non-legal. We hold, therefore, that the Commission's finding of **[**777]** total and permanent disability was against the manifest weight of the evidence, and we remand for a determination of the extent of claimant's disability.

For the reasons stated above, the judgment of the circuit court is affirmed in part and reversed in part. This cause is remanded to the Commission for further proceedings consistent with this order.

Affirmed in part, reversed in part and remanded.

McCULLOUGH, P.J., and WOODWARD J., concurring.

RARICK, J., dissenting, EGAN, J., joins in the dissent.

DISSENT BY: RARICK

DISSENT

JUSTICE RARICK dissenting:

Although the majority correctly notes that the extent and permanency of a claimant's disability are questions of fact and that the Commission's factual determinations will not be overturned unless they are against the manifest weight of the evidence *(Amoco Oil Co. v. Industrial Comm'n* (1991), 218 Ill. App. 3d 737, 748, 578 N.E.2d 1043, 1051, 161 Ill. Dec. 397), **[***20]** the majority proceeds to find the Commission's determinations as to total and permanent disability to be against the manifest weight of the evidence in this instance. Manifest weight of the evidence is that which is clearly evident, plain and indisputable. *(Caterpillar, Inc. v. Industrial Comm'n* (1992), 228 Ill. App. 3d 288, 291, 591 N.E.2d 894, 896, 169 Ill. Dec. 390.) In order for a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. (228 Ill. App. 3d at 291, 591 N.E.2d at 896.) Stated differently, a decision is contrary to the manifest weight of the evidence only when, after viewing the evidence in a light most favorable to the Commission, the court determines that no rational trier of fact could have agreed with the Commission's decision. (See *Beeler v. Industrial Comm'n* (1989), 179 Ill. App. 3d 463, 467, 534 N.E.2d 408, 411, 128 Ill. Dec. 226.) Not only do I believe the opposite conclusion is not clearly apparent, I believe the evidence here **[***21]** clearly compels affirmance of the Commission's decision. For these reasons, I dissent.

[*845] The evidence reveals claimant's treating physician, Dr. Bloch, considered claimant's condition to be chronic. While claimant had made some strides, according to Dr. Bloch, claimant also may never be able to function successfully in the **work** environment again. Claimant has become extremely depressed to the point of having suicidal ideations, and his inability to participate in even joyful activities, such as his oldest son's wedding, has served only to heighten his sense of isolation and decrease his already critically low self-esteem. He has little energy or motivation, and his concentration is quite poor. Not only has claimant's condition impaired his professional functioning, it has also impaired his daily living. Even employer's expert, Dr. Conroe, opined claimant was unable to sustain gainful **work** activities. Prior to the September 1985 incident, claimant had **worked** effectively for employer for some 20 years, had a successful marriage and social life, and had no history of mental disorders. Now claimant can do little else other than sit in front of the television and accomplish minor chores **[***22]** or errands. It was all he could do to attend three real estate closings during a two-year period. Moreover, the fact claimant can accomplish some things of a limited nature does not mean claimant is not totally disabled. (See *E.R. Moore Co. v. Industrial Comm'n* (1978), 71 Ill. 2d 353, 361, 376 N.E.2d 206, 209, 17 Ill. Dec. 207.) Being unable to perform substantially the duties of his occupation, claimant is, in my view and in that of the Commission, totally and permanently disabled. The majority's statement that claimant would appear qualified for a wide variety of jobs, both legal and non-legal is not supported by the record, and in my view, is pure speculation. As liability cannot be premised upon imagination, speculation or conjecture (see *A.M.T.C. of Illinois, Inc. v. Industrial Comm'n* (1979), 77 Ill. 2d 482, 488, 397 N.E.2d 804, 806, 34 Ill. Dec. 132), neither can a finding of no liability or, in this instance, a finding of no permanent, total disability. Given the unrebutted medical evidence supporting the finding of the Commission, I believe the majority **[***23]** has impermissibly substituted its judgment for that of the Commission **[**778]** I would therefore affirm the decision of the Commission, as confirmed by the circuit court, in its entirety.

EGAN, J., joins.

*274 Ill. App. 3d 1088, *; 654 N.E.2d 568, **;*
*1995 Ill. App. LEXIS 624, ***; 211 Ill. Dec. 106*

MICHAEL KOCHILAS, Appellant, v. THE INDUSTRIAL COMMISSION, et al. (Certified Painting Company, Appellee.)

NO. 1-94-3488WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, INDUSTRIAL COMMISSION DIVISION

274 Ill. App. 3d 1088; 654 N.E.2d 568; 1995 Ill. App. LEXIS 624; 211 Ill. Dec. 106

August 11, 1995, Decided

SUBSEQUENT HISTORY: **[***1]** Released for Publication September 25, 1995.

PRIOR HISTORY: Appeal from Circuit Court Cook County. Honorable Alexander P. White, Judge Presiding.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant claimant sought review of the judgment of the Circuit Court Cook County (Illinois) that confirmed the decision of appellee, the Illinois Industrial Commission, which reversed the arbitrator's decision that awarded the claimant **worker's compensation** benefits.

OVERVIEW: The claimant, with appellee employer's approval, brought his dog to **work** with him for protection. While he was supervising a crew that was painting subway stations, the claimant was arrested by two undercover police officers for having the dog in the station. He was injured when he resisted arrest. The claimant sought benefits pursuant to the Illinois **Workers' Compensation** Act (Act), Ill. Rev. Stat. ch. 48, para. 138.1 et seq. (1991). The Commission reversed the decision of the arbitrator finding that the claimant's injuries did not arise out of his employment. The trial court confirmed the Commission's decision. On appeal, the court reinstated the arbitrator's award. The court held that the arbitrator was correct in concluding that the claimant was authorized to have his dog with him at **work.** The court found that the Commission improperly concluded that the claimant knew that the men were police officers from the beginning of the incident, which led to the arrest. Because the claimant was not the **aggressor** and because the dispute was not purely personal, the court concluded the claimant had not stepped outside the scope of his employment and was entitled to benefits.

OUTCOME: The court reversed the decisions of the trial court and the Commission and reinstated the award of the arbitrator.

CORE TERMS: claimant's, dog, crew, police officers, arbitrator, platform, handcuff, painting, responded, attacked, arrested, stepped, closet, badge, approached, grabbed, work site, compensable, profanity, aggressor, morning, dressed, nearby, resist, arrest, tunnel, bums, subway stations, confirmed, reinstate

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN1 Under the Illinois **Workers' Compensation** Act, an injury is compensable only if it "arises out of" and "in the course of" employment. When, however, there is no causal connection between the injury and the character or conditions of the employment, or the employee is injured as a result of his stepping outside the scope of employment, protection of the Act cannot be invoked. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

HN2 Violation of the law in performing one's duties does not automatically remove an employee from the course of his employment. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN3 An appellate court must set aside a decision of the Illinois Industrial Commission on a factual question when the weight of the evidence compels an opposite conclusion. More Like This Headnote

COUNSEL: Kusper & Raucci, Chartered, of Chicago (Mark R. Slavin, of counsel), for appellant.

Grant, Gentry & Benzing, of Lisle, for appellee.

JUDGES: JUSTICE RARICK delivered the opinion of the court: COLWELL and HOLDRIDGE, JJ., concur. JUSTICE RAKOWSKI dissents. JUSTICE McCULLOUGH joins in the dissent.

OPINION BY: RARICK

OPINION

[*1088] **[**569]** JUSTICE RARICK delivered the opinion of the court:

Claimant, Michael Kochilas, sought benefits pursuant to the **Workers' Compensation** Act (Act)(Ill. Rev. Stat. 1991, ch. 48, par. 138.1, *et seq.)* for injuries sustained in the early morning hours of December 2, 1991, while in the employ of Certified Painting Co. The arbitrator awarded claimant benefits. On review, the Industrial **[*1089]** Commission (Commission) reversed the decision of the arbitrator finding claimant's injuries did not arise out of his employment. The circuit court of Cook County confirmed the decision of the Commission. Claimant appeals contending the decision of the Commission as confirmed by the circuit court is against the manifest weight of the evidence. **[***2]** We agree, and accordingly, reverse the decisions of the circuit court and Commission and reinstate the award of the arbitrator.

At the time of his injuries, claimant had been employed by Certified Painting (employer) for 19 years as a painter. For the past several months claimant had been acting as a supervisor for a crew of four whose job assignment was to paint Chicago Transit Authority (CTA) subway stations. Claimant's hours were from 9 p.m. to 5 a.m. Because he and his crew previously had been attacked and robbed while **working** in the subway system, claimant regularly brought his labrador retriever to the **work** site for protection. Claimant had been bringing his dog with him to **work** for the past eight years with employer's approval. Claimant had never encountered any objections to the dog's presence in the CTA system until December 2, 1991.

On December 2, 1991, according to claimant, claimant was returning to the subway station at 1:30 a.m. after his lunch break. As he walked toward his crew, two black men dressed like bums approached him and asked him if the dog belonged to him. One of the men pulled out a badge and told him to get the dog out of there. Claimant informed the men **[***3]** the dog was there to protect the crew. One of the men, using profanity, told claimant to get the dog out of the area or go to jail. Claimant put the dog in a nearby janitorial utility closet and turned around to get the names of the men. One of the men came up behind him, took his left hand and put handcuffs on it. Claimant resisted and was knocked down. Claimant momentarily lost consciousness and started shaking with pain. One of the officers grabbed claimant by the neck while the other stepped on his back to put the handcuffs on. The officers then lifted claimant from the arms/shoulder area and carried him off the platform. Claimant was taken to the police station and then the hospital for treatment of his injuries.

According to the testimony of Curtis Danzy, one of the arresting officers, claimant's dog had been growling at passengers. The other officer, Isaac Cotton, asked the crew to whom the dog belonged. No one responded until the officer said he was going to have the dog removed. The men then informed the **[**570]** officers the owner would be back shortly. As claimant approached the crew, the officers approached claimant to order him to take the dog away. Claimant **[*1090]** informed them the **[***4]** dog was there for protection, especially because the police were never around. Officer Cotton again ordered claimant to remove the dog to which claimant responded negatively. Officer Cotton gave claimant two choices: remove the dog or be arrested. Claimant said he would take the dog away and proceeded to take him to a storage closet some 20 feet away. Officer Cotton told him that was not good enough and attempted to handcuff claimant. Claimant resisted. Officer Danzy remarked claimant should just let Officer Cotton put the cuffs on him. Claimant, however, continued to resist. Officer Danzy grabbed claimant by the shoulders at which point claimant called out for help from his fellow employees, shouting the men were not police. Eventually all three men fell onto the ground. After wrestling with claimant a little longer, officer Cotton was able to handcuff both of claimant's wrists. The officers then lifted claimant onto his feet and escorted him out of the station. Claimant was arrested for disorderly conduct, but the charge was not pursued.

Officer Cotton related the same version of the incident up to the point of attempting to handcuff claimant. Officer Cotton testified he reached **[***5]** for claimant's arm to put the handcuffs on. Claimant told him to let go and grabbed officer Cotton's wrist. At that point officer Danzy came to his assistance. They then "dumped" claimant to the ground to subdue and cuff him. Claimant continued to struggle until they picked him up and escorted him out of the platform area.

*HN1*Under the Act, an injury is compensable only if it "arises out of" and "in the course of" employment. *(Orsini v. Industrial Comm'n* (1987), 117 Ill. 2d 38, 44-45, 509 N.E.2d 1005, 1008, 109 Ill. Dec. 166; *Panagos v. Industrial Comm'n* (1988), 171 Ill. App. 3d 12, 15, 524 N.E.2d 1018, 1020, 120 Ill. Dec. 836.) When, however, there is no causal connection between the injury and the character or conditions of the employment, or the employee is injured as a result of his stepping outside the scope of employment, protection of the Act cannot be invoked. *(Fischer v. Industrial Comm'n* (1951), 408 Ill. 115, 118-19, 96 N.E.2d 478, 481; *Armour & Co. v. Industrial Comm'n* (1947), 397 Ill. 433, 437, 74 N.E.2d 704, 706.) The question here is whether claimant stepped outside the scope of his employment. The arbitrator concluded claimant's arrest was a consequence **[***6]** of having his dog on the CTA platform, and because claimant was authorized to have his dog on the platform for protection, the risk of injury arose out of an authorized activity and therefore was compensable. The Commission, on the other hand, determined claimant stepped outside the scope of his employment in deliberately defying a lawful request from the police officers, thereby subjecting himself to a risk which was not part of his employment. The Commission further concluded claimant's testimony was not **[*1091]** credible in that he was fully aware he was talking to plain clothes police officers the entire time.

The arbitrator was correct in concluding claimant was authorized to have his dog with him at **work.** The painting crew's hours and location subjected them to a greater risk to their personal safety than the average painting crew. The men had been attacked in the past and needed additional protection. Claimant, with the approval of his employer, had been bringing his dog to the various **work** sites for some eight years without incident. The crew had been painting on the CTA platforms for over six months without encountering any authority figure ordering them to remove the dog. Under such **[***7]** circumstances, we cannot say claimant was engaged in an unauthorized activity when officers Cotton and Danzy arrived. And, we cannot say claimant was the **aggressor** in this situation. He did not attack the officers and, in his mind, did comply, albeit reluctantly, with their orders to remove the dog from the platform. What claimant did do was resist arrest. The Commission concluded claimant knew the men were police officers from the beginning. We, however, do not find sufficient support in the record for such a conclusion. Instead, the record reveals claimant was not certain as to whom he was dealing with. The incident **[**571]** occurred at 1:30 in the morning in a CTA tunnel where claimant and his crew had already been attacked once. No one in authority ever questioned the presence of claimant's dog until that night,

even though claimant had been bringing the dog into the tunnels for many months. The officers were dressed like bums and responded with profanities when claimant initially refused to remove his dog. This is not the reaction one would normally expect from police officers under the circumstances. Claimant confined his dog in a nearby closet in order to speak to the unknown men and **[***8]** get their names and badge numbers. Claimant's conduct in locking up his dog and coming back to speak with the men was not unreasonable given the situation and the hour. Claimant was arrested, however, as he tried to return. Claimant was not given the opportunity to verify the identity of the officers or straighten out any misunderstandings. The record further reveals, in struggling with the officers, claimant cried out for help from his co-**workers** while yelling the men really were not police officers. Claimant certainly was not the **aggressor** in this situation, and more importantly, the dispute was not purely personal. Under such circumstances, claimant is entitled to **compensation.** (See *Rodriguez v. Industrial Comm'n* (1983), 95 Ill. 2d 166, 170-71, 447 N.E.2d 186, 188-89, 68 Ill. Dec. 928.) HN2 Violation of the law in performing one's duties does not automatically remove an employee from the course of his employment. (See 1A Arthur Larson, *The Law of* ***Workmen's Compensation*** § 35 **[*1092]** (1994).) We conclude claimant did not step outside the scope of his employment in this instance. While we are reluctant to HN3 set aside a decision of the Commission on a factual question, we must do so when **[***9]** the weight of the evidence compels an opposite conclusion. (*Montgomery Elevator Co. v. Industrial Comm'n* (1993), 244 Ill. App. 3d 563, 567, 613 N.E.2d 822, 825, 184 Ill. Dec. 505.) Such is the case here.

For the aforementioned reasons, we reverse the judgment of the circuit court of Cook County confirming the decision of the Industrial Commission and reinstate the decision of the arbitrator awarding claimant benefits.

COLWELL and HOLDRIDGE, JJ., concur.

JUSTICE RAKOWSKI dissents.

JUSTICE McCULLOUGH joins in the dissent.

DISSENT BY: RAKOWSKI

DISSENT

JUSTICE RAKOWSKI dissenting:

The Commission concluded that claimant knew the men were police officers from the beginning. Claimant had been shown the officers' badges and had been repeatedly told to remove the dog or risk going to jail. Although claimant's testimony paints a different picture, it was for the Commission to judge credibility and draw inferences from the facts.

The question is one of fact and properly the provence of the Commission. Because there is substantial evidence which supports the Commission's decision, it cannot be said that the claimant's opposite conclusion is clearly apparent.

Because I believe that the Commission's **[***10]** decision is not against the manifest weight of the evidence, I would affirm the judgment of the circuit court.

Justice McCullough, P.J., joins in the dissent.

Source: Legal > States Legal - U.S. > Illinois > Find Cases > IL State Cases, Combined
Terms: work! and compensation and aggressor (Edit Search | Suggest Terms for My Search)

Select for FOCUS™ or Delivery

*211 Ill. 2d 272, *; 811 N.E.2d 684, **;*
*2004 Ill. LEXIS 677, ***; 285 Ill. Dec. 197*

SANDRA FRANKLIN, Appellee, v. THE INDUSTRIAL COMMISSION (Carson Pirie Scott & Compa ny, Appellant).

Docket No. 96857

SUPREME COURT OF ILLINOIS

211 Ill. 2d 272; 811 N.E.2d 684; 2004 Ill. LEXIS 677; 285 Ill. Dec. 197

May 20, 2004, Opinion Filed

SUBSEQUENT HISTORY: [*1]** Counsel Amended July 15, 2004.

PRIOR HISTORY: Franklin v. Industrial Comm'n (Scott), 341 Ill. App. 3d 128, 791 N.E.2d 1171, 2003 Ill. App. LEXIS 689, 274 Ill. Dec. 760 (Ill. App. Ct., 2003)

DISPOSITION: Judgment of the appellate court affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Leave to appeal was granted to appellant employer for review of a decision of the Illinois Industrial Commission Division of the Appellate Court, which reversed a finding of the Illinois Industrial Commission that was favorable to the employer and remanded a **workers' compensation** matter to the Commission for further findings.

OVERVIEW: Appellee claimant sought **compensation** for injuries she suffered in a physical altercation with another employee. The evidence surrounding the altercation was conflicting. An arbitrator found that the injury was not compensable because it did not arise out of the claimant's employment. The Commission agreed based on a finding that both the claimant and the other employee were **aggressors** in the fight. Thus, under the **aggressor** defense, the claimant could not recover. The circuit court affirmed but the appellate court reversed, holding that the Commission erred when it found both the claimant and the other employee were **aggressors.** On remand, the Commission was to decide whether the claimant was the **aggressor.** The supreme court affirmed. Injuries to an **aggressor** did not arise out of the **aggressor's** employment. In an altercation between two employees, only one could be the **aggressor;** thus, the Commission's decision could not stand. Whether the claimant was the **aggressor** in the case before the supreme court could only be determined based on a totality of the circumstances. Remand was required so that the Commission could decide if the claimant was the **aggressor.**

OUTCOME: The appellate court's decision was affirmed and the case was remanded to the Commission.

CORE TERMS: claimant, aggressor, fight, customer, compensable, arbitrator, causal connection, threatening, manager, arm, cosmetic, counter, approached, videotape, correctly, trigger, shouting, altercation, aggressive, violence, negate, judged, wait, coal, written reports, assigned, camera's, cup, compensation law, resulting injuries

LEXISNEXIS® HEADNOTES Hide

Workers' Compensation & SSDI > Administrative Proceedings > Alternative Dispute Resolution
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Jurisdiction
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN1 When the Illinois Industrial Commission reviews an arbitrator's decision, it exercises original and not appellate jurisdiction, regardless of whether it hears additional evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Standards of Review > De Novo Review
Civil Procedure > Appeals > Standards of Review > De Novo Review
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN2 No reviewing court may overturn a decision of the Illinois Industrial Commission unless the decision is contrary to law or is based on factual determinations against the manifest weight of the evidence. Review of Commission decisions regarding questions of law is de novo. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Evidence > Witnesses
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN3 An injury is compensable under the Illinois **Workers' Compensation** Act, 820 Ill. Comp. Stat. Ann. 305/1 et seq. (2000) only if the claimant proves by a preponderance of the evidence that the injury both occurred in the course of and arose out of the employment. An injury arises out of the employment if it results from a risk that originates in, or is incidental to, the employment. More Like This Headnote

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

HN4 When a fight at **work** arises out of a purely personal dispute, resulting injuries do not arise out of the employment. On the other hand, fights arising out of disputes concerning an employer's **work** are risks incidental to the employment, and resulting injuries are compensable. However, injuries to the **aggressor** in such a fight are not compensable. Illinois courts refer to the rule that an **aggressor's** injuries are not compensable as the "**aggressor** defense." More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > Causation
Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct
Workers' Compensation & SSDI > Defenses > Comparative & Contributory Negligence

HN5 An **aggressor's** injuries in a fight between employees do not arise out of employment. The aggression negates all causal connection between an employee's **work** and the injury, so that the **work** is neither the proximate nor a contributing cause of the injury. Instead, the cause of the injury is the **aggressor's** "own rashness." More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct
Workers' Compensation & SSDI > Defenses > General Overview

HN6 The **aggressor** defense is based on the statutory requirement that injuries are not compensable unless they arise out of the employment. 820 Ill. Comp. Stat. Ann. 305/2 (2000). More Like This Headnote

Torts > Negligence > Causation > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct

HN7 The **aggressor** defense applies only when a claimant's conduct negates the causal connection between employment and a fight. The question of who made the first physical contact, while important to determining whether that has occurred, is not decisive. Rather, a claimant's conduct must be judged in light of the totality of the circumstances. The circumstances include the conduct of the other participant or participants in the fight. More Like This Headnote | *Shepardize:* Restrict By Headnote

Labor & Employment Law > Workplace Violence
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct

HN8 Whether a claimant's conduct rises to the level that triggers the **aggressor** defense depends in large part on the degree to which the other participant in the dispute has provoked her. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > Willful Misconduct

HN9 Whether a claimant is an **aggressor** is a question of fact, and the Illinois Industrial Commission's finding must be upheld unless it is against the manifest weight of the evidence. Nevertheless, if the Commission relies on a legally erroneous premise to find a fact, the resulting decision is contrary to law and must be reversed. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Administrative Record > Remands
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN10 When a decision of the Illinois Industrial Commission is set aside, but the facts found by the Commission are sufficient to determine the correct decision, a reviewing court may simply enter the correct decision. 820 Ill. Comp. Stat. Ann. 305/19 (f)(2) (2000). However, when it is not clear from the record what decision is required, the appropriate remedy is to remand to the Commission so that it may decide in the first instance. Original jurisdiction is vested in the Commission, even though it is reviewing the decision of an arbitrator without hearing additional evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: For Carson Pirie Scott & Company, APPELLANT: Thomas J. Fitzgibbons, Ellecia L. Parsell, Inman & Fitzgibbons, Ltd., Chicago, Illinois.

For Sandra Franklin, APPELLEE: Richard J. Barr, Jr., Lannon, Lannon & Barr, Ltd., Chicago, Illinois.

JUDGES: JUSTICE GARMAN delivered the opinion of the court.

OPINION BY: GARMAN

OPINION

[*275] **[**686]** JUSTICE GARMAN delivered the opinion of the court:

Claimant Sandra Franklin sought **compensation** under the **Workers' Compensation** Act (the Act) (820 ILCS 305/1 *et seq.* (West

2000)), for an injury to her left arm suffered at **work** during a physical altercation with coemployee Geniver Mohan on February 18, 2001. An arbitrator of the Industrial Commission of Illinois (the Commission) found that the injury did not arise out of claimant's employment and was therefore not compensable. Claimant appealed to the Commission. The Commission also found that the injury did not arise out of claimant's employment, on the ground that claimant was an **aggressor** in the fight that caused the injury. Claimant appealed to the circuit court of Cook County, which confirmed the decision of the Commission. However, the Industrial Commission Division of the appellate court reversed, holding that the Commission erred when it found that both claimant and Mohan were **aggressors**. 341 Ill. App. 3d 128, 791 N.E.2d 1171, 274 Ill. Dec. 760. The appellate **[***2]** court remanded the cause to the Commission to find which employee was the **aggressor**. 341 Ill. App. 3d at 136. We granted employer Carson Pirie Scott & **[**687]** Company's petition for leave to appeal pursuant to Rule 315 (177 Ill. 2d R. 315). We now affirm the judgment of the appellate court.

BACKGROUND

Claimant was a cosmetic artist and counter manager in employer's River Oaks store, in Calumet City. She was assigned primarily to sell Elizabeth Arden cosmetics. Her assigned **work** area was a rectangular counter, or "bay," with an opening at one end. Coemployee Mohan **worked** in a bay near claimant's, selling Fashion Fair cosmetics. On February 18, 2001, claimant's left arm was seriously injured during a fight between claimant and Mohan.

Claimant filed a petition for adjustment of claim, and her case was heard by an arbitrator. The arbitrator **[*276]** denied **compensation** on the ground that the fight between claimant and Mohan was personal in nature or, alternatively, claimant was the **aggressor**. Claimant appealed to the Commission, which found that the fight was **work** related. However, the Commission denied **compensation** on the ground that claimant was an **aggressor**.

The evidence heard by **[***3]** the arbitrator and relied upon by the Commission was as follows. Both claimant and Mohan received part of their **compensation** in the form of commissions. According to employer's policy, cosmetics salespersons were to sell their assigned product lines only, except that if a customer first purchased a product from an employee's line, the employee could follow the customer to another counter and make further sales from other product lines to that customer. Also, employees were permitted to sell products from another employee's counter if the other employee was busy with other customers. Claimant testified that these rules applied to all cosmetics sales persons and that both she and Mohan were aware of the rules.

Claimant testified that she began having problems with Mohan in August of 2000 when Mohan made sales from claimant's counter in violation of the rules, and claimant complained to management. Her complaint resulted in a meeting between claimant, Mohan, and management. Claimant testified that after that meeting, she had four or five encounters with Mohan in which Mohan bumped claimant in a threatening way. Claimant testified she made written reports of three of these encounters.

[*4]** On February 18, 2001, at about 4 p.m. there were three or four customers at claimant's counter. Claimant testified she told the customers that she would take care of each in turn, and the customers agreed to wait for her. Mohan approached one of the customers and asked to **[*277]** help her. Claimant testified that the customer told Mohan that she was going to wait for claimant, and Mohan then became verbally abusive toward the customer. Claimant testified that she called for a manager. Manager Barbara Gerrard arrived and spoke to the customer. Meanwhile, Mohan was shouting threats at claimant and pointing her finger at claimant. Gerrard instructed Mohan to return to her bay. However, when Gerrard left, Mohan exited her bay and approached claimant's bay, shouting at claimant, pacing back and forth, and threatening claimant. Claimant felt frightened, began crying, and left the sales floor. She returned about 20 minutes later with aspirin and picked up a cup to get water.

Claimant testified that at this point Mohan again approached claimant's bay, shouting at her and threatening her. Claimant went to another bay, called security, and was told to remain at her bay and that security would direct **[***5]** a video camera **[**688]** at claimant's bay. Claimant testified that when she returned to her bay, Mohan was there, shouting and threatening. Claimant told Mohan to "do what you do best." Claimant testified that Mohan then approached with arms outstretched, grabbed claimant by the left arm and hair, and pulled claimant towards her. Claimant testified that she responded by striking Mohan twice "as hard as [she] could" on the head with the cup claimant was still holding in her right hand. Another employee separated the two women. Claimant's left arm, which had previously undergone surgery to treat cancer, was seriously injured.

The employer called Mohan as a witness but she refused to testify, citing her fifth amendment privilege against self-incrimination.

Courtney Harris sold Lancome cosmetics from the same bay as claimant. Harris testified that immediately before the fight Mohan approached their bay. Claimant told Mohan that she was not afraid of her. At the same **[*278]** time Mohan was telling claimant that claimant could not order Mohan around. Mohan then moved around a display table to the opening of claimant's bay. Claimant did not advance toward Mohan, but turned to face her. Harris testified **[***6]** that she did not see the fight itself.

Barbara Gerrard, who was store manager on duty on the day of the fight, testified concerning events prior to the fight. Ellyn Edwards, loss prevention manager for the employer, testified concerning written reports that claimant filed regarding earlier confrontations with Mohan. The testimony of Gerrard and Edwards contradicted claimant's testimony about the events leading to the fight on a number of points. For example, while claimant testified that in November of 2000 she made a written report to a security agent named Haskell of an incident between her and Mohan, Edwards testified that no such report was filed and that Haskell did not **work** at the River Oaks store during November of 2000.

A videotape, recorded at the time of the fight by a store security camera, was entered into evidence. The Commission viewed the tape and found that it showed Mohan approaching claimant with her arms folded. It then showed claimant striking Mohan twice with the cup. The camera's view of claimant was partially obscured by a display rack. Claimant testified on rebuttal that the tape did not depict everything that happened during the fight. The Commission found **[***7]** that in the videotape it appears claimant struck the first blow.

Both the arbitrator and the Commission found claimant was not credible. The Commission cited a number of reasons, including conflicts within claimant's testimony, conflicts between claimant's testimony and other witnesses, and conflicts between claimant's testimony and the videotape. Finally, the Commission found parts of claimant's testimony were implausible, such as her claim that she was initially an innocent bystander in a dispute **[*279]** between Mohan and a customer who preferred to wait to be served by claimant. The Commission relied on the testimony of Harris and on the videotape to find that claimant was an **aggressor** in the fight along with Mohan. On that basis the Commission denied **compensation.** The appellate court reversed and remanded, holding that the Commission erred when it denied **compensation** based on a finding that claimant was an **aggressor**, as opposed to finding that

either claimant or Mohan was the **aggressor**. 341 Ill. App. 3d at 136. The employer has appealed from that judgment. Thus our review concerns **[**689]** whether the Commission erred in its application of the **aggressor** defense.

ANALYSIS

HN1 When **[***8]** the Commission reviews an arbitrator's decision, it exercises original and not appellate jurisdiction, regardless of whether it hears additional evidence. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 483, 548 N.E.2d 1033, 139 Ill. Dec. 477 (1989). HN2 No reviewing court may overturn a decision of the Commission unless the decision is contrary to law or is based on factual determinations against the manifest weight of the evidence. *Fitts v. Industrial Comm'n*, 172 Ill. 2d 303, 307, 666 N.E.2d 4, 216 Ill. Dec. 836 (1996). Review of Commission decisions regarding questions of law is *de novo*. *Butler Manufacturing Co. v. Industrial Comm'n*, 85 Ill. 2d 213, 216, 422 N.E.2d 625, 52 Ill. Dec. 623 (1981).

HN3 An injury is compensable under the Act only if the claimant proves by a preponderance of the evidence that the injury both occurred in the course of and arose out of the employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). An injury arises out of the employment if it results from a risk that originates in, or is incidental to, the employment. *Sisbro*, 207 Ill. 2d at 203. HN4 When a fight at **work** arises out of a purely **[***9]** personal dispute, resulting injuries do not arise out of the employment. *Castaneda v. Industrial Comm'n*, 97 Ill. 2d 338, 342, 454 N.E.2d 632, 73 Ill. Dec. 535 (1983). On the other hand, fights arising out of **[*280]** disputes concerning the employer's **work** are risks incidental to the employment, and resulting injuries are compensable. *Fischer v. Industrial Comm'n*, 408 Ill. 115, 119, 96 N.E.2d 478 (1951). However, injuries to the **aggressor** in such a fight are not compensable. *Container Corp. of America v. Industrial Comm'n*, 401 Ill. 129, 133, 81 N.E.2d 571 (1948). We refer to the rule that an **aggressor's** injuries are not compensable as the "**aggressor** defense."

We first announced the **aggressor** defense in *Triangle Auto Painting & Trimming Co. v. Industrial Comm'n*, 346 Ill. 609, 178 N.E. 886 (1931). In *Triangle Auto Painting*, the claimant was injured in a fight at **work** over the use of a paint spray gun. After reviewing precedents holding that injuries in fights arising out of **work**-related disputes are injuries arising out of the employment, we held HN5 the **aggressor's** injuries in such a fight nevertheless do not arise out of the employment. *Triangle Auto Painting*, 346 Ill. at 618. **[***10]** We reasoned that the aggression negates all causal connection between the **work** and the injury, so that the **work** is neither "the proximate nor a contributing cause of the injury." *Triangle Auto Painting*, 346 Ill. at 617. Instead, the cause of the injury is the **aggressor's** "own rashness." *Triangle Auto Painting*, 346 Ill. at 618.

Subsequent opinions have applied the rule of *Triangle Auto Painting* without repeating its reasoning. See, *e.g.*, *Ford Motor Co. v. Industrial Comm'n*, 78 Ill. 2d 260, 399 N.E.2d 1280, 35 Ill. Dec. 752 (1980). However, HN6 the **aggressor** defense continues to be based on the statutory requirement that injuries are not compensable unless they arise out of the employment. See 820 ILCS 305/2 (West 2000).

The appellate court suggested that it is time "to revisit the continuing vitality of the **aggressor** defense." 341 Ill. App. 3d at 135-36. As just noted, *Triangle Auto Painting* reasoned that aggressive acts by the claimant may break the causal connection **[**690]** between the employment and the injury. This is not the only area of **workers' [*281] compensation** law where the claimant's acts may negate a **[***11]** causal connection between the employment and the injury. See, *e.g.*, *Howell Tractor & Equipment Co. v. Industrial Comm'n*, 78 Ill. 2d 567, 574-75, 403 N.E.2d 215, 38 Ill. Dec. 127 (1980) (holding claimant's injuries not compensable because, while it was reasonable and foreseeable that a traveling employee would go to a bar with coworkers at 10 p.m., it was not reasonable or foreseeable for him to attempt to return to his motel by walking three miles at 2 a.m. through an unsavory section of an unfamiliar town). *Cf. Union Starch, Division of Miles Laboratories, Inc. v. Industrial Comm'n*, 56 Ill. 2d 272, 277-78, 307 N.E.2d 118 (1974) (holding that the Commission could find the injury compensable where it was not unreasonable or unexpected for employee to seek fresh air by stepping through window onto roof when going onto the roof for fresh air through other windows was a long-standing practice in which employer acquiesced). Thus, the **aggressor** defense is part of Illinois **workers' compensation** law because of the need to determine whether an act of fighting is causally connected to the employment.

The **aggressor** defense is not expressly provided in the Act. Rather, the **aggressor** defense **[***12]** is a rational construction of what the legislature intended when it required that compensable injuries must arise out of the employment. *Triangle Auto Painting*, 346 Ill. at 618 (concluding that "it is not within the intent of the act that an employee be protected against the consequences of a fight in which he was the **aggressor**"). Since *Triangle Auto Painting* announced the **aggressor** defense more than 70 years ago, the legislature has not abolished it, which it could have done at any time. We therefore presume that the legislature acquiesces in our construction of the legislative intent. *People v. Drakeford*, 139 Ill. 2d 206, 215, 564 N.E.2d 792, 151 Ill. Dec. 337 (1990), quoting *Miller v. Lockett*, 98 Ill. 2d 478, 483, 457 N.E.2d 14, 75 Ill. Dec. 224 (1983).

[*282] In sum, because the Act still requires a causal connection between the employment and the injury, the **aggressor** defense remains vital in Illinois.

As explained above, HN7 the **aggressor** defense applies only when the claimant's conduct negates the causal connection between the employment and the fight. The question of who made the first physical contact, while important to determining whether that has occurred, **[***13]** is not decisive. *Ford Motor Co.*, 78 Ill. 2d at 263. Rather, a claimant's conduct must be judged in light of the totality of the circumstances. *Ford Motor Co.*, 78 Ill. 2d at 263. The circumstances obviously include the conduct of the other participant or participants in the fight. See *Ford Motor Co.*, 78 Ill. 2d at 263. Thus, HN8 whether a claimant's conduct rises to the level that triggers the **aggressor** defense depends in large part on the degree to which the other participant in the dispute has provoked her. For example, to respond to a brief exchange of words over a minor **workplace** mishap by seeking out the other employee a half an hour later and angrily threatening to cut his throat triggers the defense. *Container Corp. of America*, 401 Ill. at 133. To respond to threatening and abusive behavior by reflexively pushing the other employee away does not trigger the defense. *Ford Motor Co.*, 78 Ill. 2d at 263-64. For a manager to attempt to evict a discharged employee who refuses to leave the premises **[**691]** by taking a guard's pistol and approaching the employee with the pistol drawn and leveled does trigger the **[***14]** defense. *Riley v. Industrial Comm'n*, 394 Ill. 126, 130, 67 N.E.2d 172 (1946).

HN9 Whether a claimant is an **aggressor** is a question of fact, and the Commission's finding must be upheld unless it is against the manifest weight of the evidence. *Ford Motor Co.*, 78 Ill. 2d at 264. Nevertheless, if the Commission relies on a legally erroneous premise to find a fact, the resulting decision is contrary to law and must **[*283]** be reversed. See *Freeman United Coal Mining Co. v. Industrial Comm'n*, 188 Ill. 2d 243, 720 N.E.2d 1063, 242 Ill. Dec. 108 (1999). In *Freeman United* the Commission found that the claimant failed to prove a causal connection between his injury and his employment because the claimant had not presented evidence of exposure to coal dust. We held that requiring the claimant to present evidence of exposure conflicted with the statutory

presumption that coal miners are exposed to coal dust, and we concluded that therefore the Commission's decision was contrary to law. *Freeman United*, 188 Ill. 2d at 245-46.

In this case, the Commission reasoned that,

> "both [claimant's] and Mohan's continued course of aggressive conduct *** and their failure **[***15]** to withdraw from the conflict allowed for an escalation of said conflict that ultimately resulted in the acts of physical violence exhibited by both employees. [Claimant] and Mohan were in fact equal participants in the altercation marking them both as the **aggressor**. As such, the Commission finds [claimant] to be an **aggressor** in the altercation and therefore is not entitled to **compensation** under the Act." *Franklin v. Carson Pirie Scott*, Ill. Ind. Comm'n Rep. 2002IIC0166 (March 5, 2002).

The Commission applied a standard whereby aggressive conduct leading to a fight, combined with failure to avoid a fight by withdrawing from the dispute when possible, marks a claimant as an **aggressor**. Based on that standard the Commission found that both claimant and Mohan were **aggressors** and only on that basis concluded that claimant was an **aggressor** not entitled to **compensation.**

In reversing the Commission, the appellate court held that only one participant in a fight may be deemed an **aggressor**. 341 Ill. App. 3d at 136. In dissent, one justice of the appellate court suggested that the Commission's finding that Mohan was an **aggressor** is irrelevant, and the Commission must **[***16]** be affirmed so long as its conclusion that claimant was an **aggressor** is supported by the evidence. 341 Ill. App. 3d at 137 (McCullough, P.J., dissenting). **[*284]** The Commission was not required to decide whether Mohan was an **aggressor**. The Commission had to consider Mohan's conduct only as part of the circumstances against which it judged claimant's conduct. However, for the following reasons, the appellate court correctly reversed the Commission without deciding whether the Commission's finding was supported by the evidence.

The employer points out that we have never held that multiple **aggressors** are impossible as a matter of law. It is possible to imagine scenarios in which it would be appropriate to find multiple **aggressors**, particularly, as one of the two dissenting appellate court justices suggested, where more than two employees are involved. See 341 Ill. App. 3d at 137 (McCullough, P.J., dissenting). However, it is not merely an **[**692]** accident of grammar that prior cases have always spoken of *the* **aggressor**. A typical fight involving two employees has only one **aggressor**. When one employee escalates the dispute, he changes the circumstances and typically makes **[***17]** it reasonable for the other employee to respond in kind. This is not to condone answering violence with violence. It is to acknowledge that a claimant's conduct must be judged in light of the circumstances, and the circumstances include the conduct of others.

In this case, nothing in the record indicates anything other than a typical fight. Therefore the appellate court correctly held that the Commission erred when it denied **compensation** based on its finding that both claimant and Mohan were **aggressors**. The Commission must decide whether claimant was *the* **aggressor**.

The parties point out that in many cases it is difficult to identify the **aggressor**. However, even though it is often a difficult task, it is also a familiar one, both in law and in daily life. We do not agree with the employer that the difficulty of identifying the **aggressor** is a reason to **[*285]** expand the **aggressor** defense to allow the Commission to find that both participants in a typical fight were **aggressors**.

*HN10*When a decision of the Commission is set aside, but the facts found by the Commission are sufficient to determine the correct decision, a reviewing court may simply enter the correct decision. 820 ILCS 305/19(f)(2) **[***18]** (West 2000). See, *e.g.*, *Butler Manufacturing*, 85 Ill. 2d at 216. However, when it is not clear from the record what decision is required, the appropriate remedy is to remand to the Commission so that it may decide in the first instance. *Furlong Construction Co. v. Industrial Comm'n*, 71 Ill. 2d 464, 470, 376 N.E.2d 1011, 17 Ill. Dec. 682 (1978). Original jurisdiction is vested in the Commission, even though it is reviewing the decision of an arbitrator without hearing additional evidence. *Paganelis*, 132 Ill. 2d at 483. In this case, it is not clear from the record whether, had it not erred, the Commission would have found that claimant was the **aggressor**. Therefore the appellate court correctly remanded the cause so the Commission could correctly apply the **aggressor** defense in the first instance.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the appellate court, which remanded the cause to the Commission for further proceedings.

Affirmed.

*378 Ill. App. 3d 197, *; 882 N.E.2d 108, **;*
*2007 Ill. App. LEXIS 1361, ***; 317 Ill. Dec. 534*

WILLIAM J. FOSTER, Plaintiff-Appellant, v. JOHN A. JOHNSON, Defendant-Appellee.

1-06-0822

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION

378 Ill. App. 3d 197; 882 N.E.2d 108; 2007 Ill. App. LEXIS 1361; 317 Ill. Dec. 534

December 26, 2007, Decided

SUBSEQUENT HISTORY: Released for Publication February 13, 2008.

PRIOR HISTORY: [*1]**
Appeal from the Circuit Court of Cook County. No. 04 L 11421. Honorable Lynn Egan, Judge Presiding.

DISPOSITION: Reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employee appealed a decision of the Circuit Court of Cook County (Illinois), which granted defendant employee's motion to dismiss with prejudice. The motion was filed pursuant to 735 Ill. Comp. Stat. Ann. 5/2-619 (2002). Plaintiff's complaint sought damages for a battery defendant allegedly committed against plaintiff in their **workplace.** Both parties were employed by a mass transit authority.

OVERVIEW: The trial court ruled that the exclusivity clause of the Act, 820 Ill. Comp. Stat. Ann. 305/5 (2002), precluded plaintiff from filing a lawsuit for battery because a **workers' compensation** payment was made for some of his medical bills. The appellate court reversed. Section 5(a), which prohibited **workers** from filing suit against a co-employee for an intentional tort after receiving a settlement or payment under the Act, did not apply because the Industrial Commission had not yet determined whether plaintiff's injuries were compensable under the Act. Plaintiff could only recover for his injuries under the Act if the circumstances surrounding the altercation arose out of, and was in the course of his employment. Neither the complaint nor the record yielded the necessary facts to determine whether plaintiff's injuries arose out of his employment. Without those facts, the appellate court could not determine whether plaintiff's injuries were compensable under the Act. Because of the trial court's dismissal, if the Industrial Commission were to subsequently deny the **workers' compensation** claim, plaintiff would be left without a forum to which he could turn.

OUTCOME: The trial court's order was reversed and the matter was remanded with directions that the trial court conduct a hearing to determine whether plaintiff's injury was compensable under the Act.

CORE TERMS: lawsuit, compensable, compensation claims, altercation, battery, workers' compensation, medical bills, injuries arose, intentional tort, coemployees, allegedly committed, cause of action, civil action, individual capacity, settlement, injure, medical treatment, exclusivity, vacate, ankle, foot

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN1 In a motion to dismiss pursuant to 735 Ill. Comp. Stat. Ann. 5/2-619 (2002), a defendant may raise certain defects and defenses that negate a plaintiff's cause of action. More Like This Headnote

Civil Procedure > Dismissals > Involuntary Dismissals > Appellate Review
Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2 Appellate review of a dismissal pursuant to 735 Ill. Comp. Stat. Ann. 5/2-619 (2002) is de novo. More Like This Headnote

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

HN3 In order to be compensable under the Illinois **Workers' Compensation** Act, a plaintiff first must show that he has suffered an injury that arose out of and was in the course of his employment. More Like This Headnote

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

HN4 Generally, injuries resulting from an altercation do not arise out of employment when they originate from a purely personal dispute. A compensable **workers' compensation** injury must arise from a dispute concerning the employer's

work and risks incidental to employment. More Like This Headnote

COUNSEL: Charles Drake Boutwell, Northbrook, IL, counsel for APPELLANT.

Eugene Munin, Acting General Counsel of the Chicago Transit Authority, Chicago, IL (Barbara Smith and Rachel Kaplan, of counsel) for APPELLEE.

JUDGES: JUSTICE CUNNINGHAM delivered the opinion of the court. GREIMAN and THEIS, JJ., concur.

OPINION BY: CUNNINGHAM

OPINION

[109] [*198]** JUSTICE CUNNINGHAM delivered the opinion of the court:

The plaintiff, William Foster, filed a lawsuit against the defendant, John Johnson, in the circuit court of Cook County for damages sustained from a battery which the defendant allegedly committed against the plaintiff while both parties were at **work** as employees of the Chicago Transit Authority (the CTA). The plaintiff appeals from the dismissal with prejudice of his cause of action pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2002)) (section 2-619). On appeal, the plaintiff argues that the court erred by: (1) holding that the **Workers' Compensation** Act (the Act) (820 ILCS 305/5 (West 2002)) precludes him from bringing a lawsuit against the defendant for battery; and (2) **[***2]** finding that the CTA admitted liability in the **workers' compensation** action before the Industrial Commission heard his pending claims. For the following reasons, we reverse the order of the circuit court and remand for further proceedings consistent with this opinion.

BACKGROUND

The plaintiff and the defendant were both employees of the CTA, **working** in the West Shops facility at 3900 W. Maypole Ave, Chicago, Illinois. On October 17, 2002, the defendant allegedly committed a battery against the plaintiff by pushing him in the chest, causing the plaintiff to fall backward and injure his right ankle, neck, and back. The defendant also allegedly slammed the plaintiff's foot in a door, causing injuries to the plaintiff's foot and ankle.

In November 2002, the plaintiff filed for **workers' compensation** benefits with the Industrial Commission for the injuries he sustained in the October 17 incident. An affidavit from Matthew Wicklander, a claims examiner for Sedgwick Claims Management Services, Inc. (a third-party administrator of **workers' compensation** claims on behalf of the CTA), stated that the CTA has paid a total of $ 657.35 for medical treatment received by the plaintiff for injuries related **[***3]** to the October 17 incident. The plaintiff's medical insurance carrier, Blue Cross and Blue Shield, has also paid over $ 2,000 for medical treatment related to the incident.

On October 8, 2004, the plaintiff filed this action in the circuit **[*199]** court of Cook County against the defendant, in his individual capacity, for damages resulting from the alleged battery. The defendant filed a motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2002)). The defendant argued that the plaintiff was barred from recovering for injuries arising out of and during the course of his employment and that the **[**110]** plaintiff was judicially estopped from arguing inconsistent positions regarding the nature of his injuries. The defendant's motion to dismiss was denied. The defendant then filed an amended motion to dismiss, alleging that the Act precluded the plaintiff's recovery from a coworker in a common law intentional tort action arising out of and during the course of employment, where the plaintiff had already recovered from the employer under the Act. The plaintiff responded and asserted that the **workers' compensation** claim was still being disputed by the employer before the Industrial **[***4]** Commission and no determination had been made as to whether the plaintiff's injuries arose in the course of his employment. In support of his position, the plaintiff attached a purported affidavit from his **workers' compensation** counsel, asserting that the plaintiff had not received any payments from the CTA under the Act. However, the affidavit did not comply with Supreme Court Rule 191(a) (210 Ill. 2d R. 191(a)). In any event, on appeal, the plaintiff acknowledges that the CTA paid $ 657.35 of his medical bills. The plaintiff also asserted that the CTA had not admitted liability in the matter and that the defendant in each action was different. The defendant (respondent) in the **workers' compensation** action is the CTA and the defendant in the civil action is John A. Johnson, in his individual capacity.

On January 30, 2006, the trial court heard the defendant's motion to dismiss. Although the plaintiff's counsel was absent from the hearing, the trial court relied on the plaintiff's arguments from his brief. The trial court granted the defendant's motion and dismissed the plaintiff's case with prejudice. The trial court held that the exclusivity provision of the Act does apply to coemployees **[***5]** and precluded the plaintiff's intentional tort lawsuit. The trial court found to be irrelevant the insignificant amount paid by the CTA for the plaintiff's medical bills as well as the fact that the CTA never admitted liability. The court held that the exclusivity clause of the Act precluded the plaintiff from filing a lawsuit for battery, because a **workers' compensation** payment was made for some of his medical bills, regardless of the amount of the payment.

The plaintiff subsequently filed a motion to vacate the trial court's order and a motion to reconsider the defendant's motion to dismiss. The plaintiff's counsel again failed to appear in court and the trial court struck the plaintiff's motion to vacate the dismissal. The plaintiff **[*200]** timely appealed the order of the trial court granting the defendant's motion to dismiss.

ANALYSIS

HN1 In a motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2002)), a defendant may raise certain defects and defenses that negate a plaintiff's cause of action. Lawson v. City of Chicago, 278 Ill. App. 3d 628, 634, 662 N.E.2d 1377, 1382, 215 Ill. Dec. 237 (1996). HN2 Our review of a dismissal pursuant to section 2-619 is *de novo*. Lawson, 278 Ill. App. 3d at 634, 662 N.E.2d at 1382.

Section 5(a) **[***6]** of the Act prohibits plaintiffs from filing suit against a co-employee for an intentional tort after receiving a settlement or payment under the Act. Fregeau v. Gillespie, 96 Ill. 2d 479, 486, 451 N.E.2d 870, 873, 71 Ill. Dec. 716 (1983). The supreme court in Collier v. Wagner Castings Co., 81 Ill. 2d 229, 408 N.E.2d 198, 41 Ill. Dec. 776 (1980), and Fregeau v. Gillespie, 96

Ill. 2d 479, 451 N.E.2d 870, 71 Ill. Dec. 716 (1983), prevented the plaintiffs from suing their coemployees after they received settlements under the Act. In both cases, the Industrial Commission found that the plaintiffs' injuries were **[**111]** compensable under the Act *prior to* the filing of the lawsuits against their coemployees. In this case, section 5(a) is not applicable because the Industrial Commission has not determined whether the plaintiff's injuries are compensable under the Act. HN3 In order to be compensable under the Act, the plaintiff first must show that he has suffered an injury that arose out of and was in the course of his employment. Sisbro v. Industrial Comm'n, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671, 278 Ill. Dec. 70 (2003).

Here, the plaintiff sustained injures resulting from an altercation with the defendant. The plaintiff may only recover for his injuries under the Act **[***7]** if the circumstances surrounding the altercation arose out of, and was in the course of his employment. HN4 Generally, injuries resulting from an altercation do not arise out of the employment when they originate from a purely personal dispute. Franklin v. Industrial Comm'n, 211 Ill. 2d 272, 279, 811 N.E.2d 684, 689, 285 Ill. Dec. 197 (2004). A compensable injury must arise from a dispute concerning the employer's **work** and risks incidental to employment. Franklin, 211 Ill. 2d at 279-80, 811 N.E.2d at 689. Neither the complaint nor the record yield the necessary facts to determine whether the plaintiff's injuries arose out of his employment. The record and the complaint lack any facts describing the events and circumstances that preceded the altercation. For example, there is no information regarding which of the two combatants was the **aggressor** and what may have precipitated the physical altercation. Without these facts, we cannot determine whether the plaintiff's injuries are compensable under the Act.

[*201] Although the CTA paid $ 657.35 of the plaintiff's medical bills, this payment does not determine whether the plaintiff's injuries are compensable under the Act. The plaintiff must still demonstrate that his **[***8]** injuries arose out of and were in the course of his employment. It is noteworthy that counsel representing the defendant and the CTA notably stated during oral argument that the CTA "mistakenly" paid the $ 657.35 and is vigorously contesting the plaintiff's **workers' compensation** claim. Since the trial court has dismissed the plaintiffs civil lawsuit, if the Industrial Commission subsequently denies the plaintiff's **workers' compensation** claim, the plaintiff is then left without a forum to which he can turn. Thus, we believe that the trial court must conduct a hearing on the facts and circumstances of the incident which gave rise to the lawsuit and the **workers' compensation** claim. There simply was not enough information upon which to determine whether the plaintiff had chosen the correct forum in which to advance his case. Compensability under the Act must be established to defeat the plaintiff's civil action against the defendant, individually. We have no opinion regarding the outcome of such a hearing. However, the specific facts and circumstances of this case require such an inquiry by the trial court prior to dismissing the plaintiff's lawsuit.

This case is remanded to the trial court **[***9]** for a hearing to determine whether the plaintiff's injury is compensable under the Act. For the reasons stated, the order of the circuit court of Cook County is reversed and the matter is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

GREIMAN and THEIS, JJ., concur.