

1986

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

Utah Supreme Court

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## Recommended Citation

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UTAH  
DOCUMENT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH  
860091

WILLIAM MICHAEL POSSO,  
Applicant/Respondent,  
vs.  
CHERNE CONSTRUCTION, defendant  
employer and WAUSAU INSURANCE  
COMPANY, defendant insurer,  
Defendants/Applicants.:

No. 860091

138

BRIEF OF APPELLANT  
CHERNE CONSTRUCTION

WRIT OF REVIEW FROM THE INDUSTRIAL COMMISSION  
STATE OF UTAH

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FILED

JUN 12 1986

IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM MICHAEL POSSO,	:	
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Applicant/Respondent,	:	
	:	
vs.	:	
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	:	
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BRIEF OF APPELLANT  
CHERNE CONSTRUCTION

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BRIEF OF APPELLANT  
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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Industrial Commission erred when it determined that the "special hazard" exception to the "going and coming" rule applied in this case.

DETERMINATIVE PROVISIONS

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is dispositive or determinative of the case at hand.

STATEMENT OF THE CASE

Nature of Case. This matter is before the Court on a Writ of Review of an Order of the Industrial Commission awarding benefits to the applicant, William Michael Posso, who was injured as a result of an automobile/motorcycle accident near the IPP Power Plant north of Delta, Utah. The applicant made a claim for worker's compensation benefits as a result of this accident and the injuries he received. Essentially, the

applicant argued that he should be entitled to worker's compensation benefits because the injury occurred on his way home from work. Subsequently, the defendant Cherne Construction Company moved for a review of the Administrative Law Judge's decision. The Order of the Industrial Commission denying the Motion for Review was passed by the Industrial Commission on the 16th day of January, 1986. As a consequence, this matter is before the Court on the Writ of Review.

Statement of Facts.

The applicant, William Michael Posso, was injured on August 4, 1984, in an automobile/motorcycle accident on Brush Wellman Road, in Millard County, Utah. (R. 27, 31-32)

On the date of the accident, Mr. Posso was employed by Cherne Construction Corp., also known as Cherne Construction. (R. 26)

The applicant was a construction laborer for Cherne Construction at the IPP Power Plant north of Delta, Utah, located just off the Brush Wellman Road. (R. 27)

Approximately 3:30 p.m. on the date of the accident, the plaintiff completed his job duties at the IPP Plant. He turned in his employee badge at approximately 3:35 p.m. and was not intending to perform any other work duties that day. (R. 28-29)

The applicant then went to the parking lot to get on his motorcycle in order go home, to Delta, Utah. He exited the IPP Plant and intended to travel east on Brush Wellman Road to where it intersects with highway 6. He then intended to travel

south on highway 6 to Delta. (R. 30, 40, 47)

While traveling on Brush Wellman Road the applicant attempted to pass a vehicle which was turning left into the man-camp near the IPP Plant and subsequently the accident occurred. (R. 31-32)

Brush Wellman Road is a public highway maintained by Millard County. (R. 66-67)

The Brush Wellman Road at the entrance to the man-camp has been widened into a four (4) lane highway. (R. 36-37)

Brush Wellman Road was not the exclusive access to the IPP Plant. In fact, there were at least two other access roads to the plant. (R. 36, 39, 46-47)

Brush Wellman Road was not used exclusively by workers at the IPP Plant nor did it pass through the IPP Plant itself. (R. 36, 39)

#### SUMMARY OF ARGUMENT

There is only one major issue to be resolved in this particular case: Did the applicant, William Michael Posso, sustain his injury in the course of his employment? As stated above, it appears that Mr. Posso was injured on his motorcycle on his way home from work on August 4, 1984. It is the general rule that travel to and from work is not normally considered to be in the course of an employee's employment. There are, however, certain exceptions to this rule, which is commonly referred to as the "going and coming" rule. Specifically, an employee may recover worker's compensation benefits as a result



of an injury received while he is going or coming from work if the injury incurrns either "on the premises" of the employer or if the route which the employee must travel to and from work presents a "special hazard" to travel, thus becoming a special hazard of employment. It is undisputed in this case that the accident in question did not occur on the premises of the employer, Cherne Construction. Consequently, the only issue in this case is whether or not the "special hazard" exception to the "going and coming" rule applies.

There are a number of cases in Utah which set out and explain the going and coming rule and the applicable exceptions to the rule. A careful examination of those cases yields the inescapable conclusion that there was no special hazard to Mr. Posso as contemplated by law. Further, it is apparent that Mr. Posso cannot satisfy all of the requirements of the special hazard test which has been set out by the Utah Supreme Court. Finally, extension of the "special hazard" exception to the facts of this case will enlarge the exceptions to the "going and coming" rule to the point that the exceptions swallow the rule. Specifically, to allow Mr. Posso to obtain workman's compensation benefits as a result of the accident in this case will in effect vitiate the going and coming rule. There can be, if benefits are extended in this case, no distinction between the accident in the case at hand and any other accident that an employee encounters on the way to or from his or her place of business as a result of congestion or a busy intersection. As a consequence, it would be improper for the

Court to sustain the finding of the Industrial Commission.

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION ERRED WHEN IT  
DETERMINED THAT MR. POSSO WAS INJURED IN  
THE COURSE OF HIS EMPLOYMENT.

A. History of the Special Hazard Exception.

Unless the injuries of William Michael Posso can be considered to have arisen out of or in the course of his employment, workman's compensation benefits should be denied. Utah Code Ann. §35-1-45 (1953 as amended) specifically states that an employee is entitled to benefits if his injury is caused "by accident arising out of or in the course of his employment . . . ." The question in this case is whether or not his injury occurred during the course of his employment. The particular issue in this case is whether or not the circumstances surrounding Mr. Posso's accident amount to an exception to what has been called the "going and coming" rule. Generally, workmen's compensation benefits are not afforded to employees injured while traveling to and from work. See, e.g. Fidelity & Casualty Co. v. Industrial Commission, 8 P.2d 617, 618 (Utah 1932). There are however, some exceptions to the going and coming rule which have been recognized by the Supreme Court of the State of Utah.

As long ago as 1938 the Supreme Court of this State has determined that if a workman was injured in the normal course of things, while going to or coming from his or her place of employment, such an accident was the result of the

general hazards which all must meet and assume and consequently was not in the course of employment. Vitagraph, Inc. v. Industrial Commission, 85 P.2d 601, 603 (Utah 1938). The Court in Vitagraph called this the "plant" rule; that is, under this rule the employee does not actually become attached to his employment until he arrives at the plant or place of his employment and he is not in employment after he leaves the plant or place of employment. Id. at 603.

Two cases, Bountiful Brick Co. v. Industrial Commission, 68 Utah 600 251 P.555, affirmed 276 U.S. 154, 48 S. Ct. 221, 72 L. Ed. 507 (1927), and Cudahy Packing Co. v. Industrial Commission, 60 Utah 161, 207 P.148, affirmed 263 U.S. 418, 44 S. Ct. 143, and 68 L. Ed. 366 (1923), carve out an exception to the "going and coming" rule. In both Cudahy and Bountiful Brick Co., while on the way to work and within 100 feet or less of the place of employment, the decedent in each case was struck and killed by a train. In both cases, the proximity of the risk to the place of employment and the fact that the risk was regularly encountered by the employees of the business, whereas the public encountered the risk only occasionally, were controlling. It appeared under the facts of Cudahy that it was necessary for each employee to enter the plant over a particular road, which was the only road leading to the plant. Evidently, the Court predicated its decision in Cudahy, allowing benefits, upon the inference that the danger incident to crossing the railroad track, by reason of its location and proximity to the packing plant and the necessity

of crossing it, must have been within the contemplation of the parties, that is the employer and the employee at the time of employee and as a incident thereto. Basically, the Court determined that the employer's control over the employee was extended beyond the actual confines of the plant to the road that the employee was required to use as a place of danger, that is the railroad track.

A similar decision was reached in Bountiful Brick. In that case, the Court extended benefits to the decedent's dependants. The decedent crossed railroad tracks by foot to his place of business at a point where an opening in the plaintiff's fence was made in order to accommodate the ingress of plant employees. The Court stated that "by virtue of his employment [the employee] was . . . peculiarly and abnormally exposed to a common peril." Obviously, the Court determined that by being forced to cross a railroad track between fences on a daily basis the decedent was regularly exposed to a perial not encountered by the public at large. It is interesting to note that in both Bountiful Brick and Cudahy, the decedents were struck and killed by a train while on their way to work and within 100 feet or less of their place of employment. In both cases, the proximity of the risk to the place of employment and the fact that the risk was regularly encountered by the employees of the business, whereas the public encountered the risk only occasionally, were controlling.

However, this Court has more recently clarified the "special hazard" exception to the going and coming rule in the

case of Soldier Creek Coal Co. v. Bailey, 709 P.2d 1165 (Utah 1985). In that case the claimant's deceased, Mr. Bailey, was employed by a coal company 17 miles from his home in Price, Utah. There was only one road leading to the mine. From the mine the road continued on to Myton and serviced a number of ranches on that portion of the road. At any rate, the plaintiff was thrown from his pickup truck less than a third of a mile from the place of employment. The claimant alleged that the accident occurred because of a special hazard imposed by the road that serviced the mine site. Specifically, the Industrial Commission concluded that the condition of the road, which consisted of an inclined sharp right hand curve, posed a special hazard of employment. As a consequence, it determined that the accident was compensable. The Supreme Court of the State of Utah reversed and in so doing set out the elements of the "special hazard" exception to the going and coming rule which must be met before an accident can be considered compensable.

The Court determined that:

The commonest ground of extension [of the premises rule] is that the off-premises point at which the injury occurred lies on the only route, or at least on the normal route, which employees must traverse to reach the plant, and therefore the special hazards of the route become the hazards of employment.

Id. at 1166, citing 1 A. Larsen, The Law of Workmen's Compensation §15.13 (1985). The Court went on to set out the four requirements that must be met before the special hazards exception to the going and coming rule can be met.

First, there must be a close association between the route taken by the employee and the employer's premises, which usually means that the route must be the "only" route to the work place. Second, there must be an identifiable special hazard associated with the route. Third, the employee must be exposed to the special hazard as a result of his use of that route. Finally, the special hazard must be the proximate cause of the accident. The claimant simply cannot meet any of the requirements set out above.

B. The Special Hazard Exception Does Not  
Apply to this Case.

As stated in Soldier Creek Coal Co. v. Bailey, supra., at 1166, there is a four-prong test that must be satisfied. The first prong of that test is that "there must be a close association of the access way with the employer's premises, usually meaning that it must be the only route to the work place . . . ." It was well established at the hearing of this matter that in fact there were at least two other routes available to enter or leave at the IPP Plant. Although Cherne Construction concedes that the Brush Wellman Road was the most normally used access route to the IPP Plant, it does not concede that there is such a close association with the IPP Plant, as contemplated under Utah law, as to bring it within the special hazard exception to the going and coming rule. Specifically, although the Brush Wellman Road was the primary access point to the IPP Plant itself the Brush Wellman Road also was used by workers from other businesses on the road as

well as the general public. What is particularly interesting about this case and what militates against the claimant's assertion that the highway has a close association with the employer's premises is the fact that the accident in question occurred at a place on the highway which had absolutely no connection whatsoever to the means of ingress or egress to the claimant's place of employment. The facts were otherwise in Cudahy and Bountiful Brick, supra.

The second prong of the test as set out in Soldier Creek Coal Company v. Bailey, is that "there must be a special hazard associated with this route . . . ." Id. at 1166. Notwithstanding the finding of the Administrative Law Judge that there was a special hazard and notwithstanding the concurrence of the Industrial Commission with the Administrative Law Judge in denying the defendant's Motion for Review, no special hazard, as contemplated under Utah law, existed. Specifically, the Administrative Law Judge found that there was a hazard created by the employment itself. The Administrative Law Judge stated in her discussion that:

"[t]he applicant would not have been traveling on that heavily congested road for any reason but to go to or depart from his employment. . . . No matter what road the applicant chose to take back to Delta, he would still have been subjected at some point to the heavy traffic on the Brush Wellman Road along the IPP site. The fact that the applicant was actually struck by another IPP employee turning into the employer owned man-camp is another consideration to which the Administrative Law Judge gives considerable weight. The Administrative Law Judge is satisfied that there is a distinct causal connection between the condition under which the

applicant had to leave the premises and the occurrence of the injury, and feels that it would be a grave injustice not to extend coverage in this matter." (R. 123)

These statements by the Administrative Law Judge are in direct contravention to the testimony of the applicant himself. The applicant was asked:

Q: How was traffic that afternoon?

A: It was light.

Q: The traffic was light, but there was other traffic on the road; is that right?

A: That's correct.

Beyond the fact that there was other traffic on the road consisting of some other employees from the IPP Plant, there was no showing whatsoever that the traffic was unusually heavy or that it presented any special hazard. The Administrative Law Judge's findings as well as the findings of the Industrial Commission are completely gratuitous, just as the findings of the Industrial Commission in Soldier Creek Coal Company v. Bailey, supra. were gratuitous. In that case, the Court overturned the commission's ruling that the deceased was exposed to a "special hazard" because he was killed when his vehicle overturned on a graded sharp turn. Likewise, in that case, the commission noted that it was common knowledge that roads to and from coal mines were normally covered with loose coal and debris and that under those circumstances it was clear that the claimant's death was a result of a special hazard presented by the road to the mine. The Supreme Court reversed and noted that there were no findings to support the evidence, likewise, there are no



findings of fact in this case which would support the Administrative Law Judge's finding that there was a special hazard associated with the route. Further, the Industrial Commission itself stated that there is no Utah law on whether heavy traffic can be considered a special hazard. The Commission determined unilaterally, without considering other factors, that the applicant was exposed to a "special hazard." Such a finding is not supported by the evidence.

The third prong of the test states that "the employee must be exposed to the special hazard because of his use of the route . . . ." Id. at 1166. Assuming that there was a special hazard associated with the route, and assuming that that special hazard was the congested nature of the Brush Wellman Road, then the applicant clearly falls short of satisfying the third requirement of the special hazard exception to the going and coming rule. By the applicant's own testimony, as stated above, traffic on that particular afternoon on the Brush Wellman Road was in the applicant's words, "light." (R. 31). No other argument on this particular point is required. The fact is, Mr. Posso was not exposed to any special hazard.

Finally, the fourth prong of the test as set out by this Court is that "the special hazard must be the proximate cause of the accident." Id. at 1166. Again, the claimant, William Michael Posso, cannot meet his burden by showing that the special hazard was the proximate cause of the accident. The facts are undisputed, the applicant states:

As I got approximately, oh, 100 to 150 yards away from the car, I noticed that it was slowing almost to a stop and the blazer was still on my right and I could not go into the other lane, so I attempted to pass the car on the left and as I turned into the west bound lane to go around the car, it turned into me.

(R.32). As stated before, the facts show that William Michael Posso was following another vehicle in the inside east bound lane on the Brush Wellman Road leaving work. The vehicle in front of him slowed down in order to turn into the man-camp. The vehicle beside him did not allow Michael Posso to move over to the right in order to pass the car in front of him. As a consequence, Mr. Posso determined that he would pass the vehicle on its left. The exhibits D3, D4 and D5, which are part of the record on appeal, clearly show Brush Wellman Road at the entrance to the man-camp. Those photographs also show that the four-lane highway is divided by a double yellow line in the middle. Mr. Posso clearly improperly attempted to pass the vehicle that was slowing down in front of him. It cannot possibly be stated that heavy traffic or a congested Brush Wellman Road were the proximate cause of the applicant's injuries. As a consequence, it is clear, particularly in light of Soldier Creek Coal Company v. Bailey, supra, that the applicant cannot show a "special hazard" exception to the going and coming rule.

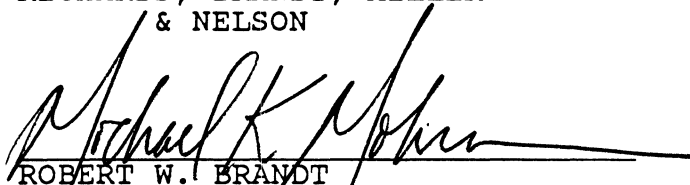
#### CONCLUSION

The defendant, Cherne Construction, urges this Court to reverse the decision of the Industrial Commission on the grounds that there is no applicable exception to the going and

coming rule and upon the policy grounds to allow benefits in this case would eliminate a reasonable and well established rule in the State of Utah.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of June, 1986.

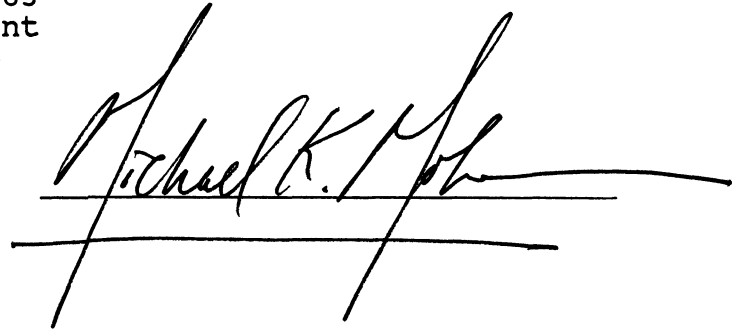
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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing instrument was mailed on this 12<sup>th</sup> day of June, 1986 to the following counsel of record:

Sherlynn W. Fenstermaker  
P.O. Box 559  
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Attorney for Respondent  
William Michael Posso

A handwritten signature in dark ink, appearing to read "Michael K. Posso", is written over two horizontal lines. The signature is stylized with a large initial 'M' and a long horizontal stroke at the end.