12-1-2014

Hamilton v. Alpha Services, LLC Appellant's Brief Dckt. 42521

IN THE SUPREME COURT OF THE STATE OF IDAHO

TODD LAWRENCE HAMILTON (DECEASED), Claimant, vs. ALPHA SERVICES, LLC, Employer, DALLAS NATIONAL INSURANCE COMPANY, Surety, Defendants	)	**SUPREME COURT NO. 42521**

APPELLANTS' (EMPLOYER/SURETY) BRIEF

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ENTERED BY THE IDAHO INDUSTRIAL COMMISSION ON THE 9TH DAY OF JANUARY, 2014.

Chairman Thomas P. Baskin, Presiding

Eric S. Bailey, ISB 4408
Bowen & Bailey, LLP
1311 W. Jefferson St.
PO Box 1007
Boise, Idaho 83701

Attorneys for Appellants

Starr Kelso, ISB 2445
P.O. Box 1312
Coeur d' Alene, Idaho 83816

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

I.

STATEMENT OF THE CASE

A. Statement of Facts:

This is an appeal by Defendants from a decision of the Idaho Industrial Commission. Respondent is Claimant, Todd Hamilton ("Claimant").

This matter arises out of a motor vehicle accident that occurred on December 7, 2011 on Wyoming Highway 230. Claimant died in the course of the accident.

1) Employment.

Claimant applied for work with Alpha Services, LLC (the "Employer") on September 7, 2011. Claimant was hired for working solely at a jobsite in Wyoming as an equipment operator.[1] As a result, Claimant left Idaho and drove his personal vehicle to the Wyoming jobsite on or about September 17, 2011. The Employer did not pay for Claimant's travel expenses to get from Idaho to Wyoming.[2]

With regards to Claimant's "home," the Employer did not provide housing to its employees in Wyoming. The Employer also did not pay the employees extra money to pay for

---

[1]Reporter's Transcript of July 17, 2013 hearing (hereinafter "Tr.") p. 44, ll. 1-14.

[2] Tr. p. 44, ll. 15-17.

housing. Claimant was given an advance to pay for the first month's rent of whatever housing he chose. That advance was then subsequently deducted from Claimant's paychecks.[3]

Similarly, the Employer did not pay for Claimant's food or groceries. Claimant was responsible for his own personal upkeep.[4] In this regard, Claimant would have to travel to Walden to get groceries. Walden is some 24 miles away from the jobsite.[5]

As a condition of his employment Claimant was not authorized to make any company purchases. Claimant was not given the company credit card PIN number. As such he was not in any way authorized to make fuel or equipment purchases for company vehicles.[6]

2) Employer's Policy Regarding Use of Company Vehicles.

The Employer had a verbal policy in place that company vehicles could not be used for personal purposes. While put in place long before the motor vehicle accident at issue, this policy came to the forefront when the Employer's managing member, Robert Zaharie ("Zaharie") learned that Claimant and a fellow-employee had driven a company vehicle to a bar in the nearby town of Walden, Wyoming on their lunch break. The Employer conveyed to Claimant that he could not use company vehicles for personal purposes, such as going to a bar at lunch time. However, the Employer learned that Claimant subsequently went to a bar at lunch in Walden a

[3] Tr. p. 65, ll. 5-19.

[4] Tr. p. 65, ll. 20-23.

[5] Tr. p. 68, ll. 4-7.

[6] Tr. p. 54 l. 1 –p. 55, l. 17.

second time. As a result of this second incident, it was again reiterated to Claimant that he could not use a company vehicle for personal use.[7]

In addition to these episodes, Mr. Zaharie testified that in the weeks prior to the motor vehicle accident, he was required to go to the worksite to deal with several personnel issues. Specifically, there was a problem with the management of the job such that the company was losing money. Additionally, Mr. Zaharie had to deal with an issue of a supervisor's son using the company vehicles for personal purposes. Apparently, Claimant was one of the individuals who complained to Mr. Zaharie about this unauthorized use of company vehicles.[8] In fact, Mr. Zaharie testified that he ended up terminating the supervisor for reasons at least partially related to his "lax attitude of people using company vehicle for personal" use. This all occurred prior to December 7, 2011. Of importance is Mr. Zaharie's testimony that once he showed up on site and dealt with this issue of unauthorized personal use of company vehicles he neither heard of any further incidents, nor observed any incidents of any such use. The purpose of this procedure was twofold: 1) each employee was guaranteed access to a vehicle to drive to and from work shifts; and 2) if a company vehicle was needed, it could easily be located either at a jobsite or at an employee's residence.[9]

---

[7] Tr. p. 45, l. 14 – p. 47, l. 25.

[8] Tr. p. 47, l. 18 - p.48, l. 13.

[9] Tr. p. 48, l. 18 – p. 49, l. 7.

3) Claimant's Work Shift the Day of the Accident.

Claimant's work shift that was to take place the day of the accident was scheduled the day prior. Zaharie met with Claimant and another employee named Leo Cortes ("Cortes") to work out the next day's schedule. The decision was made by Zaharie, who was in charge of scheduling, that Claimant would work the "early shift," which began at approximately 2:00 am or 3:00 am.[10] The plan was for Claimant to work until 12:00 pm when his shift would end. Cortes would then take over for Claimant and work the next shift. Therefore, the plan was for Claimant's shift to end by 12:00 pm on the date of the accident. There was absolutely no discussion of either Cortes or Claimant working during each other's shifts. Simply, once Claimant's shift ended, he was done for the day.[11] Mr. Zaharie testified that Claimant never indicated to him any concerns or questions as to which shift he was supposed to be working on the date of the motor vehicle accident. Additionally, Mr. Zaharie stated that he never gave Claimant any "information, direct order or inference that he was to come back and continue working later that afternoon on the worksite."[12]

---

[10] Tr. p. 61-l. 11 – p. 62, l. 2.

[11] Tr. p. 49, l. 8 – p. 51, l. 18.

[12] Tr. p. 61.

On the day of the accident, Claimant drove a company vehicle to his shift. It was the same company vehicle that Claimant was driving during the accident. It was normal, and indeed expected, that employees would drive company vehicles to the jobsite to work their shifts.[13]

It is established in this case that a hydraulic line on the equipment being used by Claimant broke during the course of Claimant's shift on the day of the accident. Claimant did not take the broken part anywhere to have it fixed because he was not authorized to do so. The broken part was retrieved by Zaharie, taken to Laramie, welded, and taken back to the jobsite by Zaharie.[14]

It is also well established in this case that once Claimant's shift ended, he left the worksite as his shift was over, and the second shift employees showed up to begin work. Cortes actually showed up early for his shift and did in fact work his shift. Under questioning by the Referee, Mr. Zaharie indicated that there would not have been any opportunity for Claimant to have come back to the worksite to engage in work because all of the other equipment was being used by other second shift employees. Specifically, the Referee asked whether Claimant could have gone back to work using a Hot Saw. Mr. Zaharie indicated that a different operator was already using it. The Referee asked whether Mr. Hamilton had skills on other pieces of equipment that he could have gone back to the worksite to use. Specifically, Claimant had skills operating a skidder, but once again Mr. Zaharie indicated that on this date at second shift there

[13] Tr. p. 52, ll. 8-16.

[14] Tr. p. 55, l. 18 – p. 56, l. 5.

was already an operator working the skidder. [15] As such, any inference being made by Claimant's counsel that Claimant was returning to the worksite to get on another piece of equipment is totally unsubstantiated by the record.

The Employer never instructed Claimant to return to the jobsite after his shift was over on the day of the accident for any purpose. It must also be noted that after the accident, the Employer found Claimant's completed timesheets at his house that reflected the hours he had worked the day of the accident. Claimant filled out his timecard on the day of the accident showing he had worked his shift for a certain number of hours – this is further confirmation that Claimant knew his shift was over for the day.[16]

4) Claimant's Post-Shift Activities.

Mr. Cortes testified at hearing that he never made any arrangements with Claimant to show up at the worksite; or for that matter the storage shed after start of the second shift on the day of the accident. Mr. Cortes further testified that he was in possession of a white service truck at the shed that had more tools in it than the company truck that Claimant was driving at the time of the accident. Therefore, Mr. Cortes never needed Claimant's vehicle on that date of the accident. In fact, Cortes and Claimant had a conversation with each other at the end of Claimant's shift when Cortes came to take over. It was determined during this conversation that both Cortes and Claimant had company vehicles, and the company vehicle Cortes had in his

[15] Tr. p. 92 – 93, l. 6.

[16] Tr. p. 57, l. 22 – p. 58, l. 9; p. 61, l. 1 – p. 62, l. 22; p. 72, l. 1 - p. 73, l. 22.

possession had tools. So, it was understood when Claimant's shift ended, and Cortes's shift began, that both men had a company vehicle. Therefore, there was absolutely no need for Claimant and Cortes to switch vehicles later in the day.[17]

Claimant's counsel made several arguments speculating that at the time of the accident, Claimant was heading toward a storage shed for some sort of work related purpose. At the time of the accident, Cortes was inside the storage shed obtaining five gallons of hydraulic fluid. He testified at hearing that it was very unlikely that the white service truck he drove to the shed could be seen from the highway because it was obscured by trees and the shed itself. The shed itself is a shipping container used to store tools and equipment. The shed is not a worksite so much as a storage container. It is accessed for short periods of time to obtain needed supplies for the actual worksite. Cortes had been at the storage shed for approximately 10 minutes prior to the accident. Cortes had never communicated with Claimant the fact that he would be at the storage shed with Claimant, let alone tell Claimant he would be at the storage shed at a specific time. Cortes and Claimant had no plans to meet at the storage shed for any reason. In fact, Claimant did not even have Cortes's cell phone number to call Cortes to try to set up such a meeting. Even if Claimant, truly had such intentions, it is undisputed that there was no cell

[17] Tr. p. 106: 24-25; 107: 1-25; 108: 1-25; 109: 1-10 (Emphasis added).

phone reception at the jobsite, as discussed below. It was literally impossible for Claimant to have arraigned such a meeting while driving back from Walden.[18]

Furthermore, items found in the vehicle Claimant was driving at the time of the accident indicate he was on a personal errand at the time of the accident. Specifically, beer, toilet paper, and other groceries were found in the vehicle post-accident. These groceries would have been purchased in a town called Walden where the employees bought groceries, which was a 40-mile round trip from Claimant's house.[19]

The fact of the matter is that Claimant's shift had ended, he had no directive from management to return to work despite his shift being over, and there was no directive for Claimant to return to work at the storage shed specifically.[20] In any event, it is clear that the accident occurred on the highway prior to Claimant reaching any known destination he might have been contemplating.

5) Cell Phone Reception.

Cell phone reception was a problem at the jobsite. The problem was that there was no cell phone reception any place near the jobsite. To get cell phone reception necessary to make or receive a call, an individual would have to leave the jobsite and drive approximately one mile

---

[18] Tr. p. 110, l. 14 – p. 114, l. 5.

[19] Tr. p. 64, ll 11-22; 68: 4-7; 88: 14-17.

[20] Tr. p. 70, l. 13 – p. 71, l. 16.

toward Laramie or approximately eight miles toward Walden. It was very typical for employees to make that drive to get cell phone reception.[21] Furthermore, Claimant did not have cell phone reception at his home.[22]

In this regard, at 1:44 pm on the date of the accident, Claimant and his wife, Tawni Hamilton, had a phone conversation. Given the nature of the cell phone coverage, it is plainly evident that Claimant's shift had ended and he was no longer working at the jobsite during this call. Claimant also could not have been home during the call due to non-existent cell phone coverage. During this conversation, Claimant's wife testified that he related that he was going back to the jobsite. However, Claimant did not tell his wife why he was going back to work, when or for what purpose he planned to go back to work, or if he was going to meet with any specific person at work.[23]

B. Course of Proceedings:

The Idaho Industrial Commission (the "Commission") held that the Claimant, Todd Hamilton, was acting within the course and scope of his employment with Defendants at the time of his fatal accident. As a result, the Commission ordered that Claimant's widow and children (the "heirs") were entitled to benefits provided for under I.C. §72-410-416, together with burial benefits as provided for under I.C. §72-436, subject to the limitations of I.C. §72-102(4).

---

[21] Tr. p. 67, l. 5 – p. 68, l. 3.

[22] Tr. p. 90, ll. 8-13.

[23] Tr. p. 34, l. 1-18; p. 35, l. 23 – p. 36 l. 25.

Appellant contests the Commission's finding that Claimant was acting within the course and scope of his employment with Defendants at the time of his fatal accident.

Defendants assert that Claimant was not within the course and scope of his employment and therefore, Claimant's heirs are not entitled to the above-identified statutory benefits.

II.

ISSUES PRESENTED ON APPEAL

1) Was Claimant acting within the course and scope of his employment at the time of his fatal accident?

2) Is Claimant's estate entitled to statutory death benefits?

III.

ATTORNEY FEES ON APPEAL

Appellant is not currently asking for attorney fees on appeal.

IV.

ARGUMENT

A. The Commission's Findings of Fact Contain Numerous Errors and Unsupported Speculative Assumptions.

When the Idaho Supreme Court reviews a decision from the Industrial Commission, it exercises free review over questions of law but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Substantial and competent evidence is

"relevant evidence which a reasonable mind might accept to support a conclusion." *Boise Orthopedic Clinic v. Idaho State Ins. Fund*, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996).

The Commission's finding that Claimant was acting within the course and scope of his employment at the time of his fatal accident is not supported by substantial and competent evidence. In attempting to provide for the heirs of Mr. Hamilton, the Referee and the Commission have bent the concepts of arising out of and in the course of employment to the breaking point, stacked a presumption upon inferences derived from suspect testimony and have created unworkable precedent on issues governing the employment relationship.

This case is on point with the Idaho Industrial Commission's decision in Oscar 2004, I.C. No. 2004-IC0225. In *Oscar*, the Employer was a masonry contractor based in Ada County, Idaho. The Employer contracted with a construction contractor to perform masonry work at a retail condominium in Wyoming. The Employer hired Claimant to work as a mason at the Wyoming project. Claimant then traveled from Boise to the jobsite in Wyoming. The travel expenses were not reimbursed. Upon arrival, Claimant lived in a trailer away from the worksite.

During the project, the Employer's portion of the work was stopped for a week and Claimant was told he could spend his time how he saw fit during that week long hiatus. One or two hours after all of the Employer's workers were released for the week, Claimant was involved in a motor vehicle accident on the highway between the worksite and the residence site. At the time of the accident, Claimant was not transporting any equipment for Employer, nor was he on an errand at the Employer's behest.

The issue the Industrial Commission was faced with was whether or not the "traveling employee" exception to the "coming and going rule" applied. Idaho follows the "coming and going rule," which provides that injuries sustained while traveling to and from work do not arise out of and in the course of employment and are not compensable under the workers' compensation statutes. *Clark v. Daniel Morine Construction Company*, 98 Idaho 114, 559 P.2d 293 (1977). The reason the employee is generally not awarded compensation for injuries that occur while traveling to and from work is that the employment relationship is considered to be suspended from the time the employee leaves his work to go home until he resumes his work. *Barker v. Fischbach & Moore, Inc.*, 105 Idaho 108, 109, 666 P.2d 635, 636 (1983).

The "traveling employee" exception to the "coming and going rule" was adopted by the Idaho Supreme Court in *Ridgeway v. Combined Ins. Cos. of Am.*, 98 Idaho 410, 565 P.2d 1367 (1977), refined in *Kirkpatrick v. Transector Sys.*, 114 Idaho 559, 759 P.2d 65, (1988), and restated in *Andrews v. Les Bois Masonry, Inc.*, 127 Idaho 65, 896 P.2d 973 (1995):

> When an employee's work requires the employee to travel away from the employer's place of business or the employee's normal place of work, the employee will be held to be within the course and scope of employment continuously during the trip, except when a distinct departure for personal business occurs.

In finding that the "traveling employee" doctrine did not apply in Oscar 2004, the Industrial Commission relied upon the following set of facts:

> For the purposes of this case, the Wyoming worksite must be considered Claimant's normal place of work. He was hired to work there, he began his employment with Employer there, and would have ended it there had the accident not intervened. Claimant was paid neither for travel time, nor for mileage -- whether between Boise and the Wyoming worksite or between the residence site and the worksite. He did not receive per diem or subsistence from Employer, but earned an extra $1.00 per hour and received cost free lodging as incentives for work far from home. (*Oscar* at p. 4).

Based upon those set of facts, the Industrial Commission found that Claimant's motor vehicle accident did not arise out of the course of his employment and thus was not compensable.

The facts of this case also do not support a finding that the traveling employee exception applies. It is well established in this case that Claimant was hired by the Employer to work solely at the Wyoming jobsite. Claimant was hired to work in Wyoming and began his employment with the Employer in Wyoming. Claimant was not paid for travel time and/or expenses between Idaho and Wyoming. Claimant was not paid for travel time or expenses for travel to and from the Wyoming worksite and Claimant's Wyoming residence. Claimant's residence in Wyoming was not paid for by the Employer. The first month's rent was paid for by the Employer via an advance, but that money was subsequently deducted from Claimant's paychecks. Claimant also did not have access to or authority to use a company credit card or have access to the company PIN to utilize the company fuel cards – thus, Claimant was not

gassing up the company vehicle in Walden. Ultimately, Claimant was not authorized to engage in any business for any reason outside the actual jobsite. Claimant was employed to run a Hot Saw. The Hot Saw was located at the jobsite and that was where Claimant was expected to work and was not considered to be at work until he was at the jobsite.[24]

Claimant was also required to utilize his own personal transportation unless he was specifically traveling to and from the worksite during his regularly scheduled shifts. The use of company vehicles was restricted to authorized usage for company purposes. Company vehicles could not be utilized for personal use. Even Claimant's counsel admits that Claimant understood this. This rule was strict for Claimant because he was not a manager. A manager was allowed to drive company vehicles to Laramie, Wyoming for purposes of obtaining and fixing equipment needed on the jobsite. Claimant was not even authorized to do this. He was not authorized to drive the company vehicle to Laramie to engage in managerial tasks. Clearly, considering Claimant was not even allowed to utilize company vehicles to fulfill company tasks without express authority from a manager, Claimant was certainly not allowed to use a company vehicle to go grocery shopping and transport liquor. However, this is exactly what Claimant did on the date of the accident.[25]

---

[24] Tr. p. 44, ll. 1-17; p. 54, l 4 – p. 56, l. 5; p. 65, ll. 5-23; p. 68, ll. 4-7; p. 91, l. 18 – p. 93, l. 6.

[25] *Id.*

For all of these reasons, the traveling employee exception does not apply. Frankly, the facts of the present case are even clearer facts for the inapplicability of the "Traveling Employee" exception then found in *Oscar* decision itself. The Employer in the *Oscar* case paid for the Claimant's lodging. The Employer in the present case did not even do that. It is very clear in the present case that a very specific delineation was made by Management between company time and personal time and specific rules were made with respect to that separation, especially with regards to company vehicles. Claimant's **knowing** violation of the company rules does not somehow put him back into the course of employment.

As stated above, in attempting to provide for the heirs of Mr. Hamilton, the Referee and the Commission have bent the concepts of arising out of and in the course of employment to the breaking point. In this case there was no evidence that Mr. Hamilton was working for the employer at the time of the accident that took his life. The evidence is to the contrary. There is no evidence that he was doing anything to further the interests of his employer at the time of that unfortunate accident. In fact, his employer's interests were contrary to his actions.

In order to reach the desired result the Referee and the Commission rely on the self-serving and suspect testimony of Mr. Hamilton's widow to the effect that he had been planning to return to "the job site". Even assuming that is true, the evidence is that claimant was driving in a direction away from "the job site" at the time of the accident. Despite that, the Referee and the Commission invent an inference from the widow's testimony. It is inferred that Hamilton had turned his truck around and was crossing the highway in order to reach a company storage

container. Of course, had he desired to go to the storage container he could have simply made a right hand turn onto the east road to reach the container directly. Had he been intending to go to "the job site" he would simply have continued down the west road after making his left hand turn off the highway. Nonetheless, without any evidence the Referee and the Commission speculate and infer that Claimant must have decided that he needed to go back to the company storage container. There is no evidence that it was Claimant's intention to go to the storage container. That is simply speculation by the Referee and Commission as to Mr. Hamilton's destination. We do not even know if Mr. Hamilton intended to turn onto the east road. Mr. Hamilton may have simply drifted into the wrong lane at the time of the collision. Assuming he did want to make the turn, his destination could just as well have been one of the various homes located near the storage container. There is simply no evidentiary basis for inferring that Mr. Hamilton's destination was the storage container.

But, having inferred that the decedent must have been headed toward the storage container at the time of the accident, the Referee and the Commission then build on this inference as though it was fact. The Referee and the Commission create yet another inference that since the decedent was headed toward the storage container he must have had a "work-related" purpose. Then, having inferred that the decedent must have been at least thinking about doing something resembling the furtherance of the employer's business, the decision reaches the conclusion that Claimant must have been in the course of his employment at the time of the

accident. Having made that leap, the decision then concludes that Mr. Hamilton's heirs are entitled to the presumption under IC §72-228 that the accident arose out of his employment.

In this way, the Commission reaches the decision that the decedent was in the course of and his death arose out of his employment even though he had finished working earlier in the day and had taken the company pickup to town on a personal errand in contravention of company policy, and despite the fact that he had not done any activity since leaving the job site that could have remotely resembled work on behalf of the employer.

The Referee and the Commission reach the compensability decision by inferring that Mr. Hamilton must have been thinking about going back to work. There is simply no evidence of that and the precedent created by the decision could prove to be very problematic in future cases. If all that is required to meet the course and scope of employment test is the intention to later participate in some work on the employer's behalf, there is a tremendous potential for mischief in later cases. Unfortunately, that is really what the Commission decision boils down to – speculation that Claimant was intending to return to some activity on behalf of the employer.

As discussed above, there is no doubt that Mr. Hamilton was not in the course and scope of his employment as he drove to town to buy groceries or as he drove back from town after having done so. Had the unfortunate accident occurred a bit earlier there could be no doubt that Claimant was not in the course and scope of his employment. What makes this claim compensable, in the eyes of the Referee and the Commission, is the decision to turn the truck around after having driven past the company storage container. But, we do not know why he

turned the truck around. We do not know where he was intending to go and we do not know why he was going there. We do know as a matter of fact that Mr. Hamilton never returned to either the work site or the employer's storage container. He did not return to carry out any activity on behalf of the employer prior to his death.

It is fair to make a presumption that an individual who was killed during working hours on an employer's job site was the victim of an accident "arising out of" the employment. That is the basis for the presumption created by IC §72-228. That is what IC §72-228 does; but that is all it does. IC §72-228 does not permit the Referee and the Commission to infer without evidence that Mr. Hamilton was in the course of employment at the time of the accident.

V.

CONCLUSION

The Commission's decision is contrary to the facts and contrary to the law. As a result, Appellants request that this court reverse the Commission's decision.

DATED this 1st day of December 2014.

BOWEN & BAILEY, LLP

NATHAN T. GAMEL - of the Firm
Attorneys for Appellants/Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 17 day of December, 2014, I caused two true and correct copies of the within and foregoing instrument to be served:

Starr Kelso Attorney at Law PO Box 1312 Coeur d'Alene, Idaho 83816 Fax 208-664-6261	_____ US Mail _____ Hand Delivery _____ Express Mail _____ Facsimile

Nathan T. Gamel