

1986

William Michael Posso v. Cherne Construction, defendant employer and Wausau Insurance Company, defendant insurer : Brief of Respondent

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM MICHAEL POSSO,

Applicant/Respondent,

vs.

No. 860091

CHERNE CONSTRUCTION, defendant
employer and WAUSAU INSURANCE
COMPANY, defendant insurer,

Defendant/Applicants.

RESPONDENT BRIEF OF
WILLIAM MICHAEL POSSO

WRIT OF REVIEW FROM THE INDUSTRIAL COMMISSION
STATE OF UTAH

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Clerk Supreme Court, Utah

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RESPONDENT BRIEF OF
WILLIAM MICHAEL POSSO

WRIT OF REVIEW FROM THE INDUSTRIAL COMMISSION
STATE OF UTAH

ISSUE FOR REVIEW

Did the Administrative Law Judge and the Industrial
Commission error in granting worker's compensation benefits to
William Michael Posso?

DETERMINATIVE STATUTE

This case is governed by the provision of Utah Code
Annotated Section 35-1-45 (1953), as amended which states:

Every employee . . . who is injured . . . by
accident arising out of or in the course of
his employment, wheresoever such injury occurred
. . . shall be paid compensation for loss
sustained on account of the injury . . .

STATEMENT OF CASE

Benefits were awarded to William Michael Posso on September 12, 1985. A motion for review was filed by defendant/appellant. That motion for review was denied by the Industrial Commission on January 16, 1986. (R. 154-157). The defendants Cherne Construction and WAUSAU Insurance Company have filed for review of the decision made by the Administrative Law Judge and affirmed by the Industrial Commission.

STATEMENT OF FACTS

Michael W. Posso was injured on August 4, 1984. On that date he was employed by Cherne Construction and had been working for them at the Intermountain Power Project site in Millard County, Utah. He was injured when a vehicle turning into the employee housing (man camp) struck the motorcycle on which he was riding. (R. 32)

Applicant/Respondent admits that prior to the accident itself he had handed in his badge. (R. 29) He then preceded to the employee parking lot where he boarded his motorcycle and began driving toward Delta where he lived. (R. 30) He traveled from the main entrance to the Brush-Wellman Road. (R. 30-31).

The road he was traveling on (Brush-Wellman Road) at that point is principally used for the transportation of Intermountain Power Project (hereafter IPP) employees to and

from work. (R. 36 & 70). Applicant admits that other vehicles do use the road inasmuch as there are other businesses and farming areas beyond (west) of the IPP Plant. However, applicant's uncontradicted testimony was that 95 percent of the traffic on the road in the area where the accident occurred is workers at the plant. (R. 36, 64-66, & 70).

Although there was testimony concerning two alternate routes to the plant from Delta, both roads were unimproved (gravel). (R. 39-40 & 70). Further, applicant testified that the roads are impassable much of the year due to water and snow and were in bad repair. (R. 39).

One of the alternate graveled roads from Delta intersects with the Brush-Wellman Road east of the point where the accident occurred. Accordingly, persons intending to travel on that road would also be required to travel over the area where applicant was injured. (See map, R. 91).

The accident which is the subject of this case occurred near the entrance to the IPP employee housing or "man camp". The man camp is only available to employees working at the IPP Plant. In order to stay there an employee must have clearance as well as turning over their substance pay to the man camp. The man camp itself is a small area carved out of the IPP premises. The entrance to the man camp is west of the first service entrance to the IPP Plant. (See map R. 91, 76). In other words, employees traveling to the plant on the Brush

Wellman Road would pass the first service entrance, the entrance to the man camp then other entrances before coming to the main entrance to the IPP Plant. (Map R. 91). At the place where the accident occurred, the road is adjacent to and immediately south of the IPP Plant itself. (R. 74 & map R. 91).

It is also important to note that the original Brush-Wellman Road had been widened so that there were four lanes from the man camp to the plant. The entrance and exit of the man camps were such a congested area with a high level of traffic the road was widened to handle the traffic going to and from work. There had been a problem at the intersection of the man camp with accidents. (R. 37).

Lowell Curtis, the adjuster for WAUSAU testified that "just adjacent to the east boundary of the Intermountain Power Project" four lanes were established. He testified that the right hand lane of the west bound traffic had been established as a turning lane and the left hand lane of east bound traffic was established as a left hand turn lane. However, there was no testimony to indicate that the road was marked turn only and the photographs introduced as exhibits D3, D4, and D5, (found on page 95 of the record) show no markings or other signs to indicate the lanes were to be used exclusively as turning lanes. (R. 68 & 92).

As Mr. Posso began traveling east on the Brush-Wellman Road there was a vehicle in front of him and a vehicle on his right. He testified that traffic was light in relationship to the normal traffic on the road. (R. 31). Mr. Posso stated that he was following a Plymouth which was going about 45 miles per hour. He did not see brake lights or direction indicators at any time. When he was about 300 yards behind the Plymouth Mr. Posso started to slow more drastically. When he was 50 to 100 yards away from the Plymouth he felt the Plymouth was going so slowly that he was going to strike it in the rear unless he made some evasive maneuver. Because there was a Blazer to his right he moved to the right into the inside west bound lane. At that time the Plymouth, which still had displayed no directional signals, turned to the left, into the man camp striking Mr. Posso on his motorcycle. (R. 31-33 & 83-85). Applicant testified that he believed the driver of the Plymouth to be an employee of IPP. (R. 78).

As a result of the accident Applicant sustained serious injuries including a broken right femur, the shattering of his right patella, second and third degree burns over 30% of his body, a broken right shoulder and scapula and severe lacerations and abrasions. He spent approximately two months in the hospital and has received continuing medical treatment to the present date. (R. 33-34).

SUMMARY OF ARGUMENT

The principle issue to be decided in this case is whether the Administrative Law Judge and the Industrial Commission erred in awarding benefits to applicant/respondent William Michael Posso. The decision in this case is neither arbitrary or capricious and has substantial evidence to support it. On that basis alone the decision should be confirmed.

There is evidence that under either of the two exceptions to the general rule that employees traveling to or from work are not to receive workers compensation has been met. At the time of the accident Mr. Posso had reached the threshold of his employment and was in such a place that he was essentially on the premises of IPP and, as such, his employer Cherne Corporation.

Further, the location of the accident coupled with the special hazards at the accident site which were certainly connected with Mr. Posso's employment, combined to allow Mr. Posso to meet the "special hazard" exception to the coming and going rule recently set by the Utah Supreme Court.

ARGUMENT

POINT I

THE ADMINISTRATIVE LAW JUDGE'S DECISION
WAS NOT ARBITRARY OR CAPRICIOUS, WHOLLY
WITHOUT CAUSE OR WITHOUT ANY SUBSTANTIAL
EVIDENCE TO SUPPORT IT.

In reviewing cases brought to the Supreme Court by the Industrial Commission, the Court must determine if the Commissions findings are:

Arbitrary or capricious, or wholly without cause or contrary to the one inevitable conclusion from the evidence or without any substantial evidence to support them. Only then should the Commission's finding be displaced. Kaiser Steel Corporation v. Monfredi, 631 P.2d 888 (Utah, 1981) at page 890.

In this case there is substantial evidence to support the Administrative Law Judge's findings which were affirmed by the Industrial Commission. That evidence is discussed below. Further, there is no indication that the findings were arbitrary or capricious. The Administrative Law Judge's Findings of Fact Conclusions of Law and Order (R. 199-125) as well as the court decision Denying Motion for Review entered by the Commission (R. 154-158) are well reasoned and show a clear understanding of the law and facts applicable to the case.

POINT II

MR. POSSO WAS ON THE "THRESHOLD" OF THE PREMISES OF HIS EMPLOYER AT THE TIME OF THE ACCIDENT.

Applicant/respondent admits that the general rule, with some exceptions, is that an employee is not within the course of his employment when merely driving to and from work. Barney v. Industrial Commission of Utah, 29 Ut. 2d 184, 506

P.2d 1271 (1973). However, the Courts have construed the rule to hold that an employee is within the course of his employment once he has reached the primary or only means of entering his employers premises even if that means is not part of his employers property. Park Utah Consolidated Mines v. Industrial Commission, 103 Ut. 64, 133 P.2d 314 (1943).

At the time of the accident Mr. Posso was traveling on the principal route used by employees traveling to and from the plant. In fact, as the Court can see from looking at the map introduced by defendants at the hearing (R. 91) two of the three possible routes require travel past the man camp entrance. Although he did have a potential alternate route, that route was on an unpaved gravel road and not commonly used by the majority of the employees. Most employees choose to take advantage of the paved maintained road rather than unimproved, gravel roads.

Once Mr. Posso arrived at that portion of the Brush-Wellman Road adjacent to IPP Plant, he was essentially at the threshold of his employment. As the Court stated in Park Utah Consolidated Mines v. Industrial Commission, Supra:

When the employee arrives at the threshold of his employment and the means for entrance are limited so that he has no choice as to the mode of entrance, all of the hazards which are peculiar to such entrance are attached to his employment. The converse is equally true as to leaving the employment. (At page 317).

Further in the Park case, the court cited, with approval, the California case of Freire v. Matson Navigation Company, 19 Cal.2d 8, 118 P.2d 809:

The fact that an accident happens upon a public road and the danger is one to which the general public is likewise exposed, however, does not preclude the existence of a casual relationship between the accident and the employment if the danger is one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree. Park Utah Consolidated v. Utah Industrial Commission, at page 316.

In the instant case, the road on which Mr. Posso was driving was clearly a part of the "premises" of IPP and of his employer Cherne Construction, particularly since the accident happened at the intersection of the Brush-Wellman Road and the entrance to the employer-provided employee housing or man camp. The road on which the accident occurred was the practical means of entering or exiting the IPP plant for the majority of its employees. Mr. Posso was, along with the other IPP employees, peculiarly subjected to the hazards on that roadway.

In Bountiful Brick Company v. Giles, 276 U.S. 154 (1928), the United States Supreme Court in interpreting the Utah Workmen's Compensation laws held that where an employee was struck by a train while crossing railroad tracks on his way to work over a customary route he was within the course of employment. This decision was within the principle announced by Cudhay Company v. Parramore, 263 U.S. 418 (1922), wherein

the United States Supreme Court had earlier declared in a case involving another Utah accident victim that:

Probably, as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by employees as a means of ingress and egress with the express consent of the employer. Cudahy, at 426.

In Bountiful Brick, supra, the court found that the railroad tracks on the eastern edge of the brickyard, being the only means of ingress and egress from that direction, were such an adjacent area, and that when an employee crossed the tracks:

. . . his employment contemplated and included in itself the manner of so going to and from his work is, we think, a fair and necessary conclusion. The employee, in crossing the tracks at any time, was exposed to a peril which is common to all, but by virtue of his employment he was required to cross the tracks regularly and continuously thus being peculiarly and abnormally exposed to a common peril . . . and the risk thereby incurred was reasonably incidental to the employment and became annexed and an implied term thereof. Bountiful Brick, at page 159.

POINT III

THE ACCIDENT WHICH INJURED WILLIAM MICHAEL POSSO WAS A RESULT OF SPECIAL HAZARDS CONNECTED WITH HIS EMPLOYMENT.

Defendant and IPP place great reliance on the recent decision of this Court in Soldier Creek Coal Company v. Bailey, 709 P.2d 1165 (Utah 1985). Applicant asserts that there are significant difference between this case and the Bailey case.

Initially, Mrs. Bailey conceded that the Industrial Commission erred in finding the Special Hazards exception applicable. That distinction alone makes comparison difficult. Additionally, the cause of Mr. Bailey's accident was that the door on the driver's side of his vehicle popped open when he was negotiating a curve causing him to lose control and be thrown from the vehicle. It is interesting to note that Judge Moffitt (who heard both the case at issue and Bailey) found no special hazard associated with the road to the mine in the Bailey case but did recognize the special hazards near the IPP plant. In Bailey supra, the Supreme Court noted that the Industrial Commission in overturning the Administrative Law Judge, had grasped for facts to support their finding that the road was hazardous without any testimony from police officers or witnesses suggesting that the curve was dangerous and that the Commission had assumed the presence of coal or debris on the curve without any evidence of such. The Court also noted that there was no evidence to suggest that the curve in the road caused the accident. The testimony apparently was that the "precipitating event" was the opening of the door. In the instant case, there was evidence of hazards connected with the route which caused the accident.

However, Bailey, supra does afford a standard to be applied in this case. In Bailey supra the Utah Supreme Court has outlined the second exception to the rule that an employee

is not within the course of his employment when merely driving to and from work.

The first exception is that the accident is covered if it occurs on the employers premises. That exception has been previously discussed. The second exception or "special hazards exception" requires:

The off premises point at which the injury occurred lies on the only, or at least on the normal route call which employees must traverse to reach the plant and that therefore the special hazards of the route become the special hazards of the employment. Bailey, at page 1166. 1 A. Larsen, the Law of Workmen's Compensation section 15.13 (1985).

That exception has been met.

A. THERE IS A CLOSE ASSOCIATION BETWEEN THE ACCIDENT SITE AND THE EMPLOYERS PREMISES.

There is no question that the accident in which Mr. Posso was injured occurred on the normal route and essentially only practical route to the IPP plant. In fact, as stated earlier, although there were three routes which Mr. Posso could have taken from Delta to the plant, two of the routes converged requiring travel over the area where the accident occurred. Because the accident occurred at the entrance to the IPP man camp, west of the service entrance it is reasonable to assume that the majority of employees would have traversed the road in the area of the man camp either entering the camp or going past the camp to their homes.

B. THERE WERE ALSO SPECIAL HAZARDS
ASSOCIATED WITH THIS ROUTE.

There were a number of special hazards associated with the route on which Mr. Posso was traveling at the time of the accident.

1. INCREASED TRAFFIC IN THE AREA.

The Administrative Law Judge found that the increased traffic along the stretch of road in front of the IPP plant was a hazard created by the employment itself. No evidence refutes this decision. Defendant and IPP are attempting to convince the Court that because the traffic the day of the accident was relatively light, there was no hazard at that roadway. However, at the time of the accident the traffic was congested enough that there were two vehicles traveling essentially side by side along with Mr. Posso. Mr. Posso testified that there was other traffic on the road indicating that there was also other traffic in the area. Certainly, had IPP not built a plant in the area and required numerous employees to work on Saturday, there would likely have been almost no traffic in the area. That alone was a special hazard associated with the route.

2. THE IMPROPERLY EQUIPPED VEHICLE OF A
CO-EMPLOYEE

Another hazard was the Plymouth vehicle turning into the man camp without any signal lights or brake lights. The fact that the vehicle was turning into the man camp gives

credence to applicant's testimony that the driver was an IPP employee. In fact, only employees at the IPP plant could stay at the man camp and because there was nothing else which could be reached from the entrance to the man camp, it is unlikely that the driver turning into the man camp could have been anything but a co-employee with Mr. Posso. Because workers compensation is the exclusive remedy against co-employees as well as an employers, (Utah Code Ann. Section 35-1-60, 1953 as amended) risks created by such co-employees must be considered as special hazards.

3. POORLY ENGINEERED AND/OR MARKED ROAD.

As the Court can see from the photographs introduced into evidence as D3, D4, and D5, found in the record at number 92 the road itself is not marked and there are certainly no signs or indications on the road to show that the vehicles are approaching an intersection. Further, there are no indications that the left hand lane is a turn lane. In fact, from looking at the road itself it is more likely that persons traveling the roadway would believe it was merely a one lane road in each direction with a wide paved shoulder which would not generally be used for travel.

C. ALL OF THE SPECIAL HAZARDS CONTRIBUTED TO CAUSE THE ACCIDENT.

As Mr. Posso testified, this accident occurred when he was traveling at 45 miles per hour behind a vehicle

which suddenly stopped in front of him displaying no brake light or turn indicators. Because he was unable to stop quickly enough and there was traffic to his right, he attempted to avoid an accident by passing on the left. As he passed, the vehicle turned into him. Certainly, had the vehicle turning into the man camp been properly equipped, had the road been more clearly marked, and/or had traffic been lighter, the accident would not have occurred.

CONCLUSION

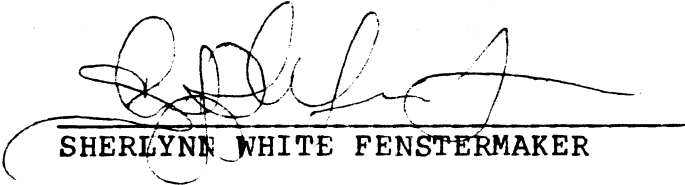
Applicant asserts that the decision of the Administrative Law Judge and the Industrial Commission must be upheld. At the time of the accident Mr. Posso was traveling the commonly used route to the plant and in fact the only paved route at the time of the accident. He was thus subjected to erratic driving by co-employees and/or vehicles which were not in proper working order or equipped with appropriate signal devices. Additionally, he was required to travel over a road which had been initially constructed for light traffic to various mines and farms beyond the IPP plant. When IPP was constructed, some minor modifications were made in the road to allow it to handle greatly increased traffic. However, clearly those modifications were not sufficient. Accordingly, there were special hazards associated with the route which Mr. Posso took and those special hazards caused him to be badly injured.

Applicant does not suggest that all accidents occurring on the Brush-Wellman Road would be compensatable. However, inasmuch as the accident occurred at the intersection with the employee-provided housing (man camp), the premises of IPP extends to such point and the hazards associated with that roadway are peculiar to employees of contractors or sub-contractors at IPP and workers compensation should be afforded in this case.

There has been no showing that the decision of the Industrial commission were arbitrary, capricious or without evidentiary support. As stated heretofore, there is a great deal of evidence and law to support the decision.

For the foregoing reasons, applicant/respondent respectfully requests that the decision of the Industrial Commission be affirmed.

Respectfully submitted, this 9th day of September, 1986.


SHERLYNN WHITE FENSTERMAKER

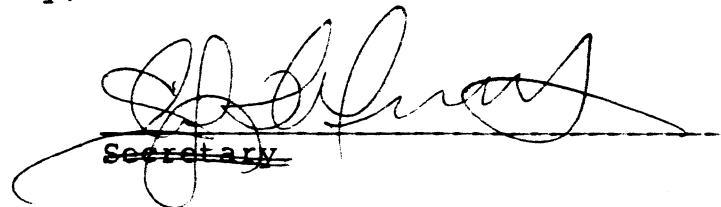
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of William Michael Posso with postage prepaid thereon this 9th day of September, 1986 to:

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