1987

Edward Alter v. Hales Sand & Gravel : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

EDWARD ALTER, State Treasurer and Custodian of the Uninsured Employers' Fund and the Industrial Commission of Utah	)	
Plaintiff - Respondent,	)	
vs.	)	No. 870013-CA
HALES SAND AND GRAVEL and/or WORKERS COMPENSATION FUND of Utah,	)	Priority No. 6
Defendant - Appellant.	)	

APPELLANT'S REPLY BRIEF

APPEAL FROM DENIAL OF APPELLANT'S MOTION FOR REVIEW BY THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH

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STATEMENT OF THE CASE

Randi Marvidikis Hales, daughter of the owner of the Appellant corporation, Hales Sand and Gravel, died July 31, 1986. Since her death occurred in the course of her employment, and since she left no dependents, the Appellant was ordered to pay $30,000 into the Uninsured Employers' Fund. The order was entered pursuant to Utah Code Ann. §35-1-68 (2)(a).

> If the commission has made a determination that there are no dependents of the deceased, it may, prior to the lapse of one year from the date of death of a deceased employee, issue a temporary order for the employer or insurance carrier to pay into the Uninsured Employers' Fund the sum of $30,000. When the amount in the Uninsured Employers' Fund reaches or exceeds $500,000, the $30,000 shall thereafter be paid into the Second Injury Fund. If the amount in the Uninsured Employers' Fund falls below $500,000 at any time after reaching the initial $500,000, the commission shall direct payments into either the Second Injury Fund or the Uninsured Employers' Fund as may be required so as to maintain the Uninsured Employers' Fund at or near $500,000. Before payment into either fund, the $30,000 shall be reduced by the amount of any weekly compensation payments paid to or due the deceased between the date of the accident and death. If a dependency claim is filed subsequent to the issuance of such an order and, thereafter, a determination of dependency is made by the commission, the award shall first be paid out of the sum deposited for credit to the Uninsured Employers' Fund or the Second Injury Fund by the employer or insurance carrier before any further claim may be asserted against the employer or insurance carrier. If no dependency claim is filed within one year from the date of death, the commission's temporary order shall become permanent and final. If no temporary order has been issued and no claim for dependency has been filed within one year from the date of death, the commission may issue a permanent order at any time requiring the carrier or employer to pay $30,000 into the Second Injury Fund. Any claim for compensation by a dependent must be filed with the commission within one year from the date of death of the deceased.

This statute provides that an employer or the employer's insurance carrier may be required to pay $30,000 into the Uninsured Employers' Fund should an employee die without dependents. The $30,000 becomes a mandatory payment if the amount in either the Uninsured Employers' Fund or the Second

Injury Fund falls below $500,000. A statutory funeral allowance of $1,800 is also required.

The Appellant filed a Motion for Review with the Utah Industrial Commission challenging the constitutionality of Utah Code Ann. §35-1-68 (2)(a). Appellant claimed this statute unduly burdens the corporation and others similarly situated in that the corporation is required to stand the cost of insurance coverage for uninsured employers and consequently subsidize his competitors in the marketplace.

The Industrial Commission denied Appellant's Motion for Review and affirmed the decision of the Administrative Law Judge requiring payment. Appellant brings this appeal as a result of that affirmation.

Subsequent to these actions, through the efforts of the Appellant, the legislature repealed the statutory provision under which the payment was ordered. House Bill No. 208, 1987 General Session.

ARGUMENT

POINT I: THE LEGISLATIVE INTENT AND REAL NATURE AND INCIDENTS OF THE NO DEPENDENT DEATH BENEFIT SUBSTANTIATE THE TAX STATUS OF THE BENEFIT.

A "tax" has been defined as, " an enforced contribution of money or other property by authority of a sovereign state from *persons or property* within its jurisdiction for the purpose of defraying the public expenses." Garrett Freight Lines, Inc., v. State Tax Commission, 103 Utah 390, 135 P.2d 523 (Utah 1943). A tax is determined to be such not depending particularly on the name given it but, more precisely by the legislative intent and its real nature and the incidents thereof. Northwestern Mutual Life Ins. Co. v. State Board of Equalization, 166 P.2d 917 (Ca. 1946).

Respondent cites the cases of Henrie v. Rocky Mountain Packing Corp., 113 Utah 415, 196 P.2d 487 (Utah 1948), and Star v. Industrial Commission, 615 P.2d 436 (Utah 1980), as support for the theory that payment of the no dependent death benefit into the Uninsured Employers' Fund is not a tax, but rather compensation. In Henrie, the nondependent father whose son was killed on the job claimed that payment of the death benefit into the state treasury was not compensation as the term was used in Article XVI, Section 5 of the Utah Constitution because it did not benefit him. Mr. Henrie maintained, therefore, that he was entitled to sue Rocky Mountain Packing Corporation for wrongful death. The Court found that compensation was payable to dependents only and did not require payment to or for the benefit of nondependent parents. The Court further found that no dependent death benefits were compensation in that they were not only paid out for workmen and their dependents, but also for disability payments, death benefits, medical, hospital and burial expenses, and other payments as provided by the Act. Star also dealt with a nondependent

parent challenging the payment of the death benefit into the special fund and Henrie was cited as support.

In spite of the fact that the Utah Supreme Court has intimated through its findings in Henrie and Star that no dependent death benefit payments into the special funds are compensation, it is obvious that such findings did not consider, nor was it necessary under the particular facts, that these payments were a tax. Rather, the Court was defining compensation so as to preclude wrongful death recoveries.

In order to determine if the no dependent death benefit is indeed a tax, the legislative intent must be acknowledged. In Star, the Court referred to Henrie in stating:

> [T]he compensation acts were intended to secure workmen and their dependents (not heirs and personal representatives) against becoming objects of charity, by making reasonable compensation for calamities incidental to the employment and to include these ensuing expenses as part of the cost of production.
>
> Supra, at p. 438.

The intent then was to compensate employees and their dependents for injury and death and thereby prevent their dependence on charity and welfare. There can be no doubt that the legislature did not intend that the state would be compensated. Therefore, payments made *from* the Uninsured Employers' Fund could be compensation, but payments made *into* the Fund could not conceivably be compensation. Rather, the no dependent death benefit is paid into the Fund in the form of a tax, although it may not be specifically referred to as such. The real nature of the payment is that it is an enforced contribution by the State on employers for a public purpose, namely to compensate workmen and their dependents so that they will not have to depend on welfare.

That the benefit paid by the Appellant into the Uninsured Employers' Fund is a taxing measure is further substantiated by how that money is spent.

As per Utah Code Ann. §35-1-107(2), the funds are not only used to compensate workers and their dependents, but also to pay the costs of administration. Further, Respondent states in its brief, "the Industrial Commission investigates over 4,000 suspected uninsured employers yearly since the creation of the Uninsured Employers' Fund provided the funding necessary to conduct those investigations." The sheer volume of these investigations amounts to a sizable cost, and surely the Court could not find such expenditures are compensation to workmen or their dependents. The Uninsured Employers' Fund is taxing employers to support the functions of government and to compensate workmen and their dependents. That payments into the Fund purport to be compensation should not prevent this Court from calling a "tax" a "tax" when presented with all the facts.

POINT II: THE NO DEPENDENT DEATH BENEFIT AS AN APPROPRIATE EXERCISE OF THE STATE'S POLICE POWER MUST ABIDE CONSTITUTIONAL GUARANTEES.

Appellant does not argue that the State, under its police powers, has the right to set up an Uninsured Employers' Fund. Appellant does argue that requiring an employer to pay into such a fund upon the fortuitous circumstance that an employee dies without dependents is not a reasonable basis for classification and does, therefore, violate the principles of equal protection. Appellant also argues that requiring payment by insured, solvent employers into a fund created to benefit the employees of insolvent or uninsured employers is discriminatory and, therefore, adverse to equal protection principles.

Respondent cites the case of Salt Lake City v. Industrial Commission, 58 Utah 314, 199 P.152 (Utah 1921) to support its contention that the no dependent death benefit is not a denial of equal protection. The facts and circumstances involved in that case are very different from those in the case at

bar. In Salt Lake City, the Plaintiff was required to pay the no dependent death benefit because he was not insured by the State Insurance Fund. The Court found no discrimination as the State had made a large financial contribution to industries employing labor when it could have put all of the burden back on industry. The Court further observed that the Plaintiff had a choice as to whether to be self-insured or to insure through the State fund.

In the instant case and under the law as it existed when Appellant's case was brought, the no dependent death benefit was required of all employers whose employees died without dependents. Therefore, there was no choice as to whether Appellant would be subject to payment into the Uninsured Employers' Fund. Further, the discrimination in the instant case was not in favor of the State, but rather in favor of employees whose employers were either insolvent or have no insurance.

The payment of no dependent death benefits was upheld as constitutional in both United Air Lines Transport Corporation, et al. v. Industrial Commission, et al., 107 Utah 52, 151 P.2d 591 (Utah 1944), and Sheehan v. Shuler, 265 U.S. 371, 44 S. Ct. 548, 68 L.Ed. 1061 (1924). However, the funds in these two cases, the Combined Injury Fund in United and funds for additional compensation due to permanent total disability and for vocational education in Sheehan, were created to benefit the employees of all employers. In analyzing the basis for the Uninsured Employers' Fund in the instant case, it cannot be ignored that this Fund was established to benefit only those employees whose employers are insolvent or uninsured. Further, although all employers are required to pay into the Fund when an employee dies without dependents, it is doubtful that an insolvent or uninsured employer will indeed have the means to pay the no dependent death benefit. Therefore, the solvent,

insured employer ends up bearing most, if not all, of the burden for the employees of insolvent, uninsured employers.

Respondent cites several sections from Utah Code Annotated to support the theory that insolvent or uninsured employers are subject to liability for injuries to their employees in at least as great a degree as are those employers who are solvent and insured. Specifically, Respondent cites Utah Code Ann. §35-1-107(1) and (3) which creates the Uninsured Employers' Fund and also provides the Fund with subrogation rights as to the insolvent employer when the Fund pays benefits to the employee. While such provisions appear to equalize the positions of the solvent, insured employers and the insolvent, uninsured employers, it is in theory only. In practice, it is unlikely that the State or the employee will be able to collect anything from the insolvent employer as the very existence of his insolvency makes him judgment proof. Therefore, provisions for collecting payments from insolvent, uninsured employers do not equalize the positions of the solvent and insolvent employers in reality.

Home Acc. Ins. Co., et al. v. Industrial Commission of Arizona, et al., 269 P.501 (Az. 1928), is cited by Respondent as authority for the idea that the no dependent death benefit is an occupational tax rather than a tax on property and, as such, is not subject to constitutional limitations. This case is also used to refute Appellant's argument that a no dependent death benefit is discriminatory and arbitrary as supported by People v. Yosemite Lumber Co., 216 P. 39 (Ca. 1923).

That the tax imposed by way of the no dependent death benefit in the instant case may be an occupational tax as opposed to a tax on property is irrelevant as occupational taxes are also subject to constitutional limitations in that they must be "uniform, fair, and equitable, bearing alike on all persons and subjects embraced in the same class and in similar circumstances." 16C C.J.S.

Constitutional Law §890. In Home Acc. Ins. Co., the Arizona Court stated that the purpose of the exaction was "not to meet the current expenses of government, but to recompense employees of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employments." Home Acc., Supra at p. 505. The tax in that case was to be paid into the rehabilitation fund of the State for the benefit of all employees. This again is very different from the tax imposed in the instant case which is not only used to recompense employees of insolvent and uninsured employers, but to pay the costs of administration and of investigating suspected uninsured employers. Therefore, the exactions imposed in the case at bar are used "to meet the current expenses of government."

In distinguishing Yosemite Lumber Co. v. Industrial Acc. Commission, 204 P. 226, (Ca. 1922), Respondent correctly points out that the case dealt with a statute that exceeded the authority granted by the California Constitution. Nonetheless, the Court found that the unconstitutional act was a taxing law irrespective of the fact that it exceeded constitutional authority in that the funds were to be used for the vocational re-education of workmen not connected in any way with some of the employers who were required to pay into the fund. Further, the surplus of the fund was to be used by the Industrial Accident Commission for administrative costs. That situation is analogous to the instant case in every respect save that of exceeding constitutional authority which, ultimately, is beside the point.

In People v. Yosemite Lumber Company, 216 P. 39 (Ca. 1923), the California Court was asked to determine whether their prior decision in Yosemite Lumber Co. v. Industrial Commission served to render nugatory the remaining provision of the Act in question. The Court again found that "a compulsory payment of a definite sum by a certain class of persons known as

employers" was "a charge upon persons or property" and that the purpose of the fund was public in that it benefited persons in the state disabled in industry. Therefore, the imposition was a tax. Supra at p. 42.

The California Court also held that the classification supporting the Act was unreasonable in that it was based on a "purely adventitious condition," namely, that an employer should have an employee die without dependents. This classification was found to be unreasonable in light of the above and particularly in that the proceeds of the tax were to be devoted to the benefit "not of the employers required to pay the tax, nor even of their employees, but to the benefit and betterment of a class of persons bearing no relation to either,..." Supra at p. 43.

In the instant case, all employers are required to pay into the Uninsured Employers' Fund when an employee dies with no dependents. This no dependent death benefit has been held to be constitutional where the Fund to be benefited thereby is for the betterment of all employees in general. This benefit has not, however, been held to be constitutional where it is for the employees of one class of employers, the insolvent and uninsured, and where solvent, insured employers are compelled to pay into a Fund which will benefit a class of persons to which they have no relation. Therefore, it is not only the unreasonableness of the classification alone that thwarts constitutional obligations in this situation, but rather the unreasonable classification in conjunction with the discriminatory application; the solvent, insured employer bearing, in reality if not in theory, the entire burden for employees of insolvent, uninsured employers.

CONCLUSION

Payment of the no dependent death benefit by solvent, insured employers into the Uninsured Employers' Fund for the benefit of the employees

of insolvent, uninsured employers is unreasonable and discriminatory. Therefore, the ruling of the Industrial Commission must be overturned.

DATED THIS 6th day of July, 1987.

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Jacqueline Hatch

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MAILING CERTIFICATE

I hereby certify that on the 6th day of July, 1987, I served a copy of the foregoing APPELLANT'S REPLY BRIEF on each of the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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Bonnie Jones

Secretary