

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE DECISION OF ARBITRATOR

GPS
SEP 25 2006

Derius Wicks
Employee/Petitioner

Case # 02 WC 5424

*10-24-06
REV. DUE*

v.

Current's Appliances
Employer/Respondent

On Sept 11 2006, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

A copy of this decision is mailed to the following parties:

21 0607 02 WC 5424
LEVY, CHARLES
SACHS EARNEST & ASSOC
1 N LASALLE ST*
SUITE 1525
CHICAGO, IL 60602

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STATE OF ILLINOIS)
)
COUNTY OF Will)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Darius Wicks
Employee/Petitioner

Case # 02 WC 5424

v.

Joliet, Illinois

Grant's Appliances
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Leo Hennessy**, arbitrator of the Commission, in the city of **Joliet**, on **July 27, 2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

- A. Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
- B. Was there an employee-employer relationship?
- C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?
- D. What was the date of the accident?
- E. Was timely notice of the accident given to the respondent?
- F. Is the petitioner's present condition of ill-being causally related to the injury?
- G. What were the petitioner's earnings?
- H. What was the petitioner's age at the time of the accident?
- I. What was the petitioner's marital status at the time of the accident?
- J. Were the medical services that were provided to petitioner reasonable and necessary?
- K. What amount of compensation is due for temporary total disability?
- L. What is the nature and extent of the injury?
- M. Should penalties or fees be imposed upon the respondent?
- N. Is the respondent due any credit?
- O. Other

FINDINGS

- On 1/6/2002, the respondent _____ was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship *did* exist between the petitioner and respondent.
- On this date, the petitioner *did not* sustain injuries that arose out of and in the course of employment.
- Timely notice of this accident *was* given to the respondent.
- In the year preceding the injury, the petitioner earned \$ _____ ; the average weekly wage was \$ 500.00 .
- At the time of injury, the petitioner was 25 years of age, *single* with 3 children under 18.
- Necessary medical services *have not* been provided by the respondent.
- To date, \$ 0 has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of \$ 0/week for 0 weeks, from 0 through 0 , which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay the petitioner the sum of \$ 0/week for a further period of 0 weeks, as provided in Section n/a of the Act, because the injuries sustained caused n/a .
- The respondent shall pay the petitioner compensation that has accrued from n/a through _____ , and shall pay the remainder of the award, if any, in weekly payments.
- The respondent shall pay the further sum of \$ n/a for necessary medical services, as provided in Section 8(a) of the Act.
- The respondent shall pay \$ _____ in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay \$ _____ in penalties, as provided in Section 19(l) of the Act.
- The respondent shall pay \$ _____ in attorneys' fees, as provided in Section 16 of the Act.

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

~~4.92~~ 4.92

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

Paul Harnsey
Signature of arbitrator

Date 9-7-06

SEP 11 2006

I. STATEMENT OF FACTS

The respondent was operating under and subject to the Illinois Workers' Compensation Act on the petitioner's date of accident, January 6, 2002. The petitioner, Darius Wicks, was employed by the respondent, Grant's Appliances, on January 6, 2002. Notice in this case is not in dispute. The petitioner earned an average weekly wage of \$500.00.

The petitioner testified that on January 6, 2002, employed as a delivery driver, he entered his workplace to begin his Sunday morning shift. At that time, he reviewed his delivery schedule for the workday. Upon review of his delivery routes, he understood that one of the routes was a great distance away from Grant's Appliance Center.

The petitioner further testified he began to discuss his delivery route with his supervisor, Richard Armstrong. He stated that he told Armstrong he would do all the deliveries on his route except for the final delivery because of it was too far away. He testified that he and Richard Armstrong began to argue regarding the route. He stated Armstrong began to use profanity. He stated that Armstrong then told him he was fired if he did not use complete his routes.

The petitioner testified that he told Armstrong he does not have the power to fire the petitioner and the petitioner proceeded to leave to begin his routes. The petitioner then stated Armstrong grabbed him from behind, reaching for his clipboard to grab it out of his hand. As Armstrong grabbed the clipboard out of the petitioner's hand, the petitioner testified Armstrong grabbed him from behind and threw him onto a table inside the room. The petitioner testified he fell onto his arm with his weight and Armstrong's weight on top of his arm causing a fracture.

The petitioner testified he was in great pain and was unable to use his left arm. He testified Armstrong proceeded to leave the room through the warehouse doors. The petitioner removed his coveralls and followed Armstrong into the warehouse. He testified he followed him to ask him questions regarding grabbing him from behind and injuring him. The petitioner stated Armstrong proceeded to strike the petitioner twice more in the warehouse.

The petitioner then stated he left the premises with a co-worker, Daniel Cooley. As they were outside, the police appeared to discuss the fight. He testified the police never mentioned to him he was able to file a complaint against Armstrong.

The petitioner was then taken to Provena Saint Joseph Medical Center by Daniel Cooley. The petitioner was examined and diagnosed with a mid shaft fracture of the radius and a dislocation of the distal radial ulnar joint. The petitioner underwent an open reduction of the fracture with plate and screw fixation to help repair the wound. The petitioner testified he has full use of his left arm but has some continued discomfort.

The petitioner testified he had never been reprimanded before for complaints regarding his routes. The petitioner testified he never struck Armstrong during the altercation and that Armstrong was the aggressor.

The petitioner further testified he had been convicted of a felony in 1995 for felony possession of marijuana. He testified that he was sentenced to probation for his conviction. The petitioner could not recall whether he had been convicted of any prior felonies. However, upon refreshing his recollection, he testified he was convicted of theft of a vehicle in 1993. Although the petitioner did not remember being convicted of any previous felonies, he did remember he was sentenced to probation as a result of the felony conviction.

The petitioner testified he was convicted of a battery as a result of the altercation between Armstrong and himself. He testified he chose not to file a complaint against Armstrong as a result of the altercation.

Daniel Cooley testified he was in the delivery room at the time of the altercation. He was a delivery driver and worked the same position as the petitioner. He stated he overheard the argument between the petitioner and Armstrong. He testified he saw the petitioner turn to leave the delivery room and Armstrong then tried to trip the petitioner and grab his clipboard.

Cooley then testified that Armstrong grabbed the petitioner and had the petitioner in a "bear hug". He testified that Armstrong and the petitioner were "tussling" at that time and the petitioner fell onto the table with Armstrong on his back.

He then stated the petitioner fell to the ground and Armstrong left through the warehouse doors. The petitioner followed Armstrong into the warehouse where the altercation continued. He testified he witnessed both the petitioner and Armstrong throwing punches until the fight was eventually broken up several minutes later.

Cooley testified he is no longer employed by the respondent because he was terminated. Cooley testified that he is a friend of the petitioner's and has been a friend of the petitioner's since they began working together at Grant's Appliances.

Kevin Arnold testified that he was a supervisor at Grant's Appliances on January 6, 2002 and was present at the altercation between Armstrong and the petitioner. He testified overheard an argument between the petitioner and Armstrong entered a doorway to the delivery room. He testified it was not unusual to hear complaints regarding routes specifically from the petitioner. He testified the petitioner's poor behavior and work status had been discussed several times prior to January 6, 2002. He testified he heard Armstrong tell the petitioner he was fired.

Arnold testified as he entered the delivery room, he witnessed the table in the room was broken and the petitioner was chasing after Armstrong. He witnessed Armstrong enter the warehouse through the doors and the petitioner followed him. Arnold further stated he

witnessed the petitioner attack Armstrong and punch Armstrong several times. He stated it was clear to him, as Armstrong was attempting to get away, he was also attempted to defend himself. He stated it was clear the petitioner was the aggressor in the warehouse.

Arnold further stated he overheard Daniel Cooley yelling during the altercation. He testified that Cooley exclaimed, "I am going to get me some of mine," referring to Armstrong. Arnold testified he notified Armstrong to beware that Daniel Cooley might wish to do Armstrong physical harm.

II. FINDING OF FACTS AND CONCLUSIONS

The Arbitrator hereby makes the following finding of Facts on all disputed issues:

In support of the Arbitrator's Decision regarding whether an accident occurred that arose out of and in the course of the petitioner's employment by the respondent, the Arbitrator finds:

In order for the petitioner to prove his injury arose out of the course of his employment, he must satisfy two factors regarding work place altercations under the Workers' Compensation Act – whether the altercation was related to work and whether the employee or the employer was the aggressor in the altercation.

The first factor, whether the altercation was related to work, was satisfied by the petitioner. The altercation between the petitioner and his supervisor, Richard Armstrong, began as a discussion regarding the petitioner's delivery route. It escalated regarding the same issue and the petitioner's refusal to complete the route which resulted in the petitioner's termination. It is clear these issues were the cause of the altercation and were related to work.

The second factor, whether the employee or the employer was the aggressor in the altercation, is the main issue in this case. The petitioner testified Armstrong began the argument and used profanity regarding his routes, Armstrong attempted to grab the clipboard from the petitioner, Armstrong grabbed the petitioner slamming him onto the table, and that Armstrong continued to hit the petitioner in the warehouse. The petitioner stated he never punched Armstrong and was completely defensive.

Daniel Cooley supported the petitioner's testimony by testifying Armstrong attempted to grab the clipboard from the petitioner and threw the petitioner onto his arm on the table. However, Cooley testified the petitioner followed Armstrong into the warehouse and the altercation continued. Cooley stated the petitioner punched Armstrong during the altercation.

Kevin Arnold testified he witnessed Armstrong attempting to leave the petitioner by entering the warehouse. He testified the petitioner followed Armstrong into the warehouse and began punching Armstrong. Arnold testified it was clear to him that Armstrong was attempting to defend himself from the petitioner.

The petitioner was tried in a criminal court related to the altercation on January 6, 2002 and was convicted of a battery offense against Armstrong. The petitioner has also been convicted of felonies in 1993 and 1995.

Under the theory of collateral estoppel, a party is barred from relitigating an issue determined against that party in an earlier action. According to 720 ILCS 5/12-3 (2004) a battery has been committed if a person "intentionally or knowingly without legal justification and by any means causes bodily harm to an individual or makes physical contact of an insulting or provoking nature with an individual.

As previously noted, the petitioner was convicted of a battery for the same incident on January 6, 2002. Richard Armstrong has not been charged or convicted of any crime related to the altercation. A Criminal Court in Will County has determined that beyond a reasonable doubt the petitioner intentionally caused harm to Richard Armstrong without legal justification. The petitioner is collaterally estopped on the issue of whether the Armstrong is at fault regarding the altercation because that issue has been already determined by the criminal courts using a higher standard of proof and convicted the petitioner of battery.

Furthermore, the petitioner's testimony itself was not believable. The petitioner testified he was not the aggressor in the altercation and claimed he never hit Armstrong. However, it is clear from both the testimony of Daniel Cooley and Kevin Arnold the petitioner did in fact hit Richard Armstrong. Their testimony coupled with battery conviction indicates the petitioner is did not testify truthfully regarding the altercation.

The petitioner also testified he was unable to use his left arm. However, the petitioner testified he quickly removed his coverall uniform and followed the petitioner into the warehouse to discuss his termination and injury. However, the petitioner continued to fight with Armstrong for several minutes after the time at which he claimed he was unable to use his arm. The petitioner may have injured his arm during the second altercation, however, but it seems evident the petitioner was capable of using his left arm to unlawfully cause harm to Richard Armstrong.

Daniel Cooley did support the petitioner's testimony that the petitioner was grabbed from behind by Richard Armstrong. However, Daniel Cooley's motivation to testify must be examined. He is a close friend of the petitioner's, he was terminated by Grant's Appliances, and there was evidence he was angry towards Richard Armstrong as well. Kevin Arnold testified he warned Armstrong of physical threats made by Daniel Cooley regarding Armstrong because of concerns about Armstrong's well being.

Also, the petitioner has failed to prove at what point during the altercation he fractured his arm. He testified he felt his arm break as he was on the table with Armstrong on top of him. However, he could have injured his arm in the warehouse where it is clear he was the aggressor. As previously noted, the petitioner's testimony is not believable. There is a presumption of untruthfulness because the petitioner is a convicted felon. Again, there

were several inconsistencies in the petitioner's testimony. It is clear he was attempting to paint the clearest picture possible of Richard Armstrong's fault with no liability for his actions.

Finally, Kevin Arnold testified he witnessed Richard Armstrong attempting to flee the petitioner. The petitioner followed Armstrong and continued his battery. Armstrong was attempting to leave the situation which was continued solely by the petitioner.

Therefore, we find that because the petitioner was the aggressor in the altercation on January 6, 2002. Because the petitioner has not satisfied the required factors for proving compensability related to the altercation, the Arbitrator finds that no accident arose out of and in the course of the petitioner's employment with the respondent.

In support of the Arbitrator's Decision regarding (F) petitioner's present condition of ill-being causally related to Petitioner's Injury, (J) the medical services provided to petitioner were reasonable and necessary, (K) TTD, and (L) the nature and extent of the petitioner's injury, the Arbitrator finds:

Because the Arbitrator finds no accident occurred on January 6, 2002, the Arbitrator finds the petitioner's present condition of ill-being is not causally related to the petitioner's work injury on January 6, 2002. Furthermore, the issue whether medical services provided to the petitioner were reasonable and necessary is moot due to the fact that no accident occurred.

Obviously, if no accident occurred, no work-related injury occurred. Therefore, the petitioner is not entitled to any TTD benefits or permanency benefits related to an alleged work injury on January 6, 2002.

Order:

The respondent is not liable for any medical expense incurred by the ~~PETITIONER~~ regarding the altercation on January 6, 2002.

The Petitioner is entitled to no TTD benefits for his lost time.

The Petitioner is entitled to no permanency benefits resulting from his alleged accident on January 6, 2002.

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 Terms: darius wicks ([Edit Search](#) | [Suggest Terms for My Search](#))

7 IWCC 1248; 2007 Ill. Wrk. Comp. LEXIS 1382, *

DARIUS WICKS, PETITIONER, v. GRANT'S APPLIANCES, RESPONDENT.

No. 02WC 5424

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILL

7 IWCC 1248; 2007 Ill. Wrk. Comp. LEXIS 1382

September 28, 2007

CORE TERMS: arm, fight, punch, door, route, altercation, warehouse, clipboard, aggressor, appliance, started, fracture, delivery, fired, forearm, assigned, battery, doctor, radio, supervisor, falling, manager, pushed, landed, pounds, walk, temporary total disability, police report, terminated, underneath

JUDGES: Molly C. Mason; James F. DeMunno; Nancy Lindsay

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Petitioner appeals the Decision of Arbitrator Hennessy finding that Petitioner failed to prove that his claimed left arm injury of January 6, 2002 arose out of and in the course of his employment. Specifically, the Arbitrator found that Petitioner was the aggressor in a work-related altercation, that Petitioner failed to prove at what point during the altercation his left arm injury occurred and that Petitioner was collaterally estopped on the issue of whether his supervisor was in fact the aggressor by virtue of his own battery conviction.

The issues on review are accident, causal connection, medical, temporary total disability, permanency and the effect of the doctrine of collateral estoppel. After considering the entire record, the Commission affirms the Arbitrator's finding that the altercation of January 6, 2002 was work-related but otherwise modifies the Decision of the Arbitrator by finding that Petitioner is not collaterally estopped due to his battery conviction, that Petitioner established that his left arm injury occurred in the initial contact between him and his supervisor, that Petitioner was not the aggressor at the time of this initial [*2] contact and that Petitioner thus established that his injury arose out of and in the course of his employment. The Commission further finds that Petitioner established a causal connection between his accidental injury of January 6, 2002 and his left arm condition of ill-being, that Petitioner is entitled to reasonable and necessary medical expenses in the amount of \$ 13,003.86, that Petitioner was temporarily totally disabled from January 7, 2002 through July 17, 2002, a period of 27 3/7 weeks, and that Petitioner is permanently partially disabled to the extent of 25% loss of use of his dominant left arm under Section 8(e).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 25-year-old appliance deliveryman, testified that he began working for Respondent two and a half years before January 6, 2002. T. 7. Petitioner routinely picked up his delivery assignments at Respondent's warehouse. His supervisor was Richard Armstrong. Petitioner testified that Armstrong did not reprimand or discipline him before January 6, 2002. T. 10-11.

2. Petitioner testified that he was at Respondent's warehouse at approximately 7:30 AM on January 6, 2002. He had just finished [*3] making delivery-related calls and was carrying his clipboard and radio. T. 12-13. Other deliverymen, including Daniel Cooley, Rick Hicks, Jaime Varkas, Mark Adams and Ron Johnson, were present but a deliveryman named Kevin Arnold was not present. T. 13-14. The warehouse area was about 20 x 20 in size and there was a door between this area and another room where appliances were stored. T. 14-15. Petitioner noticed that he was assigned to make a number of deliveries on the north side and one delivery that would have required him to make a two-hour trip south. T. 16. Armstrong walked in and Petitioner told him that he felt the trip south was out of his way. Armstrong told him to stop complaining and then swore at him. Petitioner persisted and Armstrong "kept getting agitated". Armstrong said "if [you] don't want to do the route, go home". T. 17. Petitioner stated that he wasn't refusing to do his route. He just wanted Armstrong to reassign the one delivery. T. 17.

The argument escalated and Petitioner said "forget you, I'm going to do these thirteen stops", bring the one item back to the store and "talk to Dave in the morning". Armstrong replied "if you don't want to do the whole route, [*4] give me that clipboard and radio, you're fired". T. 18. Petitioner "waved" Armstrong off and told him that he had to "talk to committee" before he could fire him. Petitioner then turned his back to Armstrong and started to move toward his truck. As he turned he realized that Armstrong was coming at him "full speed". Armstrong grabbed Petitioner and both men went down. Petitioner testified that he fell onto a table and that Armstrong then fell on top of him. Petitioner landed "flat on [his] stomach" with his left arm tucked underneath him. He was still holding the clipboard and radio. T. 20. Then Armstrong pushed up off of Petitioner and opened the door to the other room. T. 20. Petitioner stood up and noticed a sharp pain shooting down his arm. He was unable to move his arm. T. 21. His shoe had come off. He started taking his coveralls off and realized that he could not move his arm. He started walking behind Armstrong and asking him why he had pushed him. He testified that he was "mad" because Armstrong had pushed him "through the table", injuring his arm in the process. T. 21. Armstrong turned around, faced Petitioner and started pushing him. Then Armstrong hit Petitioner in the [*5]

face once or twice. T. 23. At this point, Kevin Arnold positioned himself between Petitioner and Armstrong and told them to stop. Arnold also told them he had called the police and that they were on their way. T. 22.

Petitioner indicated that both he and Armstrong are 5 feet, 9 inches tall but that, at the time of the fight, he weighed 180 pounds whereas Armstrong weighed about 220. T. 23.

3. Immediately after Arnold intervened, Petitioner went outside and the police arrived. Armstrong told the police that an altercation had occurred because of the firing. The police told Petitioner to leave Respondent's premises and told Armstrong to go back in to work. T. 24. Petitioner testified that no one was arrested at that point. It was a couple of weeks after he got out of the hospital that a Will County sheriff brought a subpoena to his house. T. 25. Petitioner indicated that he did not complete a police report on the day of the fight because he "was in the hospital and stuff. T. 26. He did not subsequently file such a report based on a advice he received from his attorneys. T. 26.

4. Petitioner denied injuring his left arm before January 6, 2002. T. 26.

5. Petitioner testified that Daniel [*6] Cooley drove him to the Emergency Room at Provena St. Joseph Hospital after the incident. His arm pain was "terrible" at that point. The history taken by the Emergency Room physician reflects that Petitioner "was in an altercation and they (sic) landed on a table". The physician noted that Petitioner denied previous left arm injuries. X-rays of the left elbow and forearm showed a mid-shaft radius fracture. The physician applied a long-arm splint, prescribed Vicodin and instructed Petitioner to return to the hospital the next day for surgery. Dr. Daley saw Petitioner at the hospital the next day and told him that his arm was "shattered". T. 30. The doctor's operative report reflects a diagnosis of a displaced and comminuted Galeazzi midshaft radius fracture with distal radioulnar joint dislocation. He noted "marked comminution" and fixed the fragments with a plate and seven screws. PX 1. After the surgery Petitioner's arm was still aching and he had to keep the arm elevated, f. 28. He followed up with Dr. Daley at Hinsdale Orthopaedics on January 9, 2002. A history dated January 9, 2002 reflects that "the supervisor pushed [Ppetitioner] into the table - he landed on arm". PX 1. Petitioner [*7] indicated that he is left-handed. X-rays showed the surgical hardware to be in good position and the doctor placed Petitioner back into a long-arm cast. Dr. Daley released Petitioner to restricted work (with no use of the left arm) on February 20, 2002. Petitioner testified that he then went to Respondent to inquire about returning to work but learned that he had been terminated in the interim. T. 31-32. Petitioner continued seeing Dr. Daley and started using a bone stimulator in May 2002, after repeat X-rays showed that the fracture still had not healed. At the last visit, oh July 17, 2002, X-rays showed consolidation of the fracture and the doctor released Petitioner to full duty. PX 1. T. 32-33.

6. Petitioner testified that he did not receive any temporary total disability benefits during the time he was unable to work. He also testified that Respondent did not pay any of his medical bills. His group carrier, North American, made payments and sent him a letter seeking reimbursement. T. 34. Petitioner submitted medical bills totaling \$ 13,003.86 (PX 3-5) and Respondent objected to these bills only on the basis of liability. T. 93-95. Respondent did not claim credit under Section [*8] 8(j).

7. On March 22, 2006 Petitioner was examined by Dr. Gross at his attorney's request. T. 35. The doctor's report reflects that Petitioner became involved in an altercation with his manager on January 6, 2002, that the manager shoved Petitioner, that Petitioner fell into a table and that the manager then fell onto Petitioner, wedging Petitioner's left arm between him and the table. Petitioner complained of left forearm and wrist pain, left arm weakness and restricted left wrist motion. On examination, Dr. Gross noted a 4-inch surgical scar, palpable hardware in the left forearm, atrophy of the thenar muscles of the left hand, tenderness of the left wrist and scaphoid area and a reduced range of motion of the left wrist, elbow and forearm. He also noted "weakness of abduction of the left fingers" and positive Tinel's and Phalen's signs on the left. Dynamometer testing was limited to 180 pounds on the left compared with 260 on the right. Pinprick examination showed decreased sensation on the ulnar aspect of the left hand, the volnar aspect of the left forearm and the dorsal aspects of the left thumb and little finger. X-rays showed the surgical hardware to be intact but the doctor [*9] noted a "slight increase in the degree of separation of the radioulnar joint". The doctor opined that Petitioner's fracture resulted from Armstrong falling on top of him while his left arm was pinned underneath him. He described Petitioner as having a major loss of the left arm. PX 2. The Commission notes that Respondent did not obtain a Section 12 examination or offer any medical causation opinion.

8. At arbitration, Petitioner testified that his left hand is still a little numb and that he "can't lift over 20 pounds". He indicated that he is unable to bend his arm back and that he hears a clicking noise when he turns his arm. He was still experiencing sharp arm pain with weather changes. T. 36.

9. Under cross-examination Petitioner acknowledged that before January 6, 2002 he had voiced other complaints about his assigned routes. He indicated that all of the drivers complained about distant deliveries. T. 37. He testified that Armstrong did not grab the clipboard out of his arms. T. 38. When Armstrong came at him he (Ppetitioner) was in the middle of the 20 x 20 warehouse area and had his back toward the door. The door was to his right and to Armstrong's left. T. 39. The table was [*10] behind Petitioner and to his right. When he turned, his intention was to go down a hallway and walk out to his truck. At that point Daniel Cooley was probably close to the lockers or to the right of Armstrong. T. 41. Petitioner testified that he attempted to remove his zip-up coveralls after he landed on the table because he wanted to see if there was visible damage to his arm. T. 42. He then followed Armstrong and asked him why he had pushed him. At that point he "wasn't thinking about [Armstrong] hitting [him] again". T. 42. Petitioner denied striking Armstrong. After the police arrived they did not pull him or Armstrong aside to "get the story". T. 43. Nor did they tell him that he could file a complaint against Armstrong. Armstrong filed a complaint against him and he was convicted of battery. Petitioner acknowledged that he had been charged with a felony (possession of marijuana) in approximately 1995. T. 44-45. He initially did not recall a second felony conviction but then indicated that he had been convicted of possession of a stolen vehicle twelve or thirteen years before the arbitration. He was sentenced to two years of probation after this conviction. He did not recall [*11] whether the arrest for marijuana possession occurred during this two-year period. T. 47. Armstrong's termination of him surprised him. He and Armstrong swore at one another. T. 47. His group carrier denied his claim because the injury resulted from an altercation. T. 48. The altercation lasted about five minutes. He would not call it a fight because he never hit Armstrong. No witnesses testified on his behalf at the criminal trial. T. 48. After both men crashed into the table the warehouse area began filling up with spectators. T. 50.

10. Petitioner then called Daniel Cooley. Cooley testified that he worked as a deliveryman for Respondent for two and a half years before January 6, 2002. T. 52. He knew Petitioner and Armstrong was his supervisor. T. 53-54. On Sunday, January 6, 2002, at about 7:30 AM he was in Respondent's warehouse along with Petitioner, Marcus Adams, Rick Hicks, Ron Jones, Jaime and Rich. Kevin Arnold worked for Respondent at that time but was not present. T. 55. Petitioner wanted Armstrong to take one of his deliveries off of his truck and Armstrong told Petitioner to go out and do the route. Cooley was about ten feet away from the two men at that point. Petitioner [*12] turned to leave and Armstrong tried to knock the radio and clipboard out of Petitioner's hands. T. 56. Armstrong was getting upset because Petitioner told him he was not going to make the one delivery. Armstrong told Petitioner "if you're not

going to do the stop, go home, you're fired". T. 57. After Armstrong tried to slap the radio and clipboard out of Petitioner's hands, Petitioner continued to walk out. Armstrong then "lunged" at Petitioner as if he was trying to trip him. The two men "got to tussling" and "that's how they fell on top of the table", with Petitioner underneath Armstrong. Armstrong was "facing toward the table when he fell". Armstrong "had Petitioner by the side, like a bear hug". He did not see any exchange of punches before the men fell. T. 59. After they fell Armstrong got up and started walking "to the bigger part of the warehouse". Petitioner followed him and started asking him why he had "sent him to the table". T. 59. Petitioner's arm was hurting and he took Petitioner to the hospital. No one was arrested that day as a result of the altercation. T. 60. Cooley denied ever fighting with Armstrong. He indicated that he no longer worked for Respondent because [*13] he had "too many injuries". He had seen Armstrong get angry at other drivers but he had never seen Armstrong hit anyone else. T. 61. A steel door separated the delivery room from the appliance room. This door was always closed and locked. T. 61. Armstrong would have had to open this door in order to move to the other room. T. 61. As Petitioner and Armstrong moved from the delivery room to the appliance room he noticed Kevin Arnold in the appliance room. As far as he knew, Arnold was in the appliance room when the fight started. T. 62.

Under cross-examination, Cooley testified that Armstrong slapped the clipboard out of Petitioner's hands at one point. When Armstrong grabbed Petitioner "everything fell". T. 63. Arnold was the only person in the appliance room before the fight. T. 64. The warehouse room had two doors. One door led to the warehouse and one "led out". When Petitioner turned to go perform his route Armstrong was facing the door that "led out". Cooley acknowledged that he and Petitioner are still friends. T. 68. Respondent terminated him because he had back problems and was on medication. T. 68-69. Cooley did not recall seeing Petitioner or Armstrong punch one another. [*14] T. 69.

On redirect, Cooley acknowledged that he lost sight of Petitioner and Armstrong for a few seconds after they went into the appliance room and that punches could have been thrown during this interval. T. 70.

Under re-cross, Cooley testified that a couple of men followed Petitioner and Armstrong into the appliance room. He was the last person to go into the room and he didn't see any punches thrown. T. 71.

11. After Cooley finished testifying, Respondent's attorney indicated that Armstrong could not be present due to a family vacation. The Arbitrator sustained Petitioner's hearsay objection to Armstrong's recorded statement. T. 72-74.

12. Respondent then called Kevin Arnold. Arnold testified that he has worked for Respondent for ten years and that he is a co-manager in the warehouse. T. 75. Arnold testified that Petitioner complained about his route on Sunday, January 6, 2002 and that this "happened a lot on Sundays when he [Petitioner] came in". After Petitioner complained, Armstrong told him to go home if he didn't want to do his route. Arnold was not sure whether Petitioner handed the clipboard to Armstrong or whether Armstrong took it out of his hands. He did not know what [*15] happened next. He only knew that the men "fell down on the table" and that an altercation ensued. He "didn't witness a whole lot of striking in that room". Armstrong "did try to end the whole thing and walk away". The door to the warehouse got opened because another employee was standing at this door and then "it all spilled over into that separate building". At that point Armstrong was "still trying to get away" and Petitioner was "still coming at him". There was a "lot of yelling, some falling down, wrestling, some punches thrown" and then it "just kind of stopped". T. 77. Armstrong was finally able to walk away and Petitioner went outside. In the middle of all this an employee called the police at his direction. T. 78. He was maybe in the doorway when he heard the crash of Petitioner and Armstrong falling onto the table. He believed he had his back turned away from the two men at that point. T. 78. When he first heard Petitioner complaining and Armstrong telling him to go home he thought maybe the two were joking around. When asked whether he saw Armstrong punch Petitioner he said "only in self-defense, I believe". He saw Petitioner throw "many" punches but there were a few times [*16] when the punches did not land. T. 80. The fight in the first room lasted a couple of minutes and then "went to the other room". The total fight lasted five or ten minutes. T. 80. There were many occasions on which Petitioner made derogatory comments or had a bad attitude in response to job assignments. T. 81. He was not Petitioner's manager and did not have access to his file to see what, if any, write-ups he had received. T. 81. He was near Cooley and did not recall Cooley being in the "office room" when the two men fell on the table. Cooley had a "lot of animosity toward" Armstrong. During the fight he recalled Cooley saying that he wanted to get in there and land some punches himself. T. 83.

Under cross-examination, Arnold testified that the door between the delivery room and the appliance room is usually locked. T. 84. There is a little hallway or foyer between the two rooms. He was in the room where the altercation began but his back was turned. Arnold did not see the two men fall on the table but he heard them fall. T. 86. When he turned, the table was on the ground and the two men were "half on the ground and half up". They both got up. Armstrong told Petitioner he was fired [*17] and Petitioner "kept coming back at" Armstrong. Petitioner "wanted to fight". Arnold's employee had the door open and Armstrong walked through the door to get away from the fight. Petitioner and the employees who followed him "did not have authorization to go through that door". The only people who had authorization were the people with keys. T. 88-89.

13. Over objection (T. 96), Respondent offered records from the Circuit Court of the Twelfth Judicial Circuit (RX 1) showing that, at age seventeen, Petitioner pled guilty to possession of a stolen motor vehicle, a Class 2 felony. Petitioner was sentenced to two years of probation terminating September 8, 1995. Additional records showed that Petitioner was charged with unlawful possession of cannabis with intent to deliver, a Class 4 felony, in November of 1995 and that Petitioner pled guilty to this charge on August 5, 1996. Petitioner was sentenced to one hundred hours of community service and was ordered to pay various fines. Petitioner subsequently entered a drug rehabilitation program and was still making payments toward the assessed fines in February of 1998.

14. Respondent also offered records from the Will County Circuit Clerk [*18] (RX 2) reflecting that Petitioner was charged with battery on January 8, 2002, that he waived his right to a jury trial and that he was found guilty in July 2002 after a bench trial. He was sentenced to six months of supervision. Supervision was revoked on December 11, 2002 after he failed to show up in court and a judgment of conviction was entered.

15. Respondent also offered a summary of recorded statements given by Richard Armstrong, Kevin Arnold, Eric Wiktor and Robert Rodela along with the police report and another summary (RX 3). The Arbitrator rejected this exhibit but allowed Respondent to make an offer of proof. Armstrong's statement was taken on January 15, 2002, eleven days after the incident. The summary reflects that Petitioner constantly complained about his assigned routes and that on January 6th he complained that the assigned route would not allow him to go to church. The two exchanged racial slurs and Armstrong indicated he did not understand this since both he and Petitioner are African-American. Petitioner charged Armstrong with being racist and indicated he expected to be assigned to good routes since he and Armstrong are the same race. Petitioner accused Armstrong [*19] of giving the best routes to the Caucasian drivers. Armstrong denied touching Petitioner and said he was walking away when Petitioner made an offensive comment. Armstrong then told Petitioner he was fired and to give him his clipboard and radio. Petitioner told Armstrong he lacked the authority to fire him and Armstrong again told him he was fired. Wiktor and McAdory were nearby when these comments were exchanged. Armstrong

reached to take the clipboard and Petitioner punched him in the face. Petitioner then started kicking Armstrong as Armstrong was trying to go upstairs to an office. The police arrived. Armstrong indicated he did not file charges at that time because the police informed him that, since it was a fight between two adults, both Petitioner and Armstrong would have to be arrested. It was only after Petitioner was told to leave the premises that Armstrong decided to file battery charges. Armstrong, who was described as weighing 260 pounds, indicated that Petitioner was slightly heavier than he is. Armstrong stated he did not fight back because he felt he was management and he was trying to get out of the situation. The Commission notes that Armstrong's statement is devoid [*20] of any mention of the table incident.

Kevin Arnold was interviewed by phone on January 15, 2002 and could not testify to any verbal abuse between Armstrong and Petitioner. In Arnold's opinion, Petitioner was the aggressor. Armstrong walked away and tried to go upstairs, with Petitioner in pursuit. Petitioner was known as a chronic complainer. The incident of January 6th was "nothing new".

Wiktor's statement was taken on January 18, 2002. Wiktor indicated that he heard Petitioner complaining to Armstrong about his route and that there was then some "verbal abuse" between the two men. Petitioner complained all the time. He heard Petitioner tell Armstrong that he was going to "kick [Armstrong's] ass" before he quit or got fired. Petitioner told Armstrong that he would sell out his own race for five dollars. Wiktor indicated that he then turned his back for a few minutes and turned only when he heard a noise. He became aware that a fight had broken out. He grabbed one of the two men (he could not recall which one he grabbed) and then Armstrong tried to get away by going upstairs to the main office. Petitioner then pursued Armstrong and "started the fight all over again". Petitioner always [*21] complained about everything. Petitioner was definitely the aggressor.

The date of Rodela's statement is not indicated. Rodela stated that he has worked for Respondent for nine years and that he is currently the assistant warehouse manager. He recalled the incident beginning around 7 AM on January 6, 2002. He did not hear any verbal abuse between the two men. He only heard a lot of yelling. He then went to the office where the two men were arguing and "it became apparent" that Petitioner was the aggressor. Petitioner continued to badger Armstrong and "it was only then that an actual physical fight between the two individuals broke out". Rodela described Petitioner as a chronic complainer. Rodela initially believed Petitioner was terminated due to the fight but later learned that the fight broke out after Petitioner was told he had been fired.

The Joliet police report describes Armstrong as the victim and indicates he complained of "soreness to right eye" but did not undergo medical care. The incident was reported on January 7, 2002. The listed witnesses are Kevin Arnold, Rick Hicks, Sidney McAdory and Eric Wiktor. Armstrong indicated that he told Petitioner he was fired and ordered [*22] him to leave the building. Petitioner became upset and "struck Armstrong to the right eye with his fist". A struggle ensued and Armstrong attempted to walk away. Petitioner then came up behind him and hit Armstrong from behind. The police officer indicated he was unable to interview any of the listed witnesses.

An additional document dated June 6, 2002 summarizes the statements of John Vance, Rick Hicks and Randy Edwards and reflects that the investigator anticipated being able to interview McAdory within the following week. The investigator described Vance as "hostile" since he had been terminated by Respondent shortly after the incident for reasons unrelated to the incident. Vance described the delivery jobs as quite strenuous and indicated that tempers flare "almost daily" because some drivers perceive that they are being assigned worse routes than others. Vance described Petitioner as a chronic complainer and the incident as "inevitable". Vance only saw the conclusion of the fight and observed Armstrong trying to get away and go to an upstairs office. Hicks was still employed by Respondent and stated he left before the fight broke out. He indicated that Petitioner had long held [*23] a grudge against Armstrong and that the fight came as no surprise. He found it comical that the two men used racial slurs since both are African-American. Other employees told him that Petitioner threw the first punch but he did not observe this. At the end of the summary the investigator indicated he would continue to try to obtain McAdory's statement.

16. The Arbitrator found that Petitioner's battery conviction precluded him from relitigating the aggression-related issues involved in the instant case. The Commission disagrees with this finding. The doctrine of collateral estoppel does not apply unless "the issue decided in the prior adjudication is identical with the one presented in the suit in question". In the battery case, the issue was whether Petitioner caused bodily harm to Armstrong or made physical contact of an insulting or provoking nature with Armstrong. 730 ILCS 5/5-8-3. Determination of who was the initial aggressor was neither necessary nor essential to the judgment. In contrast, the issues in the instant case (with the Commission affirming the finding that the altercation was work-related) are whether Petitioner was the initial aggressor and whether his injury resulted [*24] from that aggression. The judge who conducted Petitioner's criminal bench trial would have had no reason to care about when the various aggressive acts occurred or which of these acts gave rise to Petitioner's own injury. Because there is no identity of issues the Commission finds that the doctrine of collateral estoppel does not bar Petitioner's workers' compensation claim.

17. The Arbitrator also found that Petitioner was not entitled to benefits since he was the initial aggressor. In support of this finding, he described Cooley as testifying that Petitioner punched Armstrong. The Commission views the evidence differently. Cooley testified that he saw Armstrong try to slap the clipboard out of Petitioner's hands and then lunge at Petitioner. T. 58. He did not see either man punching the other. T. 69, 71. The Arbitrator's description of Arnold's initial observations is also inaccurate. Arnold did not see either man punch the other before they "fell down on the table". T. 76-77.

The Arbitrator stated that Petitioner "failed to prove at what point" the arm fracture occurred. He found it more likely that Petitioner injured his arm in the second part of the fight and further found that [*25] Petitioner was the aggressor at that point. In the Commission's view, however, it is highly unlikely that Petitioner's complex left forearm fracture, with resultant bone fragments and nerve damage (PX 2), could have been caused by any event other than the initial table incident. Petitioner testified that the first contact occurred when Armstrong lunged at him after he had turned his back and that, as a consequence, he fell forward against a table, with his left arm pinned underneath him. Petitioner also testified that the table collapsed and that Armstrong fell on top of him. Petitioner gave the same account to Drs. Daley and Gross. Petitioner's witness, Crowley, confirmed that Armstrong got Petitioner in a "bear hug" and that the men then "fell through the table", with Armstrong leaning on Petitioner as they fell. T. 59. Respondent's own exhibit reflects that Armstrong weighed 260 pounds. RX 3. Petitioner testified that he felt the immediate onset of arm pain after falling "through" the table and that he unzipped his coveralls to check for visible damage. He acknowledged that the fight resumed in another room but denied striking Armstrong. The only witness who testified that Petitioner [*26] threw any punches was Respondent's witness, Arnold, and Arnold indicated that this happened after the table incident. He further admitted that Armstrong was also throwing punches and that some of Petitioner's punches did not land. The latter admission is consistent with the police report offered by Respondent (RX 3), which shows that Armstrong claimed only some eye soreness and did not seek medical treatment. Even assuming that Petitioner landed some punches in the second part of the fight it is improbable that such contact would have caused a complex forearm fracture.

Based on the weight of the evidence, the Commission finds that Petitioner was not the initial aggressor. The Commission further finds, in partial reliance on the opinion of Dr. Gross, that Petitioner's injury occurred as a consequence of his falling forward onto a table after Armstrong lunged at him and Armstrong landing on him in such a way that his left arm was pinned beneath him.

Consistent with these findings, the Commission awards Petitioner the medical expenses in PX 3 (\$ 765.00), PX 4 (\$ 7,986.86) and PX 5 (\$ 4,252.00). These expenses total \$ 13,003.86. The Commission further awards temporary total disability [*27] benefits from January 7, 2002 (the date on which Petitioner underwent surgery) through July 17, 2002, the date on which Dr. Daley released him to full duty, a period of 27 3/7 weeks. Based on the complex nature of Petitioner's fracture, Dr. Gross' findings and Petitioner's ongoing complaints, the Commission further finds that Petitioner is permanently partially disabled to the extent of 25% loss of use of his dominant left arm under Section 8(e).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$ 13,003.86 in reasonable and necessary medical expenses pursuant to Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$ 333.33 per week (based on the stipulated average weekly wage of \$ 500.00, Arb Exh 1) from January 7, 2002 through July 17, 2002, a period of 27 3/7 weeks, that being the period of Petitioner's temporary total disability pursuant to Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$ 300.00 per week (based on the stipulated average weekly wage of \$ 500.00, Arb Exh 1) for a period of 58.75 weeks for the reason that the [*28] injuries sustained caused the permanent partial disability of Petitioner to the extent of 25% loss of use of the left arm under Section 8(e) of the Act.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of \$ 40,100.00. The probable cost of the record to be filed as return to Summons is the sum of \$ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary for the Commission.

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With regard to the first and second prongs, after a bench trial, Wicks was convicted of battery pursuant to 720 ILCS 5/5-12-3, which states in relevant part:

(a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.

The Court determined that Wicks was guilty beyond a reasonable doubt of battery.

To ascertain the relevance of this conviction to the workers compensation action requires an examination of case law. The Supreme Court has determined that an "aggressor defense" is part of the Illinois workers' compensation law because of the need to determine whether an act of fighting is causally connected to the employment. As stated in Franklin v. Industrial Comm'n, 211 Ill.2d 272, 811 N.E.2d 684 (2004),

The question of who made the first physical contact, while important to determining whether that has occurred, is not decisive. [citation omitted] Rather, a claimant's conduct must be judged in light of the totality of the circumstances. [citation omitted] The circumstances obviously include the conduct of the other participant or participants in the fight. . . .

Id., 211 Ill.2d at 282, 811 N.E.2d at 690. Thus, it is important to determine whether Wicks was the aggressor in the altercation.

The Arbitrator in this case stated:

As previously noted, the petitioner was convicted of battery for the same incident on January 6, 2002. Richard Armstrong has not been charged or convicted of any crime related to the altercation. A Criminal Court in Will County has determined that beyond a reasonable doubt the petitioner intentionally caused harm to Richard Armstrong without legal justification. The petitioner is collaterally estopped on the issue of whether the Armstrong is at fault regarding the altercation because that issue has been already determined by the criminal courts using a higher standard of proof and convicted the petitioner of battery.

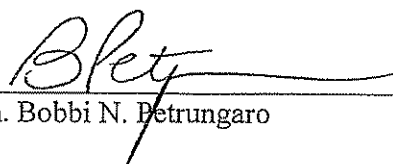
(R. at p. 000014.) The Commission, reversing the Arbitrator's finding in this regard, stated that the "[d]etermination of who was the initial aggressor was neither necessary nor essential to the judgment [of the criminal court]." (R. at p. 000213.)

However, the Court in the underlying action would have been required to ascertain whether Wicks had any legal justification to avoid a battery conviction. The Court found Wicks guilty of battery. Further, it is clear that Wicks had an incentive to fully participate. Wicks did not plead to the charge, but rather proceeded to bench trial while represented by counsel. No evidence or argument has been presented to indicate that Wicks did not fully participate in the criminal case.

The issue decided in the criminal case is identical with the issue decided here. Further, the Court in the criminal case made a final judgment on the merits in the prior case by finding Wicks guilty after a bench trial. All three of the elements required to apply collateral estoppel are met in this case, and therefore, Wicks is barred from relitigating the issue of who was the aggressor in the workers' compensation case.

WHEREFORE, the decision of the Commission is REVERSED and the decision of the Arbitrator is AFFIRMED. Clerk to notify.

9/4/04
Date


Hon. Bobbi N. Petrunaro

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394 Ill. App. 3d 1079, *, 917 N.E.2d 579, **;
 2009 Ill. App. LEXIS 1031, ***, 334 Ill. Dec. 753

BASSGAR, INC., d/b/a GRANT'S WEST HARDWARE, Plaintiff-Appellee, v. ILLINOIS **WORKERS' COMPENSATION** COMMISSION and DARIUS WICKS, Defendants-Appellants.

No. 3-08-0781WC

APPELLATE COURT OF ILLINOIS, THIRD DISTRICT, ILLINOIS **WORKERS' COMPENSATION** COMMISSION DIVISION

394 Ill. App. 3d 1079; 917 N.E.2d 579; 2009 Ill. App. LEXIS 1031; 334 Ill. Dec. 753

September 17, 2009, Submitted
 October 15, 2009, Filed

SUBSEQUENT HISTORY: Released for Publication November 20, 2009.

PRIOR HISTORY: [***1]

Appeal from the Circuit Court of Will County. No. 07-MR-947. Honorable Barbara Petrunaro, Judge, Presiding.

DISPOSITION: Circuit court judgment reversed; Commission decision reinstated.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant claimant suffered an injury to his left arm at work as a result of a physical altercation with his supervisor. Appellant Illinois **Workers' Compensation** Commission determined that the claimant was not the "initial aggressor" and awarded him medical expenses, temporary total disability benefits, and permanent partial disability benefits. The Will County Circuit Court, Illinois, set aside the Commission's decision. The claimant appealed.

OVERVIEW: The court concluded that the evidence supported the Commission's finding that the claimant was not the "initial aggressor." The evidence established that although the "altercation" between the claimant and his supervisor lasted no more than five or ten minutes, there were actually two separate acts of aggression. It was the first act of aggression that persuaded the Commission to conclude that the claimant was not the initial aggressor. A second act of aggression began when the claimant began to pursue the supervisor after the latter had retreated. The evidence established that although the claimant instigated a verbal dispute, he attempted to walk away. Prior to walking away, the claimant made a nonthreatening gesture toward the supervisor, who responded by taking hold of the claimant and throwing him against a table. Based on this evidence, the court could not say that a conclusion opposite to the one reached by the Commission was clearly apparent. Therefore, the Commission's decision was not against the manifest weight of the evidence. Although the claimant was convicted of battery, he was not collaterally estopped from asserting that the supervisor was the aggressor.

OUTCOME: The judgment of the circuit court was reversed, and the Commission's decision was reinstated.

CORE TERMS: claimant, aggressor, altercation, aggression, battery, arbitrator, route, arm, delivery, issue decided, supervisor, responded, criminal case, collaterally estopped, collateral estoppel, convicted, manifest, punches, prior adjudication, relitigating, compensable, assigned, adjacent, fracture, tackled, lasted, minutes, fight, walk, driver

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HN1 An injury is compensable under the Illinois **Workers' Compensation Act**, 820 ILCS 305/1 et seq. (2002), only if the claimant proves by a preponderance of the evidence that his injury arose out of and in the course of his employment. An injury is said to arise out of one's employment if the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the injury. Thus, where a physical confrontation occurring at one's place of employment involves a personal dispute unrelated to work, any injury which results is not considered to have arisen out of the employment. Conversely, an injury resulting from a fight between two employees involving a work-related issue is considered a risk incidental to the employment and is therefore compensable. However, the principle known as the "aggressor defense" provides that even if a fight is work related, an injury to the aggressor is not compensable. The rationale for the aggressor defense is that the claimant's own rashness negates the causal connection between the employment and the injury so that the work is neither the proximate nor a contributing cause of the injury. [More Like This Headnote](#)

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HN2 Identifying the aggressor in a workplace altercation is a question of fact for the Illinois **Workers' Compensation**

Commission. In making this determination, the fact that one party made the first contact is not decisive. Instead, the parties' conduct must be examined in light of the totality of the circumstances. These circumstances include the conduct of the other participant or participants in the altercation. An act of aggression may not be limited to merely physical conduct. As a question of fact, the Commission's finding regarding the identity of the aggressor will not be overturned on appeal unless it is against the manifest weight of the evidence. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. [More Like This Headnote](#)

[Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel](#)

HN3 Collateral estoppel is an equitable doctrine, the application of which precludes a party from relitigating an issue decided in a prior proceeding. Before collateral estoppel may be applied, three threshold requirements must be established. First, the issue decided in the prior adjudication must be identical with the issue presented in the suit in question. Second, there must have been a final judgment on the merits in the prior adjudication. Third, the party against whom estoppel is asserted must have been a party or in privity with a party to the prior adjudication. [More Like This Headnote](#)

COUNSEL: For Darius Wicks, Appellant: Mr. Dariusz Musial, Sachs, Earnest & Associates, Ltd., Chicago, IL.

For Bassgar, Inc., Appellee: Mr. Matthew J. Novak, Garafalo, Schreiber, Hart & Storm, Chartered, Chicago, IL.

JUDGES: JUSTICE HUDSON, delivered the opinion of the court. McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and DONOVAN, JJ., concur.

OPINION BY: HUDSON

OPINION

[*1080] [*581] JUSTICE HUDSON delivered the opinion of the court:

Claimant, Darius Wicks, suffered an injury to his left arm at work on January 6, 2002, as a result of a physical altercation with his supervisor. Claimant was charged with and convicted of battery (720 ILCS 5/12-3(a)(2) (West 2002)) for his role in the incident. Subsequently, claimant sought compensation for his injury under the Illinois **Workers' Compensation Act** (Act) (820 ILCS 305/1 et seq. (West 2002)). The arbitrator concluded that the altercation was "related" to claimant's work. Nevertheless, the arbitrator denied recovery, finding that claimant's criminal conviction collaterally estopped him from asserting that his supervisor was the aggressor.

[2]** Claimant appealed the matter to the **Workers' Compensation Commission** (Commission). The Commission rejected the arbitrator's finding that, because of his battery conviction, claimant was collaterally estopped from relitigating the identity of the aggressor. The Commission further determined that claimant was not the "initial aggressor" and awarded claimant medical expenses, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits. On judicial review, the circuit court of Will County set aside the decision of the Commission. Claimant then appealed the matter to this court.

I. BACKGROUND

Respondent, **Bassgar, Inc.**, d/b/a Grant's West Hardware, is an appliance **[*1081]** retailer. Claimant worked for respondent as a delivery driver. On January 6, 2002, claimant's left arm was injured during an altercation between claimant and his supervisor. On January 31, 2002, claimant filed an application for adjustment of claim seeking benefits for his injury. At the hearing on his application, claimant testified that, prior to the injury at issue, **[**582]** he had worked for respondent as a delivery driver for approximately 2 1/2 years. Regarding the events leading to the altercation with **[**3]** his supervisor, claimant testified as follows.

On January 6, 2002, claimant arrived at respondent's warehouse, retrieved his clipboard and radio, and began calling the customers on his route for that day. Claimant noticed that all but one of his deliveries were in the same vicinity. According to claimant, the remaining stop was "two hours out of [his] way" and would "make [him] get back several hours later." Claimant approached his supervisor, Richard Armstrong, regarding the anomalous delivery. Armstrong told claimant to stop complaining and then swore at him. Claimant stated that he intended to complete the route, but indicated that the one delivery was "out of place." Armstrong replied that if claimant did not want to complete the route as assigned, he could go home. Claimant then told Armstrong that he would complete the entire route except for the aberrant delivery. Armstrong responded that if claimant did not want to complete his entire route, he would be fired and that he should turn in his equipment. Claimant retorted that Armstrong did not have the authority to discharge him and he "waved [Armstrong] off."

Claimant then turned to walk to his truck. However, out of the corner **[**4]** of his eye, claimant observed Armstrong "coming at [him] at full speed." Armstrong grabbed claimant from behind, and the two men fell onto a table. Claimant fell face forward with his left arm tucked between his body and the table. Armstrong was on top of claimant. After the fall, Armstrong jumped up and ran through a nearby doorway. When claimant got up, he noticed a sharp pain shoot down his arm. Claimant then removed his coverall and "fiddl[ed]" with his arm, but he was unable to move it.

Claimant followed Armstrong, who had gone into an adjacent room, and asked him why he had pushed him into the table. Armstrong responded by pushing claimant and hitting him once or twice, causing claimant to fall. At that point, another employee approached, informed the men that he had called the police, and urged them to stop fighting. When the police arrived, Armstrong told them that he and claimant had an altercation after claimant was fired. The police instructed claimant to leave the premises. Claimant estimated that the entire altercation lasted about five minutes. Claimant denied striking Armstrong during the altercation.

[*1082] After claimant left respondent's premises, one of his coworkers took **[**5]** him to the hospital. Claimant was diagnosed with a mid-shaft fracture of the radius and a dislocation of the distal radial ulnar joint. The following day, claimant underwent an open reduction/internal fixation of the fracture with plates and screws. On February 20, 2002, claimant was allowed to return to work as long as he did not use his left arm. Claimant informed respondent that he had been released to restricted duty, but respondent told

him that he had been terminated.

Claimant testified that Armstrong filed a police report in relation to the incident and he (claimant) was arrested a couple of weeks after the events in question. Claimant was later charged by information with one count of battery (720 ILCS 5/12-3(a)(2) (West 2002)) and the matter proceeded to a bench trial. Claimant represented himself at the trial and his testimony was the only evidence presented on his behalf. Ultimately, the circuit court of Will County convicted claimant of the charged offense. The proceedings resulting in claimant's conviction were not transcribed. **[**583]** However, claimant offered the following explanation for the guilty verdict:

"The result of the trial they said that because I followed him after **[***6]** he tackled me, that on their part they said I was guilty for the battery because I followed him after he tackled me, for that part."

Claimant stated that Armstrong was never convicted of any offense related to the altercation because claimant opted not to file charges against him.

Daniel Cooley testified that he was also employed by respondent as a delivery driver on January 6, 2002. Cooley's testimony closely mirrored that of claimant. Cooley testified that, following the altercation, he heard claimant complain that his arm hurt and he took him to the hospital. Cooley stated that he never observed either of the men exchange punches, although there were a "few seconds" when both men were out of his view. Cooley stated that he has observed Armstrong become upset at other employees, but he had never seen Armstrong push or strike anyone prior to the events in question. Cooley indicated that he has remained friends with claimant and that he no longer works for respondent because he had "too many injuries."

Kevin Arnold testified that he has worked for respondent for 10 years and continued to do so at the time of the arbitration hearing. Arnold was present when the altercation between claimant **[***7]** and Armstrong occurred. According to Arnold, on the day in question, claimant was not happy with the route to which he was assigned. Claimant also expressed to Armstrong his opinion that he was not being treated well. Armstrong told claimant to complete his route or go home. The next thing Arnold knew, the two men had fallen onto a table. Armstrong **[*1083]** got up and walked away, but claimant followed him. According to Arnold, "a lot of yelling, some falling down, wrestling, and some punches" followed. Arnold observed claimant throw "many" punches at Armstrong, a few of which missed, causing claimant himself to fall. In contrast, Arnold stated that Armstrong punched claimant only in self-defense. Arnold instructed a fellow employee to call the police. Arnold estimated that the altercation lasted no more than five to ten minutes. Arnold added that it was not unusual for claimant to have a bad attitude or to complain about his route.

The arbitrator determined that the altercation between claimant and respondent was "related" to work. However, the arbitrator noted that in order to recover for an injury sustained during a workplace altercation, claimant was also required to establish that he was **[***8]** not the aggressor. The arbitrator found that claimant was "collaterally estopped on the issue of whether Armstrong is at fault regarding the altercation because that issue has been already determined by the criminal courts using a higher standard of proof" when claimant was convicted of battery. Having found that claimant was the aggressor, the arbitrator determined that claimant failed to sustain his burden of establishing that his injury arose out of and in the course of his employment.

The Commission found that collateral estoppel did not apply because the issue in the criminal proceeding was not identical to the issue in the **workers' compensation** proceeding. According to the Commission, a determination of the identity of the "initial aggressor" was neither necessary nor essential to the judgment in the criminal trial. Rather, the issue in the criminal case was whether claimant caused bodily harm to Armstrong or made physical contact of an insulting or provoking nature with Armstrong. See 720 ILCS 5/12-3(a) (West 2002). In contrast, the issue in the **workers' compensation** case was whether claimant was the "initial aggressor" and whether his injury resulted from that aggression. **[**584]** The **[***9]** Commission further determined that petitioner was not the initial aggressor. As such, the Commission awarded claimant \$ 13,003.86 as reasonable and necessary medical expenses (see 820 ILCS 305/8(a) (West 2002)), \$ 333.33 per week for a period of 27-3/7 weeks as TTD benefits (see 820 ILCS 305/8(b) (West 2002)), and \$ 300 per week for 58-3/4 weeks as PPD benefits, representing 25% loss of use of the left arm (see 820 ILCS 305/8(e) (West 2002)).

On judicial review, the circuit court of Will County set aside the decision of the Commission. The trial court rejected the Commission's finding that the court in the underlying criminal proceeding did not have to determine the identity of the initial aggressor:

[*1084] "[T]he Court in the underlying action would have been required to ascertain whether [claimant] had any legal justification to avoid a battery conviction. The Court found [claimant] guilty of battery. Further, it is clear that [claimant] had an incentive to fully participate. [Claimant] did not plead to the charge, but rather proceeded to a bench trial while represented by counsel [sic]. No evidence or argument has been presented to indicate that [claimant] did not fully participate in the **[***10]** criminal case.

The issue decided in the criminal case is identical with the issue decided here. Further, the Court in the criminal case made a final judgment on the merits in the prior case by finding [claimant] guilty after a bench trial. All three elements required to apply collateral estoppel are met in this case, and therefore, [claimant] is barred from relitigating the issue of who was the aggressor in the **workers' compensation** case."

This appeal ensued.

II. ANALYSIS

HNI An injury is compensable under the Act only if the claimant proves by a preponderance of the evidence that his injury arose out of and in the course of his employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). An injury is said to "arise out of one's employment if the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the injury. *Sisbro, Inc.*, 207 Ill. 2d at 203. Thus, where a physical confrontation occurring at one's place of employment involves a personal dispute unrelated to work, any injury which results is not considered to have arisen out of the employment. *Castaneda v. Industrial Comm'n*, 97 Ill. 2d 338, 342, 454 N.E.2d 632, 73 Ill. Dec. 535 (1983). **[***11]** Conversely, an injury resulting from a fight between two employees involving a work-related issue is considered a risk incidental to the employment and is therefore compensable. *Fischer v. Industrial Comm'n*, 408 Ill. 115, 119, 96 N.E.2d 478(1951). However, the principle known as the "aggressor defense" provides that even if a fight is work related, an injury to the aggressor is not compensable. *Franklin v. Industrial Comm'n*, 211 Ill. 2d 272, 279-80, 811 N.E.2d 684, 285 Ill. Dec. 197 (2004).

The rationale for the "aggressor defense" is that the claimant's "own rashness" negates the causal connection between the employment and the injury so that the work is neither the proximate nor a contributing cause of the injury. *Franklin*, 211 Ill. 2d at 280, quoting *Triangle Auto Painting & Trimming Co. v. Industrial Comm'n*, 346 Ill. 609, 618, 178 N.E. 886 (1931).

Identifying the aggressor in a workplace altercation is a question of fact [**585] for the Commission. *Franklin*, 211 Ill. 2d at 282. In making this determination, the fact that one party made the first contact [**1085] is not decisive. *Ford Motor Co. v. Industrial Comm'n*, 78 Ill. 2d 260, 263, 399 N.E.2d 1280, 35 Ill. Dec. 752 (1980). Instead, the parties' conduct must be examined in light of the totality of the circumstances. *Ford Motor Co.*, 78 Ill. 2d at 263. [**12] These circumstances include the conduct of the other participant or participants in the altercation. *Franklin*, 211 Ill. 2d at 282. We are also mindful that an act of aggression may not be limited to merely physical conduct. As a question of fact, the Commission's finding regarding the identity of the aggressor will not be overturned on appeal unless it is against the manifest weight of the evidence. *Franklin*, 211 Ill. 2d at 282. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *City of Chicago v. Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1093, 871 N.E.2d 765, 313 Ill. Dec. 38 (2007). In this case, a review of the totality of the circumstances supports the Commission's determination that claimant was not the "initial aggressor."

The evidence presented at the arbitration hearing establishes that although the "altercation" between claimant and Armstrong lasted no more than five or ten minutes, there were actually two separate acts of aggression. The first act of aggression began as a verbal dispute regarding the delivery route claimant was assigned on the date in question. Following an exchange of words, claimant "waved [Armstrong] off" and attempted [**13] to walk away. However, Armstrong responded by tackling claimant and forcing him against a table. As a result of Armstrong's actions, claimant's left arm became wedged between the table and his body, and he sustained a complex fracture to the limb. Armstrong eventually released claimant and walked into an adjacent room. Armstrong's decision to retreat from the physical contact and enter the adjacent room suggests that he intended to withdraw from the fight, and, consequently, that any danger to claimant had passed. Yet rather than leave Armstrong alone, claimant decided to follow him around and repeatedly ask why Armstrong had thrown him against the table. According to claimant, Armstrong responded by pushing him and hitting him once or twice. However, another witness suggested that claimant threw several punches at Armstrong and that Armstrong only reacted in self defense. In other words, a second act of aggression began when claimant began to pursue Armstrong after the latter had retreated. See *People v. Armstrong*, 273 Ill. App. 3d 531, 534, 653 N.E.2d 17, 210 Ill. Dec. 430 (1995) (stating that where the initial aggressor completely withdraws from an altercation, the victim's subsequent actions constitute a separate [**14] aggression); *People v. Lockhart*, 201 Ill. App. 3d 700, 714, 558 N.E.2d 1345, 146 Ill. Dec. 1011 (1990) (noting that although the victim initiated physical contact with the defendant, the defendant became the aggressor when he attacked the victim after the victim retreated); [**1086] *People v. Shappert*, 34 Ill. App. 3d 683, 688, 340 N.E.2d 282 (1975) (finding that the right to defend oneself does not permit the pursuit and injuring of an aggressor after the aggressor has abandoned the quarrel).

It was the first act of aggression that persuaded the Commission to conclude that claimant was not the initial aggressor. The evidence set forth above supports the Commission's finding. In particular, the evidence establishes that although claimant instigated the verbal dispute, he attempted [**586] to walk away. Prior to walking away, claimant made a nonthreatening gesture towards Armstrong. Armstrong responded by taking hold of claimant and throwing him against a table. Based on this evidence, we cannot say that a conclusion opposite to the one reached by the Commission is clearly apparent. Therefore, the decision of the Commission is not against the manifest weight of the evidence.

In so concluding, we reject the findings of the arbitrator and the trial court [**15] that, by virtue of claimant's conviction of battery, he is collaterally estopped from asserting that Armstrong was the aggressor. Collateral estoppel is an equitable doctrine, the application of which precludes a party from relitigating an issue decided in a prior proceeding. *American Family Mutual Insurance Co. v. Savickas*, 193 Ill. 2d 378, 387, 739 N.E.2d 445, 250 Ill. Dec. 682 (2000). Before collateral estoppel may be applied, three threshold requirements must be established. *Savickas*, 193 Ill. 2d at 387. First, the issue decided in the prior adjudication must be identical with the issue presented in the suit in question. Second, there must have been a final judgment on the merits in the prior adjudication. Third, the party against whom estoppel is asserted must have been a party or in privity with a party to the prior adjudication. *Savickas*, 193 Ill. 2d at 387. In this case, the first element is lacking. The Commission determined that the injuries for which claimant seeks compensation arose out of the first act of aggression. However, claimant's battery conviction did not relate to the first act of aggression. Rather, according to the testimony presented to the arbitrator, the battery conviction related to the [**16] second act of aggression. In particular, claimant testified that he was found guilty at the criminal trial because he followed Armstrong after Armstrong tackled him. There is no evidence that the court hearing the criminal charges considered claimant's role in the first act of aggression. In contrast, the Commission clearly did. It found that claimant was not the "initial aggressor" with respect to the first act of aggression. And, as we concluded above, the Commission's finding regarding the identity of the aggressor is not against the manifest weight of the evidence. Therefore, the issue decided in the criminal prosecution was not identical to the issue presented in the workers' compensation suit, and collateral estoppel does not apply.

[**1087] III. CONCLUSION

For the reasons set forth above, we reverse the judgment of the circuit court of Will County and reinstate the decision of the Commission.

Circuit court judgment reversed; Commission decision reinstated.

McCULLOUGH, P.J., and HOFFMAN, HOLDRIDGE, and DONOVAN, JJ., concur.






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