MacDonald, Chad

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

Aggressor doctrine

The Board has abandoned the aggressor doctrine in favor of a broader course of employment test. A worker is not disqualified from industrial insurance benefits solely because he was the aggressor in an assault. The test is not who started the assault but whether the worker was in the course of employment. **….*In re Chad MacDonald*, BIIA Dec., 13 13100 (2014)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CHAD A. MACDONALD	)	**DOCKET NO. 13 13100**
	)	
CLAIM NO. SG-63639	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Chad A. MacDonald, by
Meyer Thorp Attorneys At Law, PLLC, per
Stephen K. Meyer

Self-Insured Employer, Avista Corporation, by
Evans, Craven & Lackie PS, per
Jon D. Floyd

The claimant, Chad A. MacDonald, filed an appeal with the Board of Industrial Insurance Appeals on March 15, 2013, from an order of the Department of Labor and Industries dated January 18, 2013. In this order, the Department affirmed a December 18, 2012 order in which it denied the claim based on a determination that Mr. MacDonald was not in the course of employment at the time of injury. The Department order is **REVERSED AND REMANDED**.

PROCEDURAL AND EVIDENTIARY RULINGS

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer, Avista Corporation, to a Proposed Decision and Order issued on December 17, 2013. In this Proposed Decision and Order, the industrial appeals judge reversed the January 18, 2013 order, determined Mr. MacDonald was in the course of his employment at the time of his injury, and remanded the claim to the Department with directions to issue an order in which it allows the claim as an industrial injury. On March 4, 2014, the claimant filed a Response to the Petition for Review.

The Board has reviewed the evidentiary rulings in the record of proceedings. Our industrial appeals judge erred by failing to rule on a motion to strike made during the October 3, 2013 hearing. We grant this motion because Mr. MacDonald's answer after his first sentence was not responsive to the question before him. The portion of his answer starting on page 66, line 23, through page 67, line 20 is placed in colloquy. The Board has reviewed the remaining evidentiary rulings in the record of proceedings and finds no prejudicial error was committed**.** These rulings are affirmed.

DECISION

In its Petition for Review, Avista argues that Mr. MacDonald had deviated from the course of his employment at the time of his injury by leaving the most direct route to his destination in order to follow a truck driver who had provoked him while driving on I-90. It also maintains Mr. MacDonald is disqualified from having his claim allowed because he was the aggressor in the physical altercation in which he was injured, citing a significant decision, *In re Vince Polmanteer*, BIIA Dec. 88, 0362 (1989). The claimant's Response to the Petition for Review urges us to affirm our industrial appeals judge's decision that Mr. MacDonald was injured during the course of his employment because he never deviated from the course of his employment while driving his truck and was not the aggressor in the altercation resulting in his injuries.

We granted review because our industrial appeals judge's findings and conclusions exceeded our jurisdiction. While we agree with her determination that Mr. MacDonald was in the course of his employment at the time of the altercation that resulted in the injuries he wants covered in this claim, we do not have the authority to direct the Department to allow the claim. Our decision must be limited to resolving the course-of-employment issue, because that is all the Department order under appeal addresses. We also granted review to clarify the legal basis for our conclusion. We do not believe Mr. MacDonald was the aggressor in the May 24, 2012 altercation. In any event, we no longer reject claims based on the aggressor doctrine, and want to clarify the legal standard we use to adjudicate claims resulting from injuries incurred during a physical altercation with another person.

FACTUAL SUMMARY

We are in general agreement with the factual summary in the Proposed Decision and Order. We summarize the relevant facts here to provide the factual basis for our decision.

Prior to working for Avista, Mr. MacDonald served as an Army Ranger and had almost completed a training course to become a Spokane County sheriff. He also had worked as a corrections officer. Accordingly, he had received training in how to deal with dangerous confrontations. He started working for Avista in 2009 as a fleet driver. He drove company vehicles full time and stated he experienced a great deal of road rage because the company was unpopular in the Spokane area where he lived and worked. Mr. MacDonald reported having been concerned about his safety before the incident that resulted in this claim because he worked alone in his vehicle. About three months before the May injury that resulted in this claim, Mr. MacDonald had a gun pulled on him while driving. This incident presumably made him more apprehensive about becoming a victim of

violence. He testified he had organized a safety meeting to discuss how to deal with road rage. He was the safety officer for his department at the time and made a presentation to his co-workers regarding how to handle these situations.

On May 24, 2012, Mr. MacDonald was dispatched to drive from Spokane to Sand Point, Idaho. He decided to go to his house for lunch and break, which was entirely permissible based on company policies. Mr. MacDonald also chose to use a route to Sand Point that involved driving east on I-90; exiting the freeway before Coeur d'Alene; taking an arterial route often used by commercial truckers, the Idaho Road cut-off, to Trent; and then driving on U.S. 95 to Sand Point. He testified this was a route he had been shown when he was in training, and that it was preferable to staying on I-90 until it intersected U.S. 95 because it avoided the traffic and stoplights in Coeur d'Alene.

Mr. MacDonald's trainer, James Alderman, confirmed his testimony and stated this route was a quick way from Spokane to Sand Point. Mr. Alderman still worked for Avista when he testified for Mr. MacDonald. Mr. Alderman also confirmed that Avista did not require its drivers to use a specific route to travel to a particular destination. Donna Bartlett, Avista's fleet manager, also testified that Avista did not require employees to use specific routes and allowed workers to stop for lunch and breaks in their company vehicle. Spokane County Deputy Sheriff Greg Lance also confirmed the Idaho Road cut-off was a very common route used as a short cut by truckers. The evidence clearly establishes Mr. MacDonald had not deviated from the course of his employment to pursue a personal errand while driving from Spokane toward Sand Point during the afternoon of May 24, 2012.

On the afternoon of May 24, 2012, Mr. MacDonald was driving a large pick-up truck marked with an Avista insignia and pulling a trailer. He was driving east on I-90 near the Idaho border when the highway narrowed to two lanes due to construction. Mr. MacDonald found the right-hand lane in which he was traveling was an exit only lane. He had to merge with the remaining lane. Mr. MacDonald testified Victor Rogne was driving a flatbed truck behind him and refused to let him merge into his lane. After Mr. MacDonald was forced to merge, Mr. Rogne became upset because he felt he had been cut off. After the freeway returned to four lanes, Mr. Rogne illegally passed him in the far left lane, swerved at him, and flipped him off. Mr. MacDonald took pictures of Mr. Rogne's truck during this encounter. Mr. Rogne saw him taking the pictures and became even angrier. Both trucks exited at the appropriate exit for the Idaho Road cut-off. After exiting, Mr. Rogne called Avista to complain about Mr. MacDonald. These calls were recorded and can be heard at the end of Exhibit 1. Mr. Rogne admitted that he threatened to beat up Mr. MacDonald three times during this call.

Mr. MacDonald proceeded to drive about 12 miles from the exit. Around 1:15 p.m., he was on Idaho Road, a two-lane road, when he saw Mr. Rogne standing in a yard in front of his house. Unbeknownst to Mr. MacDonald, Mr. Rogne happened to live on Idaho Road. As soon as he saw the Avista truck, Mr. Rogne promptly started yelling at Mr. MacDonald. He then jumped into his personal vehicle, a Mountaineer, and sped past Mr. MacDonald. He admitted he was driving about 80 miles per hour in the lane going in the opposite direction in order to pass him. He proceeded to stop his car in the middle of the road, blocking Mr. MacDonald's pick-up. Mr. Rogne jumped out of his car and angrily approached Mr. MacDonald on the driver's side of the pick-up while swearing at him. Mr. MacDonald started swearing back but was calm. He recorded the confrontation on his cell phone. His recording shows Mr. Rogne running toward him and approaching the window of his truck. Mr. MacDonald then put his phone on his dashboard, so the remainder of the confrontation cannot be seen but much of it can be heard. The recording demonstrates that Mr. MacDonald repeatedly asked Mr. Rogne to back away from the vehicle and return to his car.

Unfortunately, Mr. Rogne did not retreat. He kept yelling at Mr. MacDonald, and then moved his arm to his back. Mr. Rogne was wearing a T-shirt identifying himself as a "Red-Neck Sportsman." Mr. MacDonald testified he thought Mr. Rogne was reaching for a gun. At that point, Mr. MacDonald testified his training took over. He could not escape; his route forward was blocked and he could not back up because there were cars stopped behind him. Mr. MacDonald exited his vehicle and took Mr. Rogne down in a chokehold until he was subdued. He admits he struck Mr. Rogne lightly in the face while restraining him. Mr. MacDonald directed a driver behind him to call 911. He released Mr. Rogne as soon as he was subdued. Mr. Rogne left the crime scene and returned to his home.

Mr. MacDonald called his employer and 911 after Mr. Rogne left. He sounded calm in a recording of his call with the 911 operator, which was entirely consistent with his testimony. Deputy Greg Lance, an experienced Spokane County Deputy Sheriff, responded and investigated the situation. He spoke first with Mr. Rogne at his home, and then went to the crime scene and interviewed Mr. MacDonald as well as several other witnesses. He also saw Mr. MacDonald's video. After talking with everyone, he concluded Mr. Rogne was the aggressor in this incident. He asked if Mr. MacDonald wanted to press charges. Mr. MacDonald declined because he preferred to talk with his employer first. Immediately afterward, Deputy Lance returned to Mr. Rogne's house to let him know the results of his investigation. Mr. Rogne became very angry and hostile, and used an

obscenity when he ordered him to leave immediately. Deputy Lance ultimately recommended that Mr. Rogne be prosecuted for assault.

There is no evidence Mr. Rogne was injured in this physical altercation, but there is evidence to the contrary regarding Mr. MacDonald. Mr. Rogne never received medical attention following this incident. He had no pictures showing any facial or other injury. Mr. MacDonald testified he injured both shoulders. Because there was no objection, he testified his left shoulder condition had been diagnosed as a left rotator cuff, biceps tendon, and SLAP lesion tears. No medical evidence was presented to confirm these diagnoses; diagnose Mr. MacDonald's right shoulder conditions; or establish the causal relationship of these conditions to the altercation.

DISCUSSION

While we are not condoning Mr. MacDonald's decision to exit his truck and subdue Mr. Rogne using a chokehold, we firmly believe he was acting in the course of his employment while doing so. Mr. MacDonald did not deviate from his course of employment by using the Idaho Road cut-off to travel between Spokane and Sand Point. He was authorized to use this route and was not deliberately pursuing Mr. Rogne when he drove by his house.

The real issue before us is whether Mr. MacDonald is disqualified from having his claim allowed based on the aggressor doctrine. This doctrine disqualifies an aggressor in a physical altercation from obtaining industrial insurance benefits because an assault is considered a deviation from a worker's course of employment. *In re Vince Polmanteer*, BIIA Dec., 88, 0362 (1989).

There are two major reasons Mr. MacDonald should not be disqualified based on this doctrine. The first reason is factual: we do not believe he was aggressor in this altercation. Prior to the altercation, Mr. Rogne admitted he would beat up Mr. MacDonald if he could. He took advantage of an unexpected encounter to do so. By running into a vehicle, hurriedly passing Mr. MacDonald at 80 miles an hour, and blocking his way, Mr. Rogne was clearly using his car to trap him. Exhibit 1 shows that Mr. Rogne was angry, aggressive, and threatening. Obviously, if Mr. Rogne had not chosen to confront Mr. MacDonald, there would not have been any altercation. Mr. MacDonald was pinned in his vehicle and could not drive away. His split second decision to defend himself by exiting his vehicle and placing Mr. Rogne in a chokehold is unusual because most people lack the strength or training to restrain someone in that fashion. However, had Mr. MacDonald remained in his vehicle and called 911, it would have taken some time for law enforcement to arrive. Deputy Lance testified the assault took place around 1:15 p.m., but he arrived at the scene at 2:02 p.m. He was the first officer to

arrive. We can understand that Mr. MacDonald could legitimately have feared grievous injuries if he had remained in his vehicle, called 911, and waited for law enforcement officers to defuse the situation. In short, we reach the same conclusion as Deputy Lance: Mr. MacDonald was the victim rather than the aggressor in this altercation.

As a matter of law, we would not disqualify Mr. MacDonald based on the aggressor doctrine even if we determined he was the assailant. Whether someone should be considered an aggressor who was outside of the course of employment at the time of his injury is not determined solely based on "who started it." To the contrary, we have determined we should abandon the aggressor doctrine and analyze cases involving assaults based on a broader course of employment analysis. *In re Margaret S. Johnson*, Dckt. No. 92,0403 (July 21, 1993). Under this analysis, if a worker was in the course of employment at the time of an assault, he or she is able to collect benefits even if he or she was the aggressor. *Johnson,* at 7-9. In the *Johnson* decision, we specifically overruled *Polmanteer*. *Johnson*, at 9. Instead, we relied on our holding in a prior significant decision and determined someone who initiated an assault could still get benefits. *In re Stanley Murebu,* BIIA Dec., 37,335 (1972). We still believe the holding in *Murebu* was correct and reaffirm its holding in this decision.

The facts in this case strongly support a conclusion that Mr. MacDonald was within the course of his employment at the time of his altercation. He was driving a truck to deliver equipment, thereby furthering Avista's interests, on a truck route between his base and his intended destination. He had not deviated from his work by taking this route to stalk Mr. Rogne, but was driving on the Idaho Road cut-off because he believed it was the fastest route to his destination. Even if we determined Mr. MacDonald initiated the altercation that resulted in his injuries, he should not be disqualified from obtaining benefits based on the aggressor doctrine.

Unfortunately, however, the findings and conclusions in the Proposed Decision and Order exceed the scope of our review by ordering the Department to allow this claim as an industrial injury. The Board's scope of review is limited to the issues the Department previously decided. *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970). It is black letter law that the Board's jurisdiction is "appellate only, and . . . if a question is not passed upon by the department, it cannot be reviewed either by the board or the superior court." *Lenk* at 982. Because the Department rejected the claim on the grounds Mr. MacDonald was not in the course of employment, we can only adjudicate whether the claim should be denied based on this doctrine. The Department has

not yet adjudicated the claim on a medical basis. We must remand the claim to the Department to determine whether this claim should be allowed as an industrial injury

FINDINGS OF FACT

1. On June 11, 2013, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Chad MacDonald was in the course of his employment with the Avista Corporation on May 24, 2012, when he was involved in a physical altercation with Victor Rogne, another truck driver, on the Idaho Road cut-off. The altercation occurred while he was driving a company vehicle between Spokane, Washington and Sand Point, Idaho. Mr. MacDonald had not deviated from his employment by driving on the Idaho Road cut-off in order to pursue a personal vendetta against Mr. Rogne.

3. Mr. MacDonald alleged he was injured as a result of this altercation and filed an Application for Benefits, which was rejected on the grounds he was not in the course of his employment at the time of his injury.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

2. The Department order dated January 18, 2013 is incorrect and is reversed. This claim is remanded to the Department to issue an order in which it determines Mr. MacDonald was in the course of his employment with Avista at the time of his injury. The Department is directed to take such further action as is appropriate under the law and the facts, including making a decision regarding whether this claim should be allowed as an industrial injury.

Dated: March 27, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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DAVID E. THREEDY Chairperson

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FRANK E. FENNERTY, JR. Member

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JACK S. ENG Member