

1986

William Michael Posso v. Cherne Construction, defendant employer and Wausau insurance Company, defendant insurer : Amicus Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Sherlynn W. Fenstermaker; attorney for respondent.

Robert W. Brandt, Michael K. Mohrman; Richards, Brandt, Miller and Nelson; attorneys for appellant.

Recommended Citation

Legal Brief, *Posso v. Cherne Construction*, No. 860091.00 (Utah Supreme Court, 1986).
https://digitalcommons.law.byu.edu/byu_sc1/857

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
K F U
45.9
.S9
DOCKET NO. 860091

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.

AMICUS CURIAE BRIEF OF
INTERMOUNTAIN POWER AGENCY

WRIT OF REVIEW FROM THE INDUSTRIAL COMMISSION
STATE OF UTAH

HENRY K. CHAI II
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Attorneys for Intermountain Power
Agency

SHERLYNN W. FENSTERMAKER
P. O. Box 559
Springville, Utah 84663
Attorney for Respondent
William Michael Posso

ROBERT W. BRANDT
MICHAEL K. MOHRMAN
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
P. O. Box 2465
Salt Lake City, Utah
Attorneys for Appellant
Cherne Construction

FILED
AUG 22 1986

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.

AMICUS CURIAE BRIEF OF
INTERMOUNTAIN POWER AGENCY

WRIT OF REVIEW FROM THE INDUSTRIAL COMMISSION
STATE OF UTAH

HENRY K. CHAI II
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Attorneys for Intermountain Power
Agency

SHERLYNN W. FENSTERMAKER
P. O. Box 559
Springville, Utah 84663
Attorney for Respondent
William Michael Posso

ROBERT W. BRANDT
MICHAEL K. MOHRMAN
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
P. O. Box 2465
Salt Lake City, Utah
Attorneys for Appellant
Cherne Construction

TABLE OF CONTENTS

	<u>Page</u>
ISSUES PRESENTED FOR REVIEW	1
DETERMINATIVE STATUTE	2
STATEMENT OF THE CASE	2
A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BY THE INDUSTRIAL COMMISSION	2
B. STATEMENT OF THE FACTS	3
SUMMARY OF ARGUMENTS	5
ARGUMENT.	6
POINT I - SINCE POSSE WAS TRAVELING ON HIS NORMAL ROUTE, RATHER THAN ON THE ONLY ROUTE, THERE IS NO CLOSE ASSOCIATION	7
POINT II - THE PROXIMITY OF THE BRUSH-WELLMAN ROAD TO THE IPP PLANT WITHOUT ANY IDENTIFICA- TION OF THE ROAD WITH THE WORK PLACE PRECLUDES A FINDING OF CLOSE ASSOCIATION WITH THE WORK PLACE	8
POINT III - NO SPECIAL HAZARD EXISTED	10
A. SINCE THE EVIDENCE PRESENTED SHOWED LIGHT TRAFFIC AND NO EVIDENCE WAS PRESENTED TO SHOW GENERAL TRAFFIC PATTERNS AS COMPARED TO A NORM, A FINDING OF HEAVY TRAFFIC IS WITHOUT SUPPORT.	10
B. ASSUMING THERE WAS HEAVY TRAFFIC, NO EVIDENCE SUGGESTS THAT IT WAS HAZARDOUS	11
POINT IV - THE ALLEGED SPECIAL HAZARD DID NOT CAUSE THE ACCIDENT	11
CONCLUSION	12

TABLE OF CITATIONS

TABLE OF CASES

<u>Cases</u>	<u>Page</u>
<u>Bountiful Brick Co. v. Industrial Commission,</u> 68 Utah 600, 251 P. 555 (1926)	8,9
<u>Cudahy Packing Co. v. Industrial Commission,</u> 60 Utah 161, 207 P. 148 (1922)	8,9
<u>Park Utah Consolidated Mines Co. v. Industrial</u> <u>Commission,</u> 103 Utah 64, 133 P.2d 314 (1943)	8,9
<u>Soldier Creek Coal Co. v. Bailey,</u> 709 P.2d 1165 (Utah 1985).	5,6,7,11

Statutes

UTAH CODE ANN. § 35-1-45 (1984)	2
---	---

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.

AMICUS CURIAE BRIEF OF
INTERMOUNTAIN POWER AGENCY

WRIT OF REVIEW FROM THE INDUSTRIAL COMMISSION
STATE OF UTAH

ISSUES PRESENTED FOR REVIEW

The ultimate determination whether the accident arose out of or in the course of employment, presents the following issues:

1. Is there a close association between the IPP Plant and the Brush-Wellman Road?
2. Was there heavy traffic and can heavy traffic be considered a special hazard?
3. Did the alleged special hazard cause the accident?

DETERMINATIVE STATUTE

Utah Code Ann. § 35-1-45 (1984) determines the outcome of this case. The relevant portion states:

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

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of Proceedings And Disposition By The Industrial Commission.

This case arises under the Utah Worker's Compensation Act. William Michael Posso ("Posso") filed an application for hearing on October 22, 1984, against Cherne Construction for an accident occurring near the Intermountain Power Project Plant ("IPP"). (R. 2) An evidentiary hearing was held on January 25, 1985. (R. 24) The sole issue at the hearing was whether the accident arose out of or in the course of employment. (R. 25)

On September 12, 1985, Administrative Law Judge Janet L. Moffitt entered her Findings of Fact, Conclusions of Law and Interim Order. She found that the "special hazards" exception to the "going and coming" rule brought the accident within the scope of employment. (R. 119-124) On September 26, 1985, Cherne Construction Company filed its Motion for Review. (R. 127, 128) With Chairman Stephen M. Hadley dissenting, the

Industrial Commission denied the Motion on January 16, 1986.
(R. 154-157)

B. Statement Of The Facts.

Although not regularly scheduled to work on Saturday August 4, 1984, Posso came to work at the IPP Plant that day to move office furniture from a building to a trailer. (R. 27) When he completed the work, he checked out at the security gate and proceeded to the employee parking lot where he boarded his motorcycle. (R. 29) He then left the IPP Plant and headed east on the Brush-Wellman Road to return to his residence in Delta, Utah. (R. 27, 30, 47) When he left the plant, his work was completed. (R. 47, 48)

The Brush-Wellman Road is a public highway maintained by Millard County. (R. 66, 67) The IPP Plant is on this road approximately 7 miles west of its intersection with State Highway 6. (R. 82) The Brush-Wellman Road extends many miles West to the Utah-Nevada border. (R. 64) Also located on this road are a Beryllium Plant (east of the IPP Plant) and gravel pits, sheep camps, grazing areas, mining sites and hiking areas (west of the IPP Plant). (R. 63-65) The road existed years before the IPP Plant was established. (R. 43) After the IPP Plant opened, the shoulders of the road were paved. The north paved shoulder is used for turning right into the plant or for turning right on leaving the plant. The south paved shoulder

is used for through traffic so that the regular lane can be used for eastbound traffic to turn left into the plant and left on leaving the plant. (R. 45)

When Posso headed east on the Brush-Wellman Road, he intended to go about 7 miles to its intersection with State Highway 6 and then south on State Highway 6 to Delta. (R. 3, 33, 82) He could have used either of two other roads to reach Delta more directly. (R. 69, 70)

When Posso began traveling east on the Brush-Wellman Road, he observed two other vehicles, both of which were traveling eastbound. A Blazer was on the paved shoulder to Posso's right and a Plymouth was more than 150 yards ahead of him. (R. 31, 32) Apparently, no traffic was coming westbound since Posso crossed into the westbound lane to pass the Plymouth. (R. 32)

Posso observed the Plymouth slow down without seeing any brake lights or turn signals. It almost came to a stop about 150 yards in front of him. (R. 32) Rather than slow down himself, Posso turned his motorcycle into the oncoming lane of traffic. (R. 32) As he reached the Plymouth, it turned left resulting in a collision. (R. 32) It appeared that the Plymouth was turning to the IPP Man Camp. (R. 32) It was not known whether the driver of the Plymouth worked at the IPP Plant. (R. 78)

SUMMARY OF ARGUMENTS

The controversy centers on the special hazards exception recently discussed by this Court in Soldier Creek Coal Co. v. Bailey, 709 P.2d 1165 (Utah 1985).

The first requirement for allowing the special hazards exception is a close association of the Brush-Wellman road with the IPP Plant. Usually this means it must have been the only route. Posso had three routes to work. Obviously it was not the only route. The Commission's use of a normal route standard obliterates the rule that travel to and from work is not in the course or scope of employment. Additionally, the necessary identification of the route with the work place does not exist.

The second requirement is that a special hazard exist. The Commission first concluded that there was heavy traffic. However, the evidence contradicts this. And even if there was heavy traffic, there was no showing that it was dangerous.

The last requirement is that the alleged special hazard cause the accident. Since there were only three cars on the road (including Posso's) when the accident occurred, heavy traffic could not have caused the accident.

Posso fails to meet the requirements of the special hazard test.

ARGUMENT

The parties agree that Posso had ended his work, left the employer's premises and was traveling home on a public road when the accident occurred. They also agree that for the accident to be within the scope of employment, the special hazards exception must apply. (R. 97, 106, 121, 154) This exception was most recently reviewed by this Court in Soldier Creek Coal Co. v. Bailey, 709 P.2d 1165 (Utah 1985). (This decision was announced after the Administrative Law Judge's decision in this case.) At the time of his accident, Bailey was traveling on the only public road leading to the mine where he worked. Although the road was paved to the mine, it was gravel thereafter. While rounding a curve, Bailey lost control of his vehicle and was killed. The Industrial Commission held that the curve in the road constituted a special hazard. This Court reversed finding no evidence that the curve was a hazard or that the curve caused the accident.

In reversing, this Court specified a four part test for application of the special hazards exception:

1. The close association of the access way to the employer's premises, usually meaning that it must be the only route to the work place." (Emphasis added).
2. A special hazard;
3. Exposure to the special hazard because of the route;

4. The causal relationship of special hazard to the accident.

709 P.2d at 1166.

The facts in Posso's case fall woefully short of this test.

POINT I

SINCE POSSE WAS TRAVELING ON HIS NORMAL ROUTE, RATHER THAN ON THE ONLY ROUTE, THERE IS NO CLOSE ASSOCIATION.

Posso had three routes to work. Other employees living in different areas also had alternative routes. Thus, it was not the only route. This alone disqualifies Posso under the close association test.

The Administrative Law Judge and Commission did not even properly apply the close association test. Instead, they found that the normal route (rather than only route) was a sufficient standard. In affirming her, the Commission observed with approval:

The Administrative Law Judge did not accept the more restrictive interpretation of the first prong as argued by Defendants (to the effect that the road had to be the only route, and that the normal route was insufficient.) (Emphasis by the Industrial Commission.) (R. 155)

This supplants the test explained in Bailey with a normal route standard. Since everyone has a normal route to work, the Commission's approach would cover anyone traveling their normal route to work. This causes the special hazard exception to obliterate the rule that travel to and from work is not in the course or scope of employment.

POINT II

THE PROXIMITY OF THE BRUSH-WELLMAN ROAD TO THE IPP PLANT WITHOUT ANY IDENTIFICATION OF THE ROAD WITH THE WORK PLACE PRECLUDES A FINDING OF CLOSE ASSOCIATION WITH THE WORK PLACE.

Another reason exists why Posso fails the close association test. Close association requires more than proximity. In many urban areas, most suburban areas and nearly all rural areas, the choice of the route to the work place becomes more and more limited as one approaches the work place. Eventually, only one public road becomes available. It may be the distance of one block or several miles. If close association simply means commencement along the final public road necessary to reach the place of employment, an enormous inequity arises. Those working in suburban and rural areas can be covered for "heavy traffic," while urban employees, who encounter much heavier traffic than rural employees, are not. In fairness, close association requires proximity together with a close association of the route to the work place.

The three Utah cases applying the close association test are Cudahy Packing Co. v. Industrial Commission, 60 Utah 161, 207 P. 148 (1922), Bountiful Brick Co. v. Industrial Commission, 68 Utah 600, 251 P. 555 (1926), and Park Utah Consolidated Mines Co. v. Industrial Commission, 103 Utah 64, 133 P.2d 314 (1943). Only Cudahy Packing involved a public road. All

three rely on more than proximity. In Cudahy Packing, the accident occurred 100 feet from the employer's premises. This court found a close association based on the proximity of the public road together with the fact that the sole purpose of the road was to service the employer, thus identifying the road with the work place. 207 P.2d at 149, 150. In Bountiful Brick, the employee crawled through a fence along the railroad track and was struck by a train 30 feet from the employer's premises. This court found a close association based on the proximity of the railroad track to the plant with the absolute requirement of crossing the railroad track, thus identifying the railroad track with the work place. And in Park Utah, the employee slipped on ice two paces beyond the employers premises on a pathway to the road. This court found a close association based on the proximity of the pathway with its sole purpose being to serve employees, thus identifying it with the work place.

Here, the road is in proximity to the IPP Plant. However, unlike Cudahy Packing, Bountiful Brick, and Park Utah, the Brush-Wellman road is not identified with the work place. It existed before the plant was built. It services many other areas. It will continue to exist if the plant shuts down. Without identification of the Brush-Wellman road with the work place, a close association does not exist.

POINT III

NO SPECIAL HAZARD EXISTED.

- A.** Since The Evidence Presented Showed Light Traffic And No Evidence Was Presented To Show General Traffic Patterns As Compared To A Norm, A Finding Of Heavy Traffic Is Without Support.

With the construction of the IPP Plant, traffic obviously increased on not only the Brush-Wellman Road, but also Highway 6, the gravel roads from Delta and the roads from Utah County. However, increased traffic does not necessarily mean heavy traffic. The only evidence of actual traffic conditions was Posso's testimony that traffic was "light." (R. 31) He only recalled two other cars on the road--the Blazer next to him and the Plymouth more than 150 yards ahead. (R 31, 32) Certainly, this does not evidence heavy traffic. The Industrial Commission seemed to find heavy traffic from the paving of the shoulders for turning lanes. (R. 154) Although this does suggest increased traffic during shift changes, it does not establish heavy traffic. Ironically, the paving of the shoulders suggests a decrease in any congestion, quite the contrary of heavy traffic.

Conspicuously absent in the record is any evidence of general traffic conditions. No evidence was presented on actual traffic patterns along the Brush-Wellman Road. Nor was any evidence presented on traffic patterns on similarly

constructed roads in the state. Since "heavy traffic" requires comparison with a norm, such evidence was necessary to support a finding of heavy traffic. Having no such evidence, the finding of heavy traffic was unjustified.

B. Assuming There Was Heavy Traffic, No Evidence Suggests That It Was Hazardous.

Assuming that traffic during shift changes was heavy, it does not necessarily follow that it was hazardous. In Bailey, the Industrial Commission found the curve in the road to be "peculiar and abnormal." 709 P.2d at 1167. Yet this Court properly observed that nothing in the record showed the curve to be dangerous. The same may be said here. No evidence was presented to show that the increased traffic was dangerous. In fact, the only record of any accident is Posso's. Even then, there were only three cars on the road. The evidence cannot support a conclusion that a hazard existed.

POINT IV

THE ALLEGED SPECIAL HAZARD DID NOT CAUSE THE ACCIDENT.

The last requirement of the special hazard exception discussed in Bailey requires a causal connection between the special hazard and the accident. Neither the Administrative Law Judge nor the Commission explained how the alleged heavy traffic caused the accident. The evidence repudiates such a connection.

First, Posso said traffic was "light." Only two other cars were observed on the road. (R. 31, 32) Obviously, traffic was not heavy and could not have caused the accident.

Second, the accident was caused either by the Plymouth failing to signal a left-hand turn (R. 32), by Posso's using the oncoming lane of traffic to pass a nearly stopped vehicle (R. 32), or by a combination of both. Any way it is examined, traffic conditions were irrelevant. There is no causal connection between the accident and the alleged special exception.

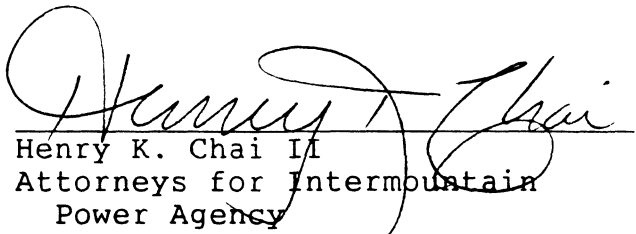
CONCLUSION

Although not directly a party to this action, the Inter-mountain Power Agency has great concern for how the Industrial Commission treats vehicle accidents occurring on the Brush-Wellman Road involving those who work at the IPP Plant. If the standard used by the Industrial Commission is upheld, contractors and subcontractors as well as IPA must pay for all auto accidents involving employees going and coming to work on the Brush-Wellman Road. This would distort the purpose of the Worker's Compensation Act and subvert the special hazard rule established by this Court. The Industrial Commission's Order

should be reversed. It should be determined that Posso was not in the course or scope of his employment when, while on his way home, he unwisely attempted to pass a stopped vehicle.

DATED this 22nd day of August, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By 
Henry K. Chai II
Attorneys for Intermountain
Power Agency

SCM1323I

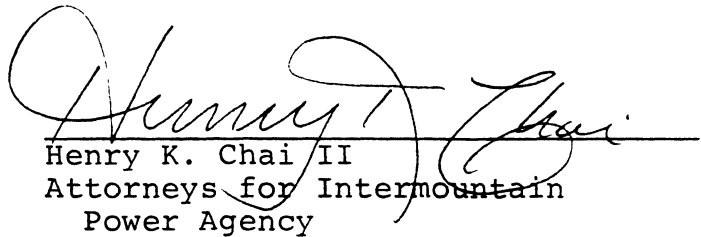
CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 1986,
four copies of the foregoing AMICUS CURIAE BRIEF OF INTER-
MOUNTAIN POWER AGENCY were mailed to the following counsel:

Industrial Commission of Utah
P.O. Box 45580
Salt Lake City, UT 84145-0580

Sherlynn W. Fenstermaker, Atty.
P.O. Box 559
Springville, UT 84663

Robert W. Brandt, Atty.
Michael K. Mohrman, Atty.
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, UT


Henry K. Chai II
Attorneys for Intermountain
Power Agency