

1996

# Judean S. Olsen, Widow of Gregory J. Olsen, Deceased v. Samuel McIntyre Investment Co : Brief of Petitioner

Utah Court of Appeals

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## Recommended Citation

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**UTAH COURT OF APPEALS  
BRIEF**

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DOCKET NO. 960398-CA**

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**IN THE UTAH COURT OF APPEALS**

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JUDEAN S. OLSEN, Widow of	)	
GREGORY J. OLSEN, Deceased	)	
	)	
Applicant and Petitioner,	)	
vs.	)	COURT OF APPEALS
	)	
SAMUEL MCINTYRE INVESTMENT, CO.	)	
and THE WORKERS COMPENSATION	)	Case No.: 960398-CA
FUND OF UTAH,	)	
	)	
	)	Priority 7
Defendants and Respondents	)	
	)	

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**BRIEF OF PETITIONER**

---

PETITION FOR REVIEW FROM A DECISION  
OF THE INDUSTRIAL COMMISSION  
STATE OF UTAH

---

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AUG 23 1996

**COURT OF APPEALS**

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JURISDICTION AND NATURE OF PROCEEDINGS
--

The Utah Court of Appeals has jurisdiction over this case pursuant to Article VIII, section 5 of the Utah Constitution, and Utah Code Ann. §§ 78-2a-3 (2)(a) (1992) 35-1-82.53 (2) (1988), 35-1-86 (1988), and 63-46b-14 (1993). This is an appeal from a final order wherein the Utah State Industrial Commission reversed the ALJ's decision and ignored the plain and clear language of Utah Code Ann. §35-1-43(3)(b), which mandates that the employer serve written notice upon the insurance carrier and the Industrial Commission if compensation coverage is not desired for an officer or director of a corporation. Until written notice is served upon both, then the officer or director is considered an employee. The Commission found that when the Workers' Compensation Fund of Utah (the Fund), had sent its weekly computer tape to the Industrial

Commission, that tape satisfied the statutory requirement of service of written notice by the employer. A Petition for Review was timely filed on June 12, 1996.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL
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Did the Industrial Commission exceed its authority when it denied applicant and her three minor children death benefits when the Commission disregarded the clear language of Utah Code Ann. §35-1-43(3)(b), which requires the employer to give written notice to both the Industrial Commission and the insurance carrier and the defendant employer did not do this?

Must defendants pay the decedent's widow and three minor children benefits because the defendant employer did not comply with Utah Code Ann. §35-1-43(3)(b)?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES
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Utah Code Ann. §35-1-43(3)(b) (1990) is dispositive of this appeal. Also, Utah Code Ann. §35-1-45 (1990) is applicable in this case. No other constitutional provisions, statutes, or rules apply.

STATEMENT OF THE CASE
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Gregory James Olsen ("Olsen") was a director or officer of Samuel McIntyre Investments on or about June 3, 1994. (R. 41) He was also an employee on that date. (R. 41) Olsen was acting within the course and scope of his employment at the time of his

death. (R. 41) In March of 1993, the Workers Compensation Fund of Utah (the Fund) received written notice from the employer that Mr. Olsen (a corporate officer) was to be excluded from coverage. (R. 41) The employer paid no further premiums for Mr. Olsen. (R. 41) The employer did not give written notice to the Industrial Commission that Mr. Olsen was to be excluded from coverage as required by statute. (R. 30, 41)

Without a hearing, because the parties stipulated to the facts, the ALJ ordered defendants to pay death benefits. (R. 45) Defendants filed a Motion for Review. (R. 53) On June 10, 1996, the Industrial Commission reversed the ALJ's order. (R. 108) Petitioner then timely filed this Petition. (R. 111)

STATEMENT OF FACTS
--------------------

Gregory James Olsen ("Olsen") was a director or officer of Samuel McIntyre Investments on or about June 3, 1994. (R. 41) He was also an employee on that date. (R. 41) Olsen was acting within the course and scope of his employment at the time of his death. (R. 41) In March of 1993, the Workers Compensation Fund of Utah (the Fund) received written notice from the employer that Mr. Olsen (a corporate officer) was to be excluded from coverage. (R. 41) The employer paid no further premiums for Mr. Olsen. (R. 41) The employer did not give written notice to the Industrial Commission that Mr. Olsen was to be excluded from coverage. (R. 30, 41) On March 30, 1994, the Workers Compensation Fund made a computer entry memorializing the exclusion. (R. 41) The Fund sent



the weekly computer tape to the Industrial Commission. (R. 41)  
Said tape contains changes in policy information including updated  
exclusions or coverage. (R. 41) The Fund has collected premiums  
retroactively when the Fund has discovered that a large group of  
employees was not covered by the employer but should have been.  
(R. 42) However, this has only been done on rare occasions and on  
a large scale basis. (R. 42)

On July 30, 1994 the employer sent to the Fund a  
"Employer's First Report of Injury or Illness." (R. 001) The Fund  
denied benefits to the widow and three minor children of Olsen,  
claiming that the decedent chose not to have coverage. (R. 002)  
After the widow filed an Application for Hearing, the parties  
stipulated to the facts and the ALJ had the parties brief the issue  
of whether there was coverage or not. (R. 003, 021) The ALJ found  
that the employer had not sent written notice to the Industrial  
Commission as required by Utah Code Ann. §35-1-43(3)(b), (R. 45)  
which states:

A corporation may elect not to include  
any director or officer of the corporation as  
an employee under this chapter. If a  
corporation makes this election, it shall  
serve written notice upon its insurance  
carrier and upon the commission naming the  
persons to be excluded from coverage. A  
director or officer of a corporation is  
considered an employee under this chapter  
until this notice has been given. (R. 41)

The ALJ ordered the employer's insurance carrier to pay death  
benefits to the widow and three minor children because the employer  
had not complied with the statute. (R. 45)

The Fund filed a Motion for Review and the Industrial

Commission granted the Motion in a split decision (2-1) on June 10, 1996. (R. 53, 108) The majority of the Industrial Commission found that the weekly computer tape sent by the Fund to the Industrial Commission somehow satisfied Utah Code Ann. §35-1-43(3)(b). (R. 108) Commissioner Carlson, in his dissent, stated that the statute requires the employer to give written notice to both the Industrial Commission and the insurance carrier. (R. 108-9) Commissioner Carlson also stated that the Industrial Commission "has no authority to disregard the statute's clear language. Furthermore, the provisions of the Utah Workers' Compensation Act are to be liberally construed in favor of coverage." (R. 109) On June 12, 1996 petitioner timely filed a Petition for Review with this Court. (R. 111)

SUMMARY OF ARGUMENT
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The Industrial Commission exceeded its authority when it reversed the ALJ's decision and ignored the plain and clear language of Utah Code Ann. §35-1-43(3)(b), which mandates that the employer send written notice to the insurance carrier and the Industrial Commission if compensation coverage is not desired for an officer or director of the corporation. Until written notice was received by both, then the officer or director is considered an employee. The Commission erroneously found that the Fund had sent a computer tape to the Industrial Commission and that tape somehow satisfied the statutory requirement of written notice from the employer.

ARGUMENT
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Standard of Review

The issue on appeal is a question of law. In considering a question of law, the reviewing Court affords no deference to the Industrial Commission's legal conclusions. Rather, this Court employs a correction-of-error standard. Hurley v. Industrial Commission, 767 P.2d 524, 527 (Utah 1988). This court must "review an agency's interpretation and application of statutes for correctness, unless the statute in question grants the agency discretion." Morton Int'l, Inc. v. Auditing Div. of State Tax Comm'n, 814 P.2d 581, 588-89 (Utah 1991). This Court must closely scrutinize the Commission's order to determine whether the appropriate legal principles were applied when the Commission failed to award applicant death benefits.

**POINT I**

**DID THE INDUSTRIAL COMMISSION EXCEED ITS AUTHORITY WHEN IT DENIED APPLICANT AND HER THREE MINOR CHILDREN DEATH BENEFITS WHEN THE COMMISSION DISREGARDED THE CLEAR LANGUAGE OF UTAH CODE ANN. §35-1-43(3)(b), WHICH REQUIRES THE EMPLOYER TO GIVE WRITTEN NOTICE TO BOTH THE INDUSTRIAL COMMISSION AND THE INSURANCE CARRIER AND THE DEFENDANT EMPLOYER DID NOT DO THIS?**

Utah Code Ann. § 35-1-43(3)(b)<sup>1</sup>, states:

A corporation may elect not to include any director or officer of the corporation as an employee under this chapter. If a corporation makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the persons to be excluded from coverage. A director or officer of a corporation is considered an employee under this chapter until this notice has been given. (Emphasis added).

Id. If the corporation does not "serve written notice upon its insurance carrier and upon the commission", then the director or officer is considered an employee. In the case at hand, the employer gave the Fund notice, but it is undisputed that the employer did not give written notice to the Industrial Commission as required by the statute. The ALJ found that the employer had not sent written notice to the Industrial Commission and ordered the employer's insurance carrier to pay the death benefits to the widow and three minor children.

The Fund filed a motion for review and the Industrial Commission granted the motion in a split 2-1 vote. The majority of the Commission found that when the Fund supplied the Industrial Commission with a magnetic computer tape, which contains changes in policy information including updated exclusions of coverage for all of the Funds' policies, the statute had been satisfied. The Commission's decision is reversable for two reasons: first, the employer did not serve the Commission notice; and, second, the

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Since the death of Mr. Olsen, the legislature has changed Utah Code Ann. §35-1-43(3)(b) to now only require that written notice be given to the insurance company.

magnetic computer tape that contains all of the information of all of the Fund's numerous policies is not notice and it certainly is not written notice as required. Because the Industrial Commission erroneously interpreted Utah Code Ann. § 35-1-43(3)(b) this Court must "review statutory interpretations by agencies for correctness, giving no deference to the agency's interpretation, unless the statute grants to the agency the discretion to interpret the statute." Ferro v. Department of Commerce, 828 P.2d 507, 510 (Utah App. 1992) (citing Morton Int'l, Inc. v. State Tax Comm'n, 814 P.2d 581, 588 (Utah 1991)). Furthermore, the statute does not grant the Industrial Commission discretion to interpret the statute.

As shown above, Utah Code Ann. §35-1-43(3)(b) states an employer may elect to exclude officers or directors; however, if this election is made, the employer shall serve written notice to both the insurance carrier and the Industrial Commission. The law is well settled that the effect of the use of the term "may" signifies permission and generally means that the action spoken of is optional or discretionary and not mandatory or required. McMaster v. McIlroy Bank, 654 S.W. 2d 591, 594 (Ark.App. 1983); State Exrail Cartwright v. Okl. Natural Gas, 640 P.2d 1341, 1345 (Okl. 1982); State v. Wilson, 264 S.E.2d 414 (So.Car. 1980).

The ordinary and usual meaning of "may" is one of permission, discretion or option and not of requirement. The word "may" when given its ordinary meaning denotes a permissive term rather than demandatory connotation of the word "shall". In Herr v. Salt Lake County, 525 P.2d 728, 729 (Utah 1974), the Utah

Supreme Court cited Anderson v. Yungkau, 329 U.S. 482 (1946), which states:

The word "shall" is ordinarily "language of command." Escoe v. Zerbst, 295 U.S. 490, 493, 55 S.Ct. 818, 819, 79 L.Ed. 1566. And when the same Rule uses both "may" and "shall", the normal inference is that each is used in its usual sense--the one act being permissive, the other mandatory.

Herr, 525 P.2d at 728.

The controlling statute in the case at hand uses both "may" and "shall." As shown above, it states, "[a] corporation may elect not to include any director or officer of the corporation as an employee under this chapter. If a corporation makes this election, it shall serve written notice upon its insurance carrier and upon the commission." That means written notice by the employer to the Industrial Commission is mandatory. This Court, in Jones v. Bountiful City Corp., 834 P.2d 556 (Utah App. 1992), stated:

Utah courts construing statutes containing the term "shall" generally have concluded that term is mandatory. . . . (term "shall" in statute is usually presumed mandatory rather than discretionary). (Cites omitted).

Id. at 559. Because the employer did not give written notice then Mr. Olsen was considered an employee and should have workers' compensation coverage. This is consistent with Utah law. This Court stated:

When faced with a question of statutory construction, we first examine the plain language of the statute. . . . We will resort to other methods of statutory interpretation only if we determine that the language is

ambiguous. . . . Thus, when statutory language is plain and unambiguous, we will not look beyond the same to divine legislative intent. . . . Additionally, we must assume "that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." . . . (Cites omitted and emphasis added).

Murphy v. Crosland, 886 P.2d 74, 79-80 (Utah App. 1994). The Industrial Commission did not determine that the statute is ambiguous, unreasonably confused, or inoperable. The defendants did not raise this defense below either. In fact, the statute is very clear and unambiguous. Mr. Olsen is considered an employee until both the Fund and the Industrial Commission received written notice from the employer informing them otherwise.

The Commission's decision that the statute does not require separate notice (R. 107) flies in the face of the plain and clear language of the statute. Moreover, the Commission ignores the affidavit of its own employee, Karla Winkler, which states, "According to our files & [sic] to the best of my knowledge the Industrial Commission has not received a corporation exclusion form on Samuel McIntyre [sic] Investments." Ms. Winkler's affidavit clearly shows that the Commission had not been served written notice. The Fund did not provide any evidence from the Industrial Commission that the Commission received the exclusion on the tape.

Commissioner Carlson accurately observed that the Commission "has no authority to disregard the statute's clear language. Furthermore, the provisions of the Utah Workers' Compensation Act are to be liberally construed in favor of

coverage." Consequently, the Industrial Commission committed reversible error when it misinterpreted Utah Code Ann. §35-1-43(3)(b) and denied applicant and her three minor children death benefits and this Court should reverse the Commission's order and reinstate the ALJ's order.

## POINT II

**MUST DEFENDANTS PAY THE DECEDENT'S  
WIDOW AND THREE MINOR CHILDREN  
BENEFITS BECAUSE THE DEFENDANT  
EMPLOYER DID NOT COMPLY WITH UTAH CODE  
ANN. §35-1-43(3)(b)?**

The Industrial Commission's decision that the Fund's computer tape satisfies Utah Code Ann. §35-1-43(3)(b) was really a pretext to deny benefits because the Commission felt it was unfair that, "Mr. Olsen, as president and signator for McIntyre, intended and understood that his workers' compensation coverage was terminated." That may have been Mr. Olsen's intent; however, until the statute was fully complied with, Mr. Olsen could not change his status as an employee and could not terminate coverage. (See, Utah Code Ann. §35-1-45). Consequently, his widow and three children are entitled to death benefits.

In Bevans v. Industrial Comm'n, 790 P.2d 573 (Utah App. 1990), this Court stated, "The Industrial Commission is not free to 'legislate' in areas apparently overlooked by our lawmakers or to exercise power not expressly or impliedly granted to it by the legislature, even in the name of fairness." Id. at 578 (emphasis



added). By following the clear and unambiguous language of other statutes, Utah courts have acknowledged harsh, and sometimes inequitable, results can occur. In Sullivan v. Scoular Grain Co. of Utah, 853 P.2d 877, 883 (Utah 1993), the Utah Supreme Court stated that "the Act allows an at-fault employer to escape liability altogether at the expense of the injured employee. We agree with plaintiff that this result is inequitable, but the effect of the statutory language is clear." Id. at 883 (footnote omitted). The same Court reiterated "'where statutory language is plain and unambiguous,' we will 'not look beyond the same to divine legislative intent.'" Id. (Cite omitted). The Court then stated, "[w]e are not free 'to assess the wisdom of a statutory scheme.'" Id. Moreover, the law in Utah is very clear, "it is for the judiciary to assume that each term of a statute was advisedly adopted by the Legislature." Stahl v. Utah Transit Auth. 618 P.2d 480, 481 (Utah 1980). In the present case, the Commission may not like the result; however, the language of the statute is clear, plain and unambiguous. Therefore, the decedent was considered an employee at the time of his death and his family is entitled to death benefits.

In Hacker v. The Industrial Commission of Arizona, 758 P.2d 662, 157 Ariz. 391 (Ariz. App. 1988) the Arizona Court was faced with a case where the statute required the employee to give written notice to the employer and the insurance carrier that coverage was waived. Hacker was the owner of the corporation which made him both employer and employee. He was killed in the course

and scope of his employment. However, his wife had sent a letter to the insurance company requesting termination of his benefits. Yet, after his death, the wife applied for benefits because the decedent had not written himself a letter notifying himself that he waived coverage. The insurance company denied benefits and argued that it would be "ludicrous" for Hacker to write himself a letter. Id. at 663-5.

However the Arizona court rejected this argument and awarded benefits. The reasons were as follows: First, "statutory formality serves a purpose separate from that of actual notice." Id. at 665. It also "reinforces the importance of the election of remedies." Such a requirement may "help to protect the claimant 'against his own improvidence or folly.'" Id. (citation omitted). "Second, the requirement of formal notice is no different than the corporate directors elect themselves officers or that corporate officers authorize the payment of salaries to themselves. It is simply a consequence of the corporate form of doing business." Id.

The carrier also claimed that such a ruling would create a "loophole" and a miscarriage of justice. The Arizona court stated, "[t]o some extent, this is true. However, both the carrier and the independent broker involved in this case were in the insurance business. As a result they should have known the requirements for a legally effective rejection of workers' compensation coverage by an employee." Id.

In the present case, to overturn the Industrial Commission's order is not unjust either. The Fund is the state's

largest workers' compensation insurer and "should have known the requirements for a legally effective rejection of workers' compensation coverage by an employee." Id. In order to protect itself, the Fund could have continued to charge a premium on the corporate officers or directors until the employer provided proof that written notice was given to the Industrial Commission.

Furthermore, the Fund is not without a remedy. The Fund admits that it has collected premiums from employers after it learned that a large group of employees was not covered by the employer but should have been<sup>2</sup>. The Fund even admitted to the Industrial Commission that as many as 26,500 employers may not have complied with §35-1-43(3)(b). 26,500 appears to be a large group of employees that are not covered but should have been. This gives the Fund an alternative remedy. Therefore, this Court should overturn the Industrial Commission's Order and reinstate the ALJ's order, which orders defendant to pay applicant death benefits.

#### CONCLUSION

In this case, the language of Utah Code Ann. §35-1-43(3)(b) is very clear and unambiguous. Officers and directors are considered employees until the employer serves written notice upon

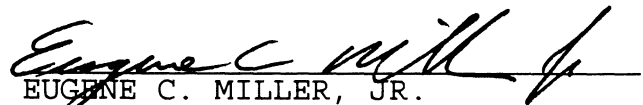
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2

This is not a new or unusual position. In Lewis v. Moultrie, 627 P.2d 94 (Utah 1981) the employer moved the court to allow it to amend its answer to include the defense that the injured plaintiff was an employee and the plaintiff's exclusive remedy was with the Industrial Commission. The employer also told the Court that coverage could be obtained for plaintiff and eight other individuals "simply by paying the previously unpaid premiums." Id. at 96.

the carrier and the Industrial Commission. This is a mandatory requirement. The Fund stipulated that the Industrial Commission did not receive notice from the employer. Because the language of this statute is plain and unambiguous, the Industrial Commission committed reversible error when it looked beyond the same to divine legislative intent. Therefore, this Court should overturn the Industrial Commission's Order and reinstate the ALJ's order, which orders defendant to pay applicant death benefits.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of August, 1996.

  
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered, 4 true and correct copies of the foregoing Brief of Appellant to the attorneys at the address listed below, on the 23<sup>RD</sup> day of August, 1996.

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1458\brief.app

# ADDENDUM A

**ative" defined — Mining lessees and sublessees  
— Partners and sole proprietors — Corporate of-  
ficers and directors — Real estate agents and  
brokers.**

(1) As used in this chapter, "employee," "worker" or "workmen," and "operative" mean:

(a) each elective and appointive officer and any other person, in the service of the state, or of any county, city, town, or school district within the state, serving the state, or any county, city, town, or school district under any election or appointment, or under any contract of hire, express or implied, written or oral, including each officer and employee of the state institutions of learning and members of the National Guard while on state active duty; and

(b) each person in the service of any employer, as defined in Section 35-1-42, who employs one or more workers or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, including aliens and minors, whether legally or illegally working for hire, but not including any person whose employment is casual and not in the usual course of the trade, business, or occupation of his employer.

(2) Unless a lessee provides coverage as an employer under this chapter, any lessee in mines or of mining property and each employee and sublessee of the lessee shall be covered for compensation by the lessor under this chapter, and shall be subject to this chapter and entitled to its benefits to the same extent as if they were employees of the lessor drawing such wages as are paid employees for substantially similar work. The lessor may deduct from the proceeds of ores mined by the lessees an amount equal to the insurance premium for that type of work.

(3) (a) A partnership or sole proprietorship may elect to include as an employee under this chapter any partner of the partnership or the owner of the sole proprietorship. If a partnership or sole proprietorship makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the persons to be covered. No partner of a partnership or owner of a sole proprietorship is considered an employee under this chapter until this notice has been given. For premium rate making, the insurance carrier shall assume the salary or wage of the employee to be 150% of the state's average weekly wage.

(b) A corporation may elect not to include any director or officer of the corporation as an employee under this chapter. If a corporation makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the persons to be excluded from coverage. A director or officer of a corporation is considered an employee under this chapter until this notice has been given.

(4) As used in this chapter, "employee," "worker" or "workman," and "operative" do not include a real estate agent or real estate broker, as defined in Section 61-2-2, who performs services in that capacity for a real estate broker if:

(a) substantially all of the real estate agent's or associated broker's income for services is from real estate commissions;

(b) the services of the real estate agent or associated broker are performed under a written contract specifying that the real estate agent is an independent contractor; and

(c) the contract states that the real estate agent or associated broker is not to be treated as an employee for federal income tax purposes.

(5) As used in this chapter, "employee," "worker" or "workman," and "operative" do not include an offender performing labor under Section 64-13-16 or 64-13-19, except as required by federal statute or regulation.

**35-1-45. Compensation for industrial accidents to be paid.**

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and funeral

# ADDENDUM B



INDUSTRIAL COMMISSION OF UTAH

**RECEIVED**

**Case No. 95-182**

NOV 20 1995

JUDEAN S. OLSEN, Widow of,  
GREGORY J. OLSEN, Deceased,

Applicant,

**vs.**

**SAMUEL MCINTYRE INVESTMENT  
COMPANY/WORKERS COMPENSATION  
FUND OF UTAH,**

**Defendants.**

\* \* \* \* \*

\*\*\*\*\*

**Workers Compensation Fund  
Legal Department**

## FINDINGS OF FACT

## CONCLUSIONS OF LAW

AND ORDER

HEARING:           Hearing Room 334, Industrial Commission of Utah,  
                      160 East 300 South, Salt Lake City, Utah, on August  
                      3, 1995 at 10:00 o'clock a.m. Said hearing was  
                      cancelled at the request of the parties.

**BEFORE:** Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The applicant was represented by Eugene Miller,  
Attorney.

The defendants were represented by Janet Moffitt, Attorney.

This case involves a claim for death benefits for the widow and 3 minor children of Gregory J. Olsen, deceased, who died in an automobile/train accident, while in the course of his employment, on June 3, 1994. The carrier denies the claim for death benefits, because the corporate employer notified the carrier in March of 1993 that it chose to exclude Gregory Olsen from coverage. As a result, the carrier discontinued collecting a premium for coverage of Olsen. Olsen was a corporate officer or director of the corporate employer and U.C.A. 35-1-43(3)(b) allows optional exclusion for corporate officers and directors. The applicant argues that the corporate employer gave inadequate notice in order to accomplish exclusion of Olsen as an employee of the corporate employer and thus, per U.C.A. 35-1-43(3)(b), Olsen must be considered an employee of the corporation on the date of his death, with his widow and children still entitled to benefits.

ORDER

RE: GREGORY J. OLSEN (deceased)

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The attorneys notified the ALJ, prior to the hearing date, that the sole issue for resolution in this case was a legal one and that there were no factual disputes. Therefore, the attorneys requested that they be allowed to file a fact stipulation and written argument, in lieu of a hearing, to present the issue to be decided. The ALJ agreed to allow for this manner of adjudication. The fact stipulation and applicant's memorandum were received at the Commission on August 23, 1995 and the defendants' responsive memorandum was received at the Commission on September 20, 1995. The matter was considered ready for decision on September 20, 1995.

#### FINDINGS OF FACT:

The undisputed facts in this matter are as follows, verbatim from the applicant's memorandum:

1. Gregory James Olsen (Olsen) was a director or officer of Samuel McIntyre Investments on or about June 3, 1994. He was also an employee on that date.
2. Olsen was acting within the course and scope of his employment at the time of his death.
3. In March of 1993, the Workers Compensation Fund of Utah (the Fund) received written notice from the employer that Mr. Olsen (a corporate officer) was to be excluded from coverage. The employer paid no further premiums for Mr. Olsen.
4. The employer did not give written notice to the Industrial Commission that Mr. Olsen was to be excluded from coverage. (Exhibit A, Affidavit from Karla Winkler).
5. On March 30, 1994, the Workers Compensation Fund made a computer entry memorializing the exclusion. The Fund sent the weekly computer tape to the Industrial Commission. Said tape contains changes in policy information including updated exclusions of coverage.

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6. The Fund has collected premiums retroactively when the Fund has discovered that a large group of employees was not covered by the employer but should have been. However, this has been done on rare occasions and on a large scale basis.

ARGUMENT PRESENTED:

Both parties agree that the applicable statutory provision is U.C.A. 35-1-43(3)(b), which reads as follows:

A corporation may elect not to include any director or officer of the corporation as an employee under this chapter. If a corporation makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the persons to be excluded from coverage. A director or officer of a corporation is considered an employee under this chapter until this notice has been given.

The applicant argues that the plain language of the last sentence of this provision indicates that, if written notice is not provided to both the insurance carrier and the Industrial Commission, by the corporation, there is no exclusion and the non-excluded directors and officers are considered employees for workers compensation purposes. The applicant argues that, in the instant case, although the carrier was notified in writing of the intended exclusion, the Commission was not, and therefore Olsen must be considered an employee as of the date of his death. With respect to the carrier's failure to collect a premium in this case, the applicant argues that this is the carrier's error and the carrier should have continued to collect a premium on Olsen until such time as it was clear that the corporation had notified the Commission of the exclusion. In addition, as a means of remedying the failure to collect a premium after March of 1993, the applicant argues that the carrier can simply charge the corporation a "back premium" for coverage of Olsen for the period from March 1993 to the date of Olsen's death.

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Counsel for the applicant cites the Arizona case of Hacker v. Industrial Commission of Arizona, 758 P.2d 662 (Ariz. App. 1988) as on point. Counsel argues that in Arizona there is a statute that requires the employee to give notice to the employer if an exclusion is desired. In Hacker, apparently the spouse of the employee gave notice to the insurance carrier that exclusion was requested. Per counsel for the applicant, the court found this to be insufficient notice and found that there was a purpose behind requiring the exact format of notice that the statute required, even if it resulted in requiring a corporate officer to basically write himself a letter giving notice of his desire to be excluded.

Counsel for the defendants argues that the corporate decision to drop coverage on corporate officers/directors in this case most certainly involved Olsen's input, considering he was a corporate officer/director. Counsel argues that it is inappropriate to allow corporate officers/directors to profit from their own non-compliance with the statute. Counsel argues that this occurs when corporate officers/directors are allowed to decide to exclude themselves, thereby saving the cost of a premium, and then are allowed to recover on a claim for benefits after the desired exclusion, because the corporation failed to do as the statute requires (i.e. notify the Commission in writing). Counsel argues that this is an especially inappropriate result when notice to the Commission serves no purpose. Counsel indicates that the legislature has recognized that no purpose is served by requiring notification and has eliminated the requirement for Commission notice as of the most recent amendment to U.C.A. 35-1-43(3)(b). Finally, counsel argues that the Commission did receive actual notice of the exclusion in this case, because the Commission received the carrier's computer tape which contained the exclusion information.

#### CONCLUSIONS OF LAW:

The ALJ has reread section U.C.A. 35-1-43(3)(b) many times over in order to determine whether or not there is any ambiguity in the language of the statute. In the final analysis, the ALJ finds that there is no ambiguity and that the last sentence clearly requires that the corporation itself must give written notice to both the carrier and the Industrial Commission before an exclusion is accomplished. Receipt of notice is not a requirement in the statute and thus the matter of the computer tape received by the

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Commission would seem to be irrelevant. The ALJ finds that, in the instant case, it is clear that written notice was not given to the Commission by the corporation, as the statute requires. As such, per the literal language of U.C.A. 35-1-43(3)(b), Olsen was not excluded as an employee and must still be considered an employee of the corporation at the time of his death. As a result, the widow and the children are due death benefits.

Having stated the ultimate ruling in this matter, the ALJ feels compelled to explain that she finds the unambiguous language of U.C.A. 35-1-43(3)(b) to require an act on the part of corporate employers (giving notice to the Commission) that has no apparent underlying purpose. In addition, as noted by counsel for the defendants, the language of this section allows for corporate officers/directors to simply fail to comply with the apparently purposeless notice and thereby profit as a result. The ALJ cannot believe this result was intended by the legislature. The ALJ should state that she has no information that would confirm that, in the instant case, Olsen was involved in any intentional attempt to profit by non-compliance with the statutorily required notice. It is a possibility, but certainly nothing in the stipulated facts of this case suggests a corporate attempt to defraud the carrier. Nonetheless, the ALJ is bothered by the potential for abuse that the statutory language allows. Unfortunately, the ALJ cannot invalidate the legislation simply because she finds it objectionable. Perhaps the legislature was aware of the potential for abuse when the statute was amended recently. At least the current reading of the statute does not allow for corporate abuse.

The ALJ should also note that she has rendered her decision in this matter simply based on what she considers to be unambiguous language in the statute and not based on the applicant's arguments with respect to the Hacker case or his arguments regarding potential remedies available to the carrier. The ALJ finds the Hacker rationale is not exactly on point and it is unclear whether the carrier remedy suggested by the applicant is actually available to the carrier in this particular case. In Arizona, the statute apparently requires notice by the actual employee to be excluded (as opposed to by the corporation) to the employer (as opposed to to the Commission). In Hacker the employee's spouse notified the carrier of the exclusion request. This is clearly a long way from the requirement that the employee notify the employer. In the instant case, compliance with notification was much closer to what the statute requires and thus it is less clear that the intended exclusion should be nullified. In addition, apparently, the court

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RE: GREGORY J. OLSEN (deceased)

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in Hacker found that there was some purpose to having the employee do the notification, because it provided evidence of an actual election of remedies made by the individual who would be entitled to the benefits. As noted above, the Utah statutory requirement of notice to the Commission by the corporation does not have any apparent underlying purpose. Therefore, it is unclear why non-compliance with the requirement should result in a finding of no-exclusion-accomplished. But once again, the ALJ cannot invalidate the legislation simply because it does not serve any apparent logical purpose.

Apparently, because the parties wanted the threshold issue of coverage resolved first, the ALJ has not been provided with facts relative to the issue of the appropriate compensation rate. As such, the ALJ will not make an actual accounting of benefits due in this order. If the applicant is desirous of having an actual award made in a Supplemental Order, the applicant's attorney should petition for such and provide the ALJ with a suggested rate that the defendants can respond to. Otherwise, the ALJ will presume that the parties will settle the issue of the actual accounting of benefits due. In the following order, the ALJ will simply note that death benefits are found due and owing. This conclusion is based on resolution of the sole legal issue presented to the ALJ in favor of the applicant.


ORDER:

IT IS THEREFORE ORDERED that the defendants, Samuel McIntyre Investment Company/Workers Compensation Fund of Utah, pay the applicant, Judean Olsen, widow, and her three minor children, death benefits, as a result of the death of her husband, Gregory J. Olsen, in the course of his employment with Samuel McIntyre Investment Company on June 3, 1994.

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RE: GREGORY J. OLSEN (deceased)  
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IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal. In the event a Motion for Review is timely filed, the parties shall have fifteen (15) days from the date of filing with the Commission, in which to file a written response with the Commission in accordance with Section 63-46b-12(2) Utah Code Annotated.

DATED this 16<sup>th</sup> day of November, 1995.

  
\_\_\_\_\_  
Barbara Elicerio  
Administrative Law Judge

**CERTIFICATE OF MAILING**

I certify that on November 16<sup>th</sup> 1995, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of Judean S. Olsen, Widow of Gregory J. Olsen, Deceased, was mailed to the following persons at the following addresses, postage paid:

Judean Olsen  
101 Grason Vista Drive  
Queenston, UT 21658

Eugene Miller, Jr.  
Attorney at Law  
311 South State, Suite 340  
SLC, UT 84111-2320

Janet Moffitt  
Attorney at Law  
Workers Compensation Fund of Utah  
P O Box 57929  
SLC, UT 84157-0929

INDUSTRIAL COMMISSION OF UTAH

Wilma Burrows (RF)  
Wilma Burrows  
Adjudication Division



# ADDENDUM C

THE INDUSTRIAL COMMISSION OF UTAH

ORDER DENYING MOTION FOR REVIEW  
JUDEAN S. OLSEN  
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On receipt of the foregoing letter, WCF mailed to McIntyre, to Mr. Olsen's attention, a form entitled "Corporate Officer/Director Exclusion Form". In substance, the form explained that pursuant to §35-1-43 of the Utah Workers' Compensation Act, after the form was completed, signed and returned to WCF, any corporate officers or directors listed thereon would no longer be McIntyre's "employees" for purposes of receiving workers' compensation benefits. On February 3, 1992, McIntyre returned the form, signed by Mr. Olsen as president of the company. The form listed Mr. Olsen as the only officer/director which McIntyre intended to exclude from workers' compensation coverage. Based on the foregoing, WCF excluded Mr. Olsen from coverage under McIntyre's workers' compensation insurance policy and reduced McIntyre's premium accordingly.<sup>1</sup>

From February 1992, when McIntyre excluded Mr. Olsen from coverage, until Mr. Olsen's death in 1994, McIntyre paid no premiums for workers' compensation insurance coverage on Mr. Olsen. Although McIntyre did not provide separate notice to the Industrial Commission that it had excluded Mr. Olsen from coverage, WCF notified the Industrial Commission in the usual and customary manner, by means of magnetic tape which was downloaded into the Industrial Commission's records.

On June 3, 1994, Mr. Olsen died in an accident arising out of and in the course of his duties for McIntyre.

**DISCUSSION AND CONCLUSIONS OF LAW**

The Utah Workers' Compensation Act provides benefits to the dependant survivors of employees who have died as a result of accidents arising out of and in the course of employment. See Utah Code Ann. §35-1-45. Corporate officers and directors are generally

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<sup>1</sup> The Industrial Commission notes some unexplained inconsistency between the dates which appear on the documents submitted by WCF and the dates referred to in WCF's motion for review. However, these inconsistencies do not appear significant because under either version, Mr. Olsen, on behalf of McIntyre, instructed WCF to exclude Mr. Olsen from workers' compensation coverage prior to Mr. Olsen's death.

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JUDEAN S. OLSEN

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considered "employees" for purposes of the benefits provided by the Act. However, §35-1-43 of the Act allows corporations to exclude officers and directors from coverage. As of the date of Mr. Olsen's death, the requirements for "opting out" with respect to corporate officers and directors were set forth in §35-1-43(3)(b) of the Act as follows:

A corporation may elect not to include any director or officer of the corporation as an employee under this chapter. If a corporation makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the person to be excluded from coverage. A director or officer of a corporation is considered an employee under this chapter until this notice has been given.

Thus, at the time of Mr. Olsen's death, §35-1-43(3)(b) required written notice to both the insurance carrier and the Industrial Commission in order to exclude an officer or director from coverage. It is clear to the Industrial Commission that Mr. Olsen, as the president and signator for McIntyre, intended and understood that his workers' compensation coverage was terminated.

While §35-1-43(3)(b) requires written notice of exclusion to both the insurance carrier and the Industrial Commission, it does not require separate notice. In this case, it is undisputed that McIntyre, through Mr. Olson as its president, gave written notice of Mr. Olsen's exclusion to WCF, which in turn notified the Industrial Commission by means of magnetic tape. As a result, the Industrial Commission received the same information regarding McIntyre's exclusion of Mr. Olsen that it would have received if McIntyre had directly notified the Industrial Commission.

In her decision, the ALJ concluded that the exclusion provision of §35-1-43(3)(b) requires two separate and distinct written documents to effectuate exclusion. As noted above, the Industrial Commission finds no requirement of separate notice. The Industrial Commission also concludes that notice to the Industrial Commission by means of magnetic tape, when such notice is accurate and timely, satisfies §35-1-43(3)(b)'s requirements.

ORDER DENYING MOTION FOR REVIEW  
JUDEAN S. OLSEN  
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In summary, the Industrial Commission concludes that pursuant to §35-1-43(3)(b) of the Utah Workers' Compensation Act, McIntyre excluded Mr. Olsen from coverage under the Act. Consequently, Mr. Olsen's survivors are not entitled to the benefits provided by the Act.

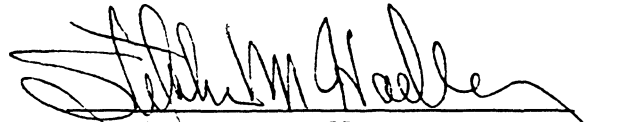
Because of the foregoing determination, it is unnecessary for the Industrial Commission to consider the other points raised by WCF's motion for review.

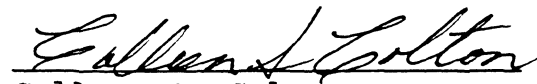
ORDER

The Industrial Commission reverses the decision of the ALJ and grants WCF's motion for review. The Industrial Commission concludes that Mr. Olsen was not covered by the Utah Workers' Compensation Act at the time of his death. Consequently, his dependants are not entitled to survivors benefits under the Act. It is so ordered.

Dated this 10<sup>th</sup> day of June, 1996.



  
Stephen M. Hadley  
Chairman

  
Colleen S. Colton  
Commissioner

DISSENT

I dissent. Although I may be sympathetic to the position chosen by my colleagues, I find the requirements of §35-1-43(3)(b) are explicit in their requirement that the employer give notice of its election to exclude officers and directors from coverage by giving written notice of such election to both the Industrial Commission and the insurance carrier. Regardless of the argument

ORDER DENYING MOTION FOR REVIEW  
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advanced by the majority that the written notice of exclusion need not be a separate notice, the plain language of the statute simply states otherwise. The Industrial Commission has no authority to disregard the statute's clear language. Furthermore, the provisions of the Utah Workers' Compensation Act are to be liberally construed in favor of coverage. Consequently, I would conclude, as did the ALJ, that McIntyre did not meet §35-1-43(3)(b)'s requirements for exclusion of Mr. Olsen. I would further conclude that WCF's other arguments are without merit and that Mr. Olsen's widow and dependants are entitled to workers' compensation benefits.

A handwritten signature in cursive script, reading "Thomas R. Carlson". The signature is written in dark ink and is positioned above a horizontal line.

Thomas R. Carlson  
Commissioner

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Industrial Commission to reconsider this Order. Any such request for reconsideration must be received by the Industrial Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with that court within 30 days of the date of this order.

ORDER DENYING MOTION FOR REVIEW  
JUDEAN S. OLSEN  
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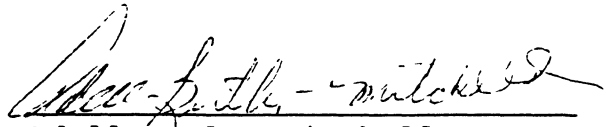
CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Judean S. Olsen, Case No. 95-0182, was mailed first class postage prepaid this 15<sup>th</sup> day of ~~May~~<sup>June</sup>, 1996, to the following:

JUDEAN S. OLSEN  
101 GRASON VISTA DRIVE  
QUEENSTONE, MD. 21658

EUGENE MILLER  
ATTORNEY AT LAW  
40 EAST SOUTH TEMPLE #300  
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JANET L. MOFFITT  
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WORKERS' COMPENSATION FUND OF UTAH  
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Adell Butler-Mitchell  
Support Specialist  
Industrial Commission of Utah