

2007

Workers Compensation Fund and Iverson Steel
and Erection Company v. State of Utah
Department of Administrative Services Division of
Risk Management, Argonaut Insurance Co.,
Washington County School District and Wadman
Corporation : Reply Brief

Utah Court of Appeals

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WORKERS COMPENSATION)	JOINT REPLY BRIEF OF
FUND and IVERSON STEEL AND)	PLAINTIFFS/APPELLANTS
ERECTION COMPANY,	)	WORKERS
	)	COMPENSATION FUND,
Plaintiffs-Appellants	)	IVERSON STEEL AND
	)	ERECTION COMPANY and
vs.)	DEFENDANT/APELLEE
	)	WADMAN CORPORATION
STATE OF UTAH DEPARTMENT)	
OF ADMINISTRATIVE	)	Case Nos. 20070160
SERVICES DIVISION OF RISK	)	20070180
MANAGEMENT, ARGONAUT)	
INSURANCE CO., WASHINGTON	)	Third District
COUNTY SCHOOL DISTRICT	)	Court No. 020903830
and WADMAN CORPORATION)	
	)	Priority
Defendants/Appellees.)	

**Appeal from Summary Judgment by
the Honorable Sandra Peuler, Third District Court Judge**

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IN THE UTAH COURT OF APPEALS

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APPENDIX 1

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**Stipulated Order of Dismissal with Prejudice of Plaintiffs' Claims Against Wadman
Corporation**

APPENDIX 2

Assignment of Rights by Wadman Corporation

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JURISDICTION OF THE COURT OF APPEALS

See plaintiffs' opening brief at Page 1.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

See plaintiffs' opening brief at Pages 1-3.

STATEMENT OF THE CASE

See plaintiffs' opening brief at Pages 4-8.

STATEMENT OF FACTS

PLAINTIFFS/APPELLANTS RESPONSE TO DEFENDANTS/APPELLEE'S STATEMENT

Plaintiffs/appellants Workers Compensation Fund ("WCF") and Iverson Steel and Erection Company ("Iverson") and, by assignment of rights to WCF¹, Wadman Corporation ("Wadman") reassert the Statement of Facts from their opening brief found at pages 9-37. Plaintiffs present one additional responsive fact hereafter.

Plaintiffs respond to the "Statement of Facts" found at Pages 7-10 of defendants/appellees' (jointly referred to as "Argonaut") brief. First, as general comment, the "facts" are incomplete and thereby leave incorrect inferences. Argonaut Insurance makes inferences from the facts that do not meet the summary judgment evidentiary standard. It bears repeating. When considering a motion for summary judgment, the Court must consider "all of the facts and evidence presented, and every reasonable

¹See as Appendix 1 a copy of this Court's order approving the settlement between Wadman and WCF. Appendix 2 is a copy of Wadman's assignment of rights to WCF.

inference arising therefrom, in a light most favorable to the party opposing the motion.”

Katzenberger v. State, 735 P.2d 405, 408 (Utah App. 1987).

Additional Fact 1: As a point of clarification addressing some of Argonaut’s arguments, WCF and Iverson Steel and Erection settled their claim against general contractor Wadman while this matter was pending on appeal. As part of that settlement, Wadman assigned to WCF “...any and all rights of whatever nature Wadman may have to cross-claims and claims made by it regarding workers’ compensation insurance coverage involving or arising out of the work- related accidental injuries experienced by Iverson Steel employee Corey Searle while he was working on an OCIP covered Washington County School District project building the Santa Clara Middle School on February 7, 2002”². That assignment includes any rights Wadman may have in its appeal against Argonaut. The Court has combined the claims for the purposes of appellate court consideration.

At appropriate points in the body of this brief, plaintiffs will cite to the Statement of Facts from the opening brief as well as to the Record on Appeal.

SUMMARY OF THE ARGUMENT

Argonaut principally argues the following in its brief: (1) Argonaut had no responsibility to provide workers’ compensation insurance coverage to Iverson and its injured employee, Corey Searle because the final element for a contract, an enrollment

²See Appendices 1 and 2.

form, was not forwarded to its agent Willis of Utah before the accident in question; (2) that there is no public policy requiring Argonaut to assume coverage; (3) that the OCIP program is no different than an employer sponsored group health insurance program; (4) the failure to complete an enrollment form was a substantive rather than technical error; (5) Wadman did not individually brief the issues and therefore its claims should be dismissed; (6) there was no privity of contract between plaintiffs and Argonaut and they therefor lack standing to bring this declaratory relief action; (7) Wadman did not have apparent authority to act on behalf of Argonaut; (8) Argonaut is not in the position of a statutory employer of Iverson's injured employee; and (9) the Alternate Employer Endorsement does not provide coverage to Iverson.

This reply brief does not address all of the arguments made by Argonaut in its brief. Where there is no specific response, it is because plaintiffs are satisfied that the arguments of the opening brief adequately address the argument topic. However, for the purpose of argument context, plaintiffs repeat their brief Summary of the Argument from the opening brief which follows directly.

Argonaut Insurance is the OCIP workers' compensation insurance carrier for the State of Utah and its rolling wrapup OCIP program and in this case the school district. The construction project at issue is an OCIP project. Iverson subcontracted to perform some of the steel erection work on the project. Iverson was to pick up the slack for another subcontractor that had fallen behind schedule.

Wadman project managers acting for it as the general contractor, testified that from Wadman's perspective Iverson was fully qualified to perform its contract and was fully enrolled. It encouraged Iverson to begin its work on the Washington County School District project. The one page form was completed before the accident at issue, but Wadman did not immediately send it on to Argonaut.

Through on site inspection by its Safety Inspector, Lemanski, Argonaut had direct knowledge of Iverson's work erecting steel at the OCIP project. It acquiesced and ratified Wadman's decision to allow Iverson to begin its work. By extension, Argonaut impliedly ratified Iverson's enrollment before transmittal of the completed one page form..

Iverson was totally innocent. It followed all of the directions of Argonaut's apparent enrollment agent, Wadman. Iverson knew of nothing more that it should do to complete the process. Having given the apparent authority to Wadman, Argonaut cannot now claim an enrollment failure or any other material breach of the OCIP workers' compensation insurance contract. Argonaut has failed in its duty to the other members of the OCIP Team to provide insurance coverage for claims from injured OCIP project employees. A delay in providing the form for an otherwise qualifying project contractor is not a "material breach" of the contract. Argonaut's Vice-President of Underwriting, Haskell, so testified. The case law of Utah so provides.

Wadman has admitted its commitment to the proposition that Iverson was covered

by the Argonaut OCIP workers compensation insurance. Argonaut should not be allowed to profit from its failures at the expense of innocent non-OCIP workers, contractors and insurance carriers. This is a loss contemplated by the OCIP RFP and the OCIP contracts to be covered by the OCIP insurance carrier. Public policy, fairness and the law require Mr. Searle's serious injuries to be covered by Argonaut. Argonaut's own underwriter would do so.

Regarding some of the specific claims in Argonaut's brief, as a declaratory relief action to determine coverage issues between two workers' compensation insurance carriers, WCF has standing and the trial court, and by extension this Court, has jurisdiction to determine the issues presented.³ Under that circumstance, privity of contract between WCF and Argonaut is not required to determine which should cover the on-the-job injuries at issue. There was privity of contract between Wadman and Argonaut. The issue to be determined is Argonaut's OCIP project contractual obligation to provide workers' compensation insurance for all contractors allowed to perform bid jobs on the project.

Wadman assigned its interest in this matter to WCF. The opening brief stated that fact and also that it was a joint brief of WCF, Iverson and Wadman.

This Court recognizes the...*overarching importance to the public* [of the workers' compensation comprehensive plan], *as opposed to the parties only ...Society itself is*

³Utah Code Ann. §78-33-1 *et seq.* and Utah Rule of Civil Procedure 57.

vitally concerned...It is a matter relating to the promotion of the general welfare...[It] is not just a private benefit affecting only the interests of the employer and the employee⁴.

The Workers Compensation Act is biased toward inclusion of coverage as a matter of the strongest of public policies. It does not contemplate the manipulative insurance company behavior advocated by Argonaut.

ARGUMENT

POINT 1

IN THIS DECLARATORY RELIEF ACTION, WCF, IVERSON AND WADMAN HAVE STANDING.

At Page 22 of Argonaut's brief the claim is made of a standing failure for WCF to bring this declaratory relief action. The argument is WCF lacks privity of contract. That begs the question of this appeal—Argonaut's obligation to provide workers' compensation coverage for OCIP injured employees of project subcontractors.

First, this matter was brought as a declaratory relief action. The trial court and on appeal this Court does have jurisdiction:

The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations...

Utah Code Ann. §78-33-1. As is entirely appropriate, WCF asked the trial Court and, on appeal, this Court to determine the rights, status and legal relationship of Iverson and

⁴*Touchard v. La-Z-Boy Inc.*, 2006 UT 71, PP14-15, 148 P.3d 945.

Wadman to the OCIP. WCF, as supported by Iverson and Wadman, alleges a contract was formed between Iverson and the OCIP which contract altered WCF's legal relationship to Iverson, *ie.* WCF had no legal obligation to provide insurance for a project that the OCIP covered. Argonaut became the primary carrier when Iverson qualified and was accepted to perform contracted services at the OCIP work site.

Also, by assignment, WCF stands in the shoes of Iverson and Wadman in this matter. Iverson and Wadman have every right to seek declaratory relief to determine whether they in fact have contractual and/or statutory rights⁵ to insurance coverage from the OCIP's insurance carrier, Argonaut.

Further:

Any person interested under a...written contract, ***or whose rights, status or other legal relations are affected by a...contract...***, may have determined any question of construction or validity arising under the instrument...[or] contract...and obtain a declaration of rights, status or other legal relations thereunder.

Utah Code Ann. §78-33-2. (Emphasis added.) Contrary to Argonaut's assertion, one insurance company seeking a determination that another carrier is liable for a loss sustained by an insured does not require the insurance carriers be in privity of contract

⁵Under the circumstances of this case, the OCIP exercised and/or had the right to exercise control over Iverson Steel and therefore has a statutory employee/employer relationship which the Workers' Compensation Act requires the OCIP to pay the compensation and medical expense benefits to Searle. See Utah Code Ann. §§ 34A-2-103 and 34A-2-201.

with one another. WCF's rights and obligations under its contract of insurance with Iverson are dependent on whether or not the Argonaut has contractual or statutory coverage.

Consider:

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be ***liberally construed and administered.***

Utah Code Annotated §78-33-12. (Emphasis added.)⁶

Jenkins v. Finlinson, 607 P.2d 289, 290 (Utah 1980) lists four criteria for maintenance of a proper declaratory relief cause of action. Other than citing the four requirements, the *Jenkins* court cites to very few facts and explains little. However, it is clear under the facts presented that each of the prerequisites to jurisdiction exist: (1) Presently Justiciable Controversy; (2) Adversity of the interests of the parties; (3) Legally protectable interest in the controversy; and (4) Ripeness of the issues.

WCF brought this declaratory relief cause of action to determine which of two workers' compensation insurance carriers had the obligation to provide insurance coverage to Iverson for the on the job injury to Iverson's employee, Corey Searle. The Complaint and the supportive facts presented give rise to justiciable fact and legal issues as to the Argonaut's liability to pay the statutorily required workers' compensation

⁶See also URCP 57: ...*The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate...*

benefits. WCF's complaint is crafted to ask this court to declare whether the OCIP and therefore Argonaut Insurance had a contractual obligation to Iverson to provide workers' compensation insurance coverage for its employees while they worked on the Washington County School District project. WCF, Iverson and Wadman have a substantial and material interest in the outcome of that decision. Argonaut is the carrier for the OCIP project, a project not covered by WCF.

Reinforcing WCF's substantial interest, Iverson and Wadman assigned WCF their interests in the issue of the OCIP's liability for that accident. WCF now stands in Iverson's shoes.

As an OCIP team member and the project's insurance carrier, it was Argonaut's duty to police its own insurance coverage requirements at the project. It was its duty to provide the insurance for all contractors who were allowed by its team to work on the project. It had the duty to not allow any contractor on the job site if the contractor had not met the enrollment criteria—which Iverson had. It had all the tools at its disposal to inform contractors in general and Iverson in particular of the enrollment procedures and to ensure that they were completed. The OCIP administrators and they alone failed in those duties. By refusing coverage, Argonaut is asking WCF to cover for its failings. That sort of insurance company mischief is contrary to sound public policy.

WCF had neither the duty nor the right to police the OCIP project. Neither did Iverson have that duty.

Iverson was enrolled. Iverson complied with all the requirements of which it had been made aware.

Finally, Argonaut made two inapposite jurisdictional arguments in two adjudicative forums. Before the Utah Labor Commission, the exclusive forum for the injured employee to have his workers' compensation claim adjudicated, Argonaut asked to be dismissed because the district court is where controversies as to coverage between insurance companies should be determined.⁷ Here, Argonaut argues WCF has no standing to have the coverage issue determined because it is not a party to the OCIP. The logical extension to Argonaut's conflicting arguments is there is no judicial forum with jurisdiction before which coverage disputes between insurance carriers can be determined because there is no privity of contract between them. That makes no sense whatsoever. It flies in the face of the remedial nature of the Declaratory Relief Act. Utah Code Ann. §§ 78-33-1 through 78-33-13.

⁷ While WCF disagrees with Argonaut's argument that it should be dismissed from the proceedings brought by the injured employee before the Utah Labor Commission on other grounds, WCF does agree with Argonaut that as to the issue regarding which of the two insurance companies is responsible to provide coverage, the district court is the correct forum.

POINT 2

CONTRARY TO ARGONAUT'S ASSERTIONS, ARGONAUT HAD AN ENFORCEABLE CONTRACT TO PROVIDE INSURANCE FOR ALL "OCIP" CONTRACTORS. IVERSON HAD A FULLY ENFORCEABLE CONTRACT TO PERFORM THE OCIP PROJECT STEEL ERECTION AND HAD FULLY QUALIFIED FOR WORKERS' COMPENSATION INSURANCE FROM ARGONAUT.

At Pages 12-21, Argonaut argues it had no contractual relationship with Iverson or its employee Corey Searle at the time of the very serious accident that occurred at the OCIP project. The claim is there had been no "offer and acceptance".⁸ Let's examine that. There is no question that there had been an "offer and acceptance" between the OCIP sponsor State of Utah and Argonaut to provide workers' compensation insurance on all its projects. There is no question that there had been an "offer and acceptance" between OCIP owner Washington County School District and Argonaut to provide workers' compensation insurance for all contractors of whatever level whose bids were approved to do work on the OCIP project. There is no question that there was "offer and

⁸Argonaut cites the old case of *R. J. Draum Constr. Co. V. Child*, 247 P.2d 817, 820 Utah 1952. *Draum* presents issues as to when a contract is formed in the construction industry bidding process. It did not deal with statutorily mandated workers' compensation insurance coverage as we have here. Interesting language is found at 247 P.2d at 819.

*If appellant unconditionally accepted respondents' offer before it was withdrawn, there was a binding contract. Such an acceptance requires manifestation of unconditional agreement to all of the terms of the offer and an intention to be bound thereby. **Such manifestation may be either written or oral or by actions and conduct or a combination thereof...***

(Emphasis added.)

acceptance” between Wadman as the OCIP general contractor and Argonaut to provide workers’ compensation insurance coverage for any such liability to which Wadman may be exposed arising out of the OCIP project construction activities.

It is further un rebutted that those four entities are a part of the “OCIP Team” *working together to implement the insurance program.*⁹ In practice, Wadman as the general contractor was established as a “gatekeeper” to implement the insurance program and to police subcontractor’s admission to the OCIP project.

It is uncontested that Wadman had the authority to enter into binding contracts with subcontractors to perform services on the OCIP project. It had done so with every subcontractor on the job. That there was “offer and acceptance” between Wadman and Iverson to perform steel erection services on the project at a price reduced to account for workers’ compensation insurance premiums covered by the OCIP is uncontested.¹⁰ That the injury occurred at the OCIP project while Mr. Searle was performing OCIP project work is an established fact.

It was clear to Wadman in its insurance “gate keeping” duties that the injuries to Mr. Searle would be covered by Argonaut:

My understanding, anybody that comes onto the project and goes through the safety orientation is qualified and covered

⁹See Fact 9 to opening brief and OCIP Safety and Health Manual”, “Abbreviations and Acronyms”, R. 757-758.

¹⁰See Fact 21 to the opening brief and Steve Iverson Deposition, Pages 21-24. (R. 818)

*under the OCIP.*¹¹

Iverson had contracted with the OCIP to perform the duties it was at the time of the accident. Mr. Iverson had no knowledge of anything more he must do:

*...I was under the impression that I need not do anything more—I didn't have to—my workman's comp would not be covering this policy—or that job, that OCIP would...*¹²

Argonaut most certainly had “offer and acceptance” binding contracts to cover all workers' compensation liabilities of the OCIP project.

Argonaut allowed Wadman to act in the capacity of insurance and project gatekeeper from the beginning:

*...we had gone through the whole job using basically the same process, give or take, you know, a time frame. We had religiously gone through the [safety] training, and they emphasized that more so than the [enrollment] form, and at no point in time had they ever come back and told us we were doing something incorrectly with the procedure we were following. And so I didn't really understand why there would have been a question about it [the coverage for the Searle accident].*¹³

Finally, it is clear this is the very situation Argonaut's Robert G. Haskell, Vice

¹¹See Fact 23 to the opening brief and Wadman's Troy Mangum Deposition, Page 23, Lines 8-10. (R. 832.)

¹²See Fact 19 of opening brief. Deposition of Steve Iverson, Page 68, lines 2-5. (R 813.) See, also Page 38, lines 10-17; and Page 82, lines 6-16. (R 815.)

¹³See Fact 13 of opening brief. Wadman's Tim Brown Deposition, Page 22 line 11 through Page 24 line 4. (R. 789-790.) See also Tim Brown Deposition Pages 46 and 47. (R. 793.)

President, Underwriting, admitted Argonaut would provide coverage. He testified if all of the pieces were in place except for the formal documents, from an underwriting perspective, Argonaut would provide coverage.¹⁴

POINT 3

OCIP WORKERS' COMPENSATION COVERAGE IS NOT THE SAME AS VOLUNTARY PARTICIPATION IN AN EMPLOYER'S GROUP HEALTH INSURANCE PROGRAM.

Argonaut makes the obviously incorrect comment ...*the Program* [meaning the OCIP] *is not significantly different than a group health plan provided by an employer for its employees.*¹⁵ That, simply is not true. The OCIP is much different. Group health insurance is completely voluntary. Participation is not a prerequisite to employment. Participation is not a prerequisite to setting foot on the employer's premises. The group health insurance carrier is not in a position to allow or deny access to the job site. Group health insurance is not mandated by State statute¹⁶.

Compare that to the OCIP: (1) Insurance coverage is not voluntary. The OCIP requires the coverage and does not allow separate coverage by its contractors; (2) the OCIP requires all contractors to reduce their bids to reflect a reduction to account for OCIP workers' compensation insurance premiums the project owner pays for the project

¹⁴See Fact 1 from opening brief and deposition of Robert F. Haskell, Pages 52 through 56. (R. 748-750.)

¹⁵Page 13 of Argonaut's Brief.

¹⁶Utah Code Ann. §34A-2-201.

coverage¹⁷¹⁸; (3) the OCIP team, including Argonaut, controls access to the work site¹⁹; (4) absent OCIP qualification and coverage, a contractor's employees are not to be admitted for work²⁰; (5) No uncovered worker is allowed on the job site to perform services for the OCIP project²¹; (6) the OCIP team can expel a contractor for violation of Argonaut safety standards²². That is not like group health insurance.

POINT 4

CONTRARY TO ARGONAUT'S ARGUMENT, THE STATE LEGISLATURE AND THIS COURT HAVE FOUND THE SANCTITY OF THE WORKERS' COMPENSATION SYSTEM IS OF *OVERARCHING IMPORTANCE TO THE PUBLIC*. SOUND PUBLIC POLICY DICTATES COVERAGE BY ARGONAUT UNDER THE FACTS OF THIS CASE.

Argonaut also argues once the OCIP contract with the owner and the general

¹⁷In fact Iverson's contract was reduced to account for OCIP insurance premiums. The OCIP accepted the premium for the entire period. It never reimbursed Iverson for the reduction for the period it claims no coverage prior to and including the day of the Searle accident. See Fact 21 in WCF's opening brief and the letter from Wadman dated January 25, 2002, reflecting the arrangement. (R. 821.) Steve Iverson Deposition, Pages 21-24. (R. 818.)

¹⁸ See Statement of Fact 21 from opening brief; Steve Iverson Deposition, Pages 21-24. (R. 818.) See also the letter from Wadman dated January 25, 2002, reflecting the contractual arrangement. (R. 821.)

¹⁹See Statement of Fact 11 from the opening brief. See, also "Safety and Health Manual", "Preface". (R. 758-759.)

²⁰*Id.*

²¹*Id.*

²²*Id.*

contractor is established, it is not in the realm of public policy for the OCIP insurance carrier to cover all project workers²³. Argonaut assumed that responsibility for workers' compensation coverage for the entire project by those contracts. Argonaut chooses to ignore its responsibilities. This Court has not ignored the...*overarching importance to the public* [of the workers' compensation comprehensive plan], *as opposed to the parties only ...Society itself is vitally concerned...It is a matter relating to the promotion of the general welfare...[It] is not just a private benefit affecting only the interests of the employer and the employee*²⁴. To allow Argonaut to introduce insurance carrier mischief into that plan is indeed a breach of public policy.

To justify its conduct, Argonaut argues a simple form Wadman had not completed, should deprive Iverson and its severely injured employee the benefits required by statute. There is no argument that Iverson was not qualified in all aspects to perform the steel erection work it was performing at the time of the accident.. Iverson followed all procedures to qualify it had been asked to do by the OCIP team. Argonaut accepted premiums from the project owner from a reduced Iverson bid to provide the services the project owner accepted. Iverson did not pay premium to WCF on the wages it paid its employees for the OCIP work performed. So, premium was paid for coverage Iverson was not afforded.

²³See Argonaut's Brief at Page 13.

²⁴*Touchard v. La-Z-Boy Inc.*, 2006 UT 71, PP14-15, 148 P.3d 945.

Under these circumstances, if Argonaut is allowed to avoid liability, it provides a dark incentive to insurance carriers to maximize their profits by accepting premium for risks for which they in advance have no intention to cover. It allows them to pick and choose coverage at their discretion. What is even worse, the carrier is allowed to make that decision after a loss has occurred. The mischief is, if no loss occurs the carrier pockets the premiums even if no enrollment form is completed. If a loss does occur, then the carrier pleads “no enrollment form, no contract, no coverage”. In this instance, Argonaut received premiums from the first day Iverson was on the job but provided coverage under its argument only beginning the day after the injuries to Mr. Searle. That is insurance carrier mischief. It should not be allowed. It is a scenario offensive to the fundamental concept of “coverage inclusion” found in the Utah Workers’ Compensation Act, the strongest of legislative public policies²⁵.

POINT 5

CONTRARY TO ARGONAUT’S ARGUMENT, PLAINTIFF’S OPENING BRIEF CITED TO THE RECORD FOR THE FACTS AND REASONABLE INFERENCES DRAWN THEREFROM.

Argonaut unfairly and incorrectly criticizes plaintiffs’ opening brief stating, *Plaintiffs’ “factual” allegations are naked assertions without supporting citations and are insufficient as a matter of law to raise an issue of fact*²⁶. That claim is incorrect.

²⁵*Touchard, supra.*

²⁶Argonaut’s brief at pages 22-28.

Plaintiffs meticulously cited to the record in the Statement of Facts in their opening brief. They thereafter argued the application of the facts and the reasonable inferences²⁷ therefrom in the body of the brief. Plaintiffs will not use additional space and the Court's time to respond in more detail to Argonaut's claims of briefing inadequacy. Plaintiffs instead refer the Court to the detailed Statement of Facts found at pages 9-23 of the opening brief.

POINT 6

AS PART OF THE SETTLEMENT BETWEEN WCF AND WADMAN, CROSS-CLAIM APPEAL RIGHTS WERE ASSIGNED TO WCF. THE APPEAL DISMISSAL WAS AS TO THE CLAIMS BETWEEN WCF AND WADMAN RESERVING THE CROSS-CLAIM APPEAL RIGHTS.

Argonaut states at Page 21 of its brief that Wadman must be dismissed for a failure to brief the issues. That argument is totally without merit. The opening brief covered all issues for WCF, Iverson and Wadman. The title page of the brief informed: "Brief of Workers Compensation Fund, Iverson Steel and Erection Company and Defendant/Appellee Wadman Corporation". Throughout the brief, it is stated that this is a joint presentation of WCF, Argonaut and Wadman. WCF's right to so represent is contained in the Assignment document, the Stipulation for Dismissal as between WCF

²⁷When considering a motion for summary judgment, the Court must consider "all of the facts and evidence presented, and every reasonable inference arising therefrom, in a light most favorable to the party opposing the motion." *Katzenberger v. State*, 735 P.2d 405, 408 (Utah App. 1987).

and Wadman and the Order of this Court dismissing the claims between WCF and Wadman.²⁸ WCF, Iverson and Wadman did not dismiss claims or rights as to Argonaut.

CONCLUSION

Plaintiffs repeat their conclusion from the opening brief as it applies to the arguments advanced in Argonaut's brief. Argonaut Insurance is the Owner Controlled Insurance Program ("OCIP") workers' compensation insurance carrier for the State of Utah and its rolling wrap up OCIP program. The concept of an OCIP is that all liability insurance of whatever nature on a given construction is controlled by the construction project owner. The goal is to control insurance costs by economies of size and enforcing overriding safety programs. Individual contractors are required to reduce their bids by the costs they would otherwise pay for their insurance.

The construction project at issue is an OCIP project. Iverson subcontracted to perform some of the steel erection work on the project. Iverson was to pick up the slack for another subcontractor that had fallen behind schedule.

Wadman project managers acting for it as the general contractor, testified that from Wadman's perspective Iverson was fully qualified to perform its contract and was fully enrolled for insurance purposes. It encouraged Iverson to begin its work on the Washington County School District project. Argonaut claims enrollment was not perfected because an enrollment form was not received by it prior to an injury to an

²⁸See Appendices 1 and 2.

Iverson employee. The one page enrollment was completed before the accident at issue, but Wadman did not immediately send it on to Argonaut.

Through on site inspection by its Safety Inspector, Lemanski, Argonaut had direct knowledge of Iverson's work erecting steel at the OCIP project. Argonaut acquiesced and ratified Wadman's decision to allow Iverson to begin its work. By extension, Argonaut impliedly ratified Iverson's enrollment before transmittal of the completed form..

Iverson was totally innocent. It followed all of the directions of Argonaut's enrollment agent, Wadman. Iverson knew of nothing more that it should do to complete the process. Having given the apparent authority to Wadman, Argonaut should not be allowed to escape its indemnification obligation. It is should be ineffectual legally to now claim an enrollment failure or any other material breach of the OCIP workers' compensation insurance contract.


Argonaut has failed in its duty to the other members of the OCIP Team to provide insurance coverage for claims from injured OCIP project employees. A delay in providing the form for an otherwise qualifying project contractor is not a "material breach" of the contract. Argonaut's Vice-President of Underwriting, Haskell, so testified. The case law of Utah so provides.

Wadman has admitted its commitment to the proposition that Iverson was covered by the Argonaut OCIP workers compensation insurance. Argonaut should not be allowed

to profit from its failures at the expense of innocent OCIP workers, OCIP contractors and non-OCIP workers compensation insurance carriers. This is a loss contemplated by the OCIP RFP and the OCIP contracts. It should be covered by Argonaut, the OCIP insurance carrier. Public policy, fairness and the law require Mr. Searle's serious injuries to be covered by Argonaut. Argonaut's own underwriter would do so.

DATED this 14th day of April, 2008.

JAMES R. BLACK, P.C.

By: 
James R. Black
Co-Counsel for Workers Compensation
Fund and by assignments of right, Iverson
Steel and Erection Company and Wadman
Corporation

WORKERS COMPENSATION FUND

BY: _____
Dennis V. Lloyd, Vice-President & Gen.
Counsel, Co-Counsel for Workers
Compensation Fund and by assignments of
right, Iverson Steel and Erection Company
and Wadman Corporation

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of April 2008 I mailed two true and correct copies of the above Reply Brief of Workers Compensation Fund, postage prepaid, to:

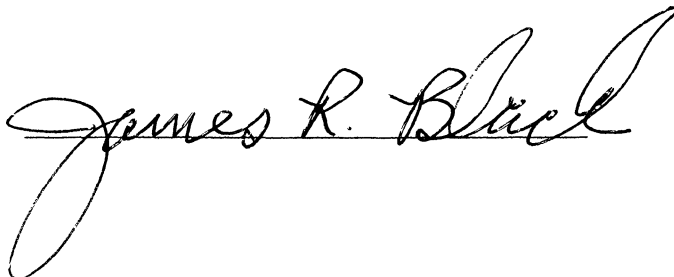
Theodore E. Kanell
PLANT, CHRISTENSEN & KANELL, PC
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111

Counsel for Appellees State of Utah
Department of Administrative Services
Division of Risk Management,
Argonaut Insurance Co.,
Washington County School District

AS A COURTESY TO SETTLING DEFENDANTS--ONE COPY EACH:

William H. Christensen
LARSEN CHRISTENSEN & RICO
50 West Broadway
Salt Lake City, Utah 84101
Counsel for Willis

Stephen F. Noel
SMITH KNOWLES, P.C.
4723 Harrison Boulevard, Suite 200
Ogden, Utah 84403
Counsel for Wadman

A handwritten signature in black ink, reading "James R. Black". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal stroke extending to the right.

APPENDICES

Tab 1

ORIGINAL

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Co-counsel for Plaintiffs

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OCT 04 2007

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Dennis V. Lloyd (1984)
392 East 6400 South
Salt Lake City, Utah 84107
Telephone: (801) 288-8060
Facsimile: (801) 288-8038
Co-counsel for Plaintiffs

IN THE COURT OF APPEALS
STATE OF UTAH

* * * * *

WORKERS COMPENSATION FUND)	
and IVERSON STEEL AND)	
ERECTION COMPANY,)	
)	
Plaintiffs and Appellants)	
)	
vs.)	
)	
STATE OF UTAH DEPARTMENT OF)	
ADMINISTRATIVE SERVICES,)	
DIVISION OF RISK MANAGEMENT;)	
ARGONAUT INSURANCE CO.,)	
WASHINGTON COUNTY SCHOOL)	
DISTRICT and WADMAN)	
CORPORATION;)	
)	
Defendants and Appellees)	

**RULE 41(a)(2)(ii) UTAH RULES
OF CIVIL PROCEDURE
STIPULATION FOR
DISMISSAL WITH
PREJUDICE OF PLAINTIFFS'
CLAIMS AGAINST WADMAN
CORPORATION**

Trial Court No. 020903830

Judge Sandra N. Peuler

Court of Appeals
No. 20070160-CA

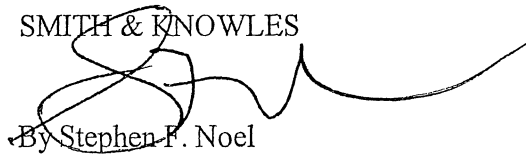
* * * * *

Pursuant to Rule 41(a)(2)(ii) Utah Rules of Civil Procedure, the plaintiffs, Workers

Compensation Fund and Iverson Steel and Erection Company and defendant below Wadman Corporation, through their respective counsel, hereby stipulate and agree that all of the Plaintiffs claims for relief asserted against Wadman Corporation have been resolved and may be dismissed on the merits and with prejudice. The parties hereto jointly move the Court for an order of dismissal consistent with this Stipulation without an award of fees or costs. This Stipulation is not intended to release or dismiss Plaintiffs' claims against any defendant not otherwise already dismissed. This Stipulation is also not intended to dismiss any cross-claims or claims raised by Wadman Corporation in its Answer herein or in its separately filed Complaint identified as Third District Court Civil No. 06091767 all of which have been assigned to Workers Compensation Fund.

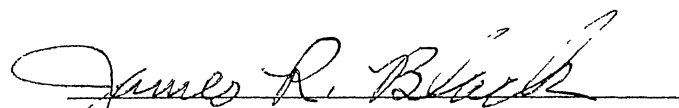
Dated this 7 day of Sept August 2007.

SMITH & KNOWLES


By Stephen F. Noel
Counsel for Wadman Corporation

Dated this 16TH day of August 2007

JAMES R. BLACK, P.C.


By James R. Black
Co-counsel Workers Compensation Fund,
Iverson Steel and Erection Company

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above **RULE 41(a)(2)(ii) UTAH**

RULES OF CIVIL PROCEDURE STIPULATION FOR DISMISSAL WITH PREJUDICE

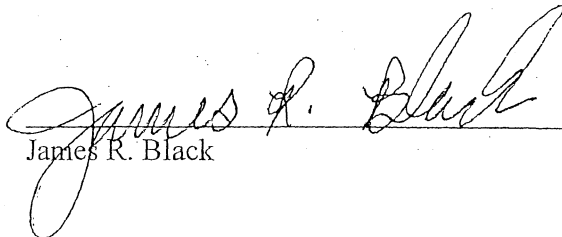
OF PLAINTIFFS' CLAIMS AGAINST WADMAN CORPORATION was mailed postage

prepaid this 15th day of August 2007 to the following:

Theodor E. Kanell
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Dennis V. Lloyd
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James R. Black

ORIGINAL

FILED

UTAH APPELLATE COURTS

OCT 04 2007

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Co-counsel for Plaintiffs

IN THE COURT OF APPEALS
STATE OF UTAH

* * * * *

WORKERS COMPENSATION FUND
and IVERSON STEEL AND
ERECTION COMPANY,

Plaintiffs and Appellants

vs.

STATE OF UTAH DEPARTMENT OF
ADMINISTRATIVE SERVICES,
DIVISION OF RISK MANAGEMENT;
ARGONAUT INSURANCE CO.,
WASHINGTON COUNTY SCHOOL
DISTRICT and WADMAN
CORPORATION;

Defendants and Appellees

**STIPULATED ORDER OF
DISMISSAL WITH
PREJUDICE OF PLAINTIFFS'
CLAIMS AGAINST WADMAN
CORPORATION**

Trial Court No. 020903830

Judge Sandra N. Peuler

Court of Appeals
No. 20070160-CA

* * * * *

THE COURT, having reviewed the Stipulation between the plaintiffs, Workers

Compensation Fund and Iverson Steel and Erection Company and defendant Wadman Corporation, and good cause appearing, and pursuant to Rule 41(a)(2)(ii) Utah Rules of Civil Procedure, HEREBY ORDERS that all of the Plaintiffs' claims for relief asserted against Wadman Corporation should be and ARE HEREBY DISMISSED ON THE MERITS WITH PREJUDICE No fees or costs are awarded. Neither this Order nor the referenced Stipulation is intended to effect the release or dismissal of Plaintiffs' claims against the remaining defendants, nor does it have any effect on the assignment of rights between plaintiffs and Wadman Corporation.

Dated this 4th day of October 2007
~~7 day of September 2007~~

BY THE COURT OF APPEALS

Russell W. Black
JUDGE

Approved as to Form:

Dated this 7 day of September 2007.

SMITH & KNOWLES

[Signature]

By Stephen P. Noel
Counsel for Wadman Corporation

Dated this 16th day of July 2007

JAMES R. BLACK, P.C.

James R. Black
By James R. Black
Counsel for Workers Compensation Fund
& Iverson Steel & Erection Company

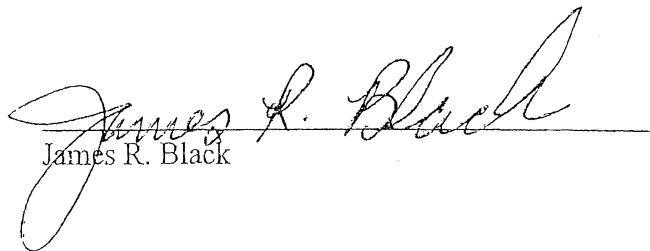
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above STIPULATED ORDER OF
DISMISSAL WITH PREJUDICE OF PLAINTIFFS' CLAIMS AGAINST WADMAN
CORPORATION was mailed postage prepaid this 5th day of July 2007 to the following:

Theodor E. Kanell
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Stephen F. Noel
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Counsel for Wadman Corp.

Dennis V. Lloyd
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Salt Lake City, Utah 84107


James R. Black

CERTIFICATE OF MAILING

I hereby certify that on October 4, 2007, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

THEODORE E KANELL
PLANT CHRISTENSEN & KANELL
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THIRD DISTRICT, SALT LAKE
ATTN: JODI BAILEY / MARINA DAVIS
450 S STATE ST
PO BOX 1860
SALT LAKE CITY UT 84114-1860

Dated this October 4, 2007.

By 
Administrative Secretary

Case No. 20070160
THIRD DISTRICT, SALT LAKE, 020903830

Tab 2

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FILED
UTAH APPELLATE COURTS
OCT 04 2007

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Salt Lake City, Utah 84107
Telephone (801) 288-8060
Facsimile (801) 288-8038

Attorneys for Workers Compensation Fund

BEFORE THE COURT OF APPEALS
STATE OF UTAH

* * * * *

WORKERS COMPENSATION FUND)	
and IVERSON STEEL AND)	
ERECTION COMPANY,	)	ASSIGNMENT OF RIGHTS BY
	)	WADMAN CORPORATION
Plaintiffs and Appellants)	
	)	Trial Court No. 020903830
vs.)	
	)	Judge Sandra N. Peuler
STATE OF UTAH DEPARTMENT OF)	
ADMINISTRATIVE SERVICES,)	
DIVISION OF RISK MANAGEMENT;	)	Court of Appeals. 20070160-CA
ARGONAUT INSURANCE CO.,)	
WILLIS OF UTAH, INC (settled);and)	
WADMAN CORPORATION (not an)	
appellee herein, settled.);)	
)	
Defendants and Appellees)	
)	

* * * * *

1 The undersigned Stephen F Noel as Counsel for Wadman Corporation (hereinafter “Wadman”), having been given authority by his client to so act, hereby assigns to Workers Compensation Fund (hereinafter “WCF”) any and all rights of whatever nature Wadman may have to cross-claims and claims made by it regarding workers’ compensation insurance coverage involving or arising out of the work- related accidental injuries experienced by Iverson Steel employee Corey Searle while he was working on an OCIP covered Washington County School District project building the Santa Clara Middle School on February 7, 2002. The assigned claims are more particularly described in the two consolidated causes of action currently pending before the Utah Court of Appeals under the caption of this pleading.


The first of the consolidated causes of action was filed in the Third Judicial District Court by Workers Compensation Fund and Iverson Steel and Erection Company. It is styled WORKERS COMPENSATION FUND and IVERSON STEEL AND ERECTION COMPANY Plaintiffs, vs STATE OF UTAH DEPARTMENT OF ADMINISTRATIVE SERVICES, DIVISION OF RISK MANAGEMENT; ARGONAUT INSURANCE CO.; WILLIS OF UTAH, INC.; WASHINGTON COUNTRY SCHOOL DISTRICT and WADMAN CORP., Defendants, Civil No. 020903830. As part of its answer to the above complaint, Wadman filed a cross-claim against the other named defendants.

The second of the consolidated causes of action was also filed in the Third Judicial District Court by Wadman. It is styled WADMAN CORPORATION V STATE OF UTAH DEPARTMENT OF ADMINISTRATIVE SERVICES, DIVISION OF RISK MANAGEMENT; ARGONAUT INSURANCE CO., WILLIS OF UTAH, INC ; WASHINGTON COUNTY SCHOOL DISTRICT, Civil No. 06091767.

2 In exchange for the Assignment of Right by Wadman Corporation and for other consideration satisfactory to the parties as set forth in that certain document entitled 'SETTLEMENT AGREEMENT AND RELEASE' Iverson Steel and Erection Company by virtue of its assignment of rights to Workers Compensation Fund and Workers Compensation Fund by and through Dennis V Lloyd, Senior Vice-president and General Counsel hereby agree to release, forever discharge Wadman from any liability it may have associated with the claims made by Workers Compensation Fund against it in the above described litigation

3 Neither Wadman nor WCF assumes any liability either may owe to third parties as result of entering into this "Assignment" except as may be otherwise expressly agreed in the "SETTLEMENT AGREEMENT AND RELEASE".

Dated this 7 day of September 2007



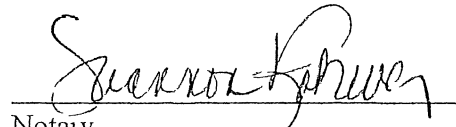
WADMAN CORPORATION
By Stephen F Noel
SMITH KNOWLES
Legal Counsel

NOTARY

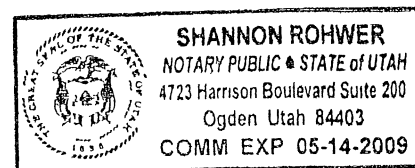
Stephen F Noel personally appeared before me on the 7 day of September, 2007, and swore under oath that he is authorized to and did sign the above ASSIGNMENT OF RIGHTS

County of Weber)

State of Utah)



Notary



25th Sept
Dated this ___ day of August 2007

Dennis V Lloyd
WORKERS COMPENSATION FUND
By Dennis V Lloyd Senior Vice-president and
General Counsel

NOTARY

Dennis V Lloyd personally appeared before me on the 25th day of ~~August~~^{Sept}, 2007, and
swore under oath that he is Senior Vice-president and General Counsel of the Workers
Compensation Fund and is authorized to and did sign the above ASSIGNMENT OF RIGHTS

County of Salt Lake)
:
State of Utah)

Patricia K Jones
Notary



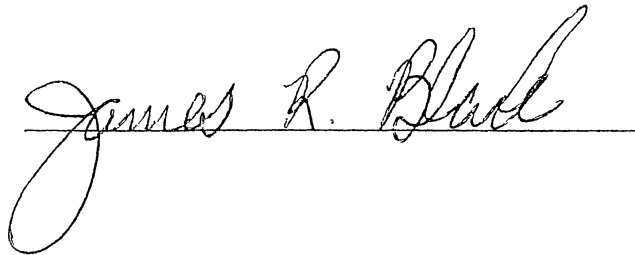
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of ASSIGNMENT OF RIGHTS BY
WADMAN CORPORATION was mailed postage prepaid this 1ST day of Oct. ~~August~~, 2007 to the
following

Theodor E Kanell
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Counsel for State of Utah Department
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of Risk Management, Argonaut Insurance
Company, and Washington County School
District.

Stephen F. Noel
SMITH & KNOWLES
4723 Harrison Blvd.
Ogden, Utah 84403
Counsel for Wadman Corp.

Dennis V. Lloyd
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Salt Lake City, Utah 84107

A handwritten signature in cursive script, reading "James R. Black", is written over a horizontal line.