

## **MacDonald, Chad**

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### **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)*

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

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

4 **APPEARANCES:**

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

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

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

16 **PROCEDURAL AND EVIDENTIARY RULINGS**

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

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

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

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

20 **FACTUAL SUMMARY**

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

23 Prior to working for Avista, Mr. MacDonald served as an Army Ranger and had almost  
24 completed a training course to become a Spokane County sheriff. He also had worked as a  
25 corrections officer. Accordingly, he had received training in how to deal with dangerous  
26 confrontations. He started working for Avista in 2009 as a fleet driver. He drove company vehicles full  
27 time and stated he experienced a great deal of road rage because the company was unpopular in the  
28 Spokane area where he lived and worked. Mr. MacDonald reported having been concerned about his  
29 safety before the incident that resulted in this claim because he worked alone in his vehicle. About  
30 three months before the May injury that resulted in this claim, Mr. MacDonald had a gun pulled on him  
31 while driving. This incident presumably made him more apprehensive about becoming a victim of  
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1 violence. He testified he had organized a safety meeting to discuss how to deal with road rage. He  
2 was the safety officer for his department at the time and made a presentation to his co-workers  
3 regarding how to handle these situations.

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

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

20 On the afternoon of May 24, 2012, Mr. MacDonald was driving a large pick-up truck marked  
21 with an Avista insignia and pulling a trailer. He was driving east on I-90 near the Idaho border when  
22 the highway narrowed to two lanes due to construction. Mr. MacDonald found the right-hand lane in  
23 which he was traveling was an exit only lane. He had to merge with the remaining lane.  
24 Mr. MacDonald testified Victor Rogne was driving a flatbed truck behind him and refused to let him  
25 merge into his lane. After Mr. MacDonald was forced to merge, Mr. Rogne became upset because he  
26 felt he had been cut off. After the freeway returned to four lanes, Mr. Rogne illegally passed him in the  
27 far left lane, swerved at him, and flipped him off. Mr. MacDonald took pictures of Mr. Rogne's truck  
28 during this encounter. Mr. Rogne saw him taking the pictures and became even angrier. Both trucks  
29 exited at the appropriate exit for the Idaho Road cut-off. After exiting, Mr. Rogne called Avista to  
30 complain about Mr. MacDonald. These calls were recorded and can be heard at the end of Exhibit 1.  
31 Mr. Rogne admitted that he threatened to beat up Mr. MacDonald three times during this call.  
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1 Mr. MacDonald proceeded to drive about 12 miles from the exit. Around 1:15 p.m., he was on  
2 Idaho Road, a two-lane road, when he saw Mr. Rogne standing in a yard in front of his house.  
3 Unbeknownst to Mr. MacDonald, Mr. Rogne happened to live on Idaho Road. As soon as he saw the  
4 Avista truck, Mr. Rogne promptly started yelling at Mr. MacDonald. He then jumped into his personal  
5 vehicle, a Mountaineer, and sped past Mr. MacDonald. He admitted he was driving about 80 miles  
6 per hour in the lane going in the opposite direction in order to pass him. He proceeded to stop his car  
7 in the middle of the road, blocking Mr. MacDonald's pick-up. Mr. Rogne jumped out of his car and  
8 angrily approached Mr. MacDonald on the driver's side of the pick-up while swearing at him.  
9 Mr. MacDonald started swearing back but was calm. He recorded the confrontation on his cell phone.  
10 His recording shows Mr. Rogne running toward him and approaching the window of his truck.  
11 Mr. MacDonald then put his phone on his dashboard, so the remainder of the confrontation cannot be  
12 seen but much of it can be heard. The recording demonstrates that Mr. MacDonald repeatedly asked  
13 Mr. Rogne to back away from the vehicle and return to his car.

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

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

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

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

### 10 **DISCUSSION**

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

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

20 There are two major reasons Mr. MacDonald should not be disqualified based on this doctrine.  
21 The first reason is factual: we do not believe he was aggressor in this altercation. Prior to the  
22 altercation, Mr. Rogne admitted he would beat up Mr. MacDonald if he could. He took advantage of  
23 an unexpected encounter to do so. By running into a vehicle, hurriedly passing Mr. MacDonald at  
24 80 miles an hour, and blocking his way, Mr. Rogne was clearly using his car to trap him. Exhibit 1  
25 shows that Mr. Rogne was angry, aggressive, and threatening. Obviously, if Mr. Rogne had not  
26 chosen to confront Mr. MacDonald, there would not have been any altercation. Mr. MacDonald was  
27 pinned in his vehicle and could not drive away. His split second decision to defend himself by exiting  
28 his vehicle and placing Mr. Rogne in a chokehold is unusual because most people lack the strength or  
29 training to restrain someone in that fashion. However, had Mr. MacDonald remained in his vehicle and  
30 called 911, it would have taken some time for law enforcement to arrive. Deputy Lance testified the  
31 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  
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1 arrive. We can understand that Mr. MacDonald could legitimately have feared grievous injuries if he  
2 had remained in his vehicle, called 911, and waited for law enforcement officers to defuse the  
3 situation. In short, we reach the same conclusion as Deputy Lance: Mr. MacDonald was the victim  
4 rather than the aggressor in this altercation.

5 As a matter of law, we would not disqualify Mr. MacDonald based on the aggressor doctrine  
6 even if we determined he was the assailant. Whether someone should be considered an aggressor  
7 who was outside of the course of employment at the time of his injury is not determined solely based  
8 on "who started it." To the contrary, we have determined we should abandon the aggressor doctrine  
9 and analyze cases involving assaults based on a broader course of employment analysis. *In re*  
10 *Margaret S. Johnson*, Dckt. No. 92,0403 (July 21, 1993). Under this analysis, if a worker was in the  
11 course of employment at the time of an assault, he or she is able to collect benefits even if he or she  
12 was the aggressor. *Johnson*, at 7-9. In the *Johnson* decision, we specifically overruled *Polmanteer*.  
13 *Johnson*, at 9. Instead, we relied on our holding in a prior significant decision and determined  
14 someone who initiated an assault could still get benefits. *In re Stanley Murebu*, BIIA Dec., 37,335  
15 (1972). We still believe the holding in *Murebu* was correct and reaffirm its holding in this decision.

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

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

3 **FINDINGS OF FACT**

- 4 1. On June 11, 2013, an industrial appeals judge certified that the parties  
5 agreed to include the Jurisdictional History in the Board record solely for  
6 jurisdictional purposes.
- 7 2. Chad MacDonald was in the course of his employment with the Avista  
8 Corporation on May 24, 2012, when he was involved in a physical  
9 altercation with Victor Rogne, another truck driver, on the Idaho Road  
10 cut-off. The altercation occurred while he was driving a company  
11 vehicle between Spokane, Washington and Sand Point, Idaho.  
12 Mr. MacDonald had not deviated from his employment by driving on the  
13 Idaho Road cut-off in order to pursue a personal vendetta against  
14 Mr. Rogne.
- 15 3. Mr. MacDonald alleged he was injured as a result of this altercation and  
16 filed an Application for Benefits, which was rejected on the grounds he  
17 was not in the course of his employment at the time of his injury.

18 **CONCLUSIONS OF LAW**

- 19 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
20 parties and subject matter in this appeal.
- 21 2. The Department order dated January 18, 2013 is incorrect and is  
22 reversed. This claim is remanded to the Department to issue an order in  
23 which it determines Mr. MacDonald was in the course of his employment  
24 with Avista at the time of his injury. The Department is directed to take  
25 such further action as is appropriate under the law and the facts,  
26 including making a decision regarding whether this claim should be  
27 allowed as an industrial injury.

28 Dated: March 27, 2014.

29 BOARD OF INDUSTRIAL INSURANCE APPEALS

30 \_\_\_\_\_  
31 DAVID E. THREEDY Chairperson

32 \_\_\_\_\_  
FRANK E. FENNERTY, JR. Member

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JACK S. ENG Member



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