

1996

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

Utah Court of Appeals

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DOCKET NO. 960398-CA

COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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)	
)	

REPLY BRIEF OF PETITIONER

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

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SUMMARY OF ARGUMENT

Defendants do not dispute the affidavit of Karla Winkler, which states that the Industrial Commission did not receive written notice. The defendants cannot disregard clear statutory language and create a procedure contrary to the Utah Code Ann. §35-1-43(3)(b). To allow them to do that would allow defendants to create legislation. That is the role of the legislature and not the Industrial Commission or the judiciary. When the legislature changed the statute in 1995 to read the way the defendants want the old statute to be interpreted is clear evidence that the legislature did its job. However, the new statute cannot be applied retroactively because the new statute does not clarify how the earlier statute should have been understood and retroactive application would grant defendants' greater rights and it would impose greater liability upon the applicants. Lastly, defendants claim that public policy dictates that Mr. Olsen's family be deprived of his death benefits because they will be at odds with the employer about coverage. Defendants cite no cases in support of this claim, and, contrary to defendants' claim, declaratory actions are frequently filed when either the insured or the insurance company have a dispute that relates to statutory interpretation. Also, because defendants freely admit that they disregarded the requirement that written notice be sent to the Industrial Commission their public policy claim is ineffectual.

REPLY POINT I

UTAH CODE ANN. §35-1-43(3)(b) REQUIRES WRITTEN NOTICE AND IT WAS NOT GIVEN. THE DEFENDANTS DO NOT HAVE THE POWER TO REWRITE THE STATUTE AT THEIR CONVENIENCE AND DISREGARD THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE.

A. KARLA WINKLER'S AFFIDAVIT THAT THE INDUSTRIAL COMMISSION DID NOT RECEIVE WRITTEN NOTICE IS UNCHALLENGED

In the defendants' Point I, they cite RDG Assoc./Jorman Corp. v. Indus. Com'n. 741 P.2d 948, 951 (Utah 1987), which states that, "proper construction of a statute must further its purposes." However, the defendants fail to say what the purpose of the Utah Workers' Compensation Act is. The Utah Supreme Court has unequivocally stated:

The Workmen's Compensation Act is to be construed liberally to further the statutory purposes of providing relief from injuries caused by industrial accidents. . . . The Industrial Commission is in the first instance responsible for effectuating the purposes of the Act by construing its provisions to secure its humane objectives. (Cite omitted).

Pinter Constr. Co. v. Frisby, 678 P.2d 305, 306 (Utah 1984). The statute in question, Utah Code Ann. § 35-1-43(3)(b), states that the corporation "shall serve written notice upon its insurance carrier and upon the commission . . ." otherwise the officer or director is still considered an employee. (Emphasis added). In this case, the employer did not serve written notice upon the Commission. It is uncontested that Karla Winkler's affidavit, which states, "[a]ccording 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" (R. 30), establishes that an employer must file a corporation exclusion form with the Commission and it was not filed. The Fund's sending a computer tape does not satisfy the clear and unambiguous language of Utah Code Ann. §35-1-43(3)(b). What is noticeably lacking in the defendants brief is any reply or even a comment to Ms. Winkler's affidavit. Because Mr. Olsen's request to the Fund did not satisfy the statutory requirements of Utah Code Ann. §35-1-43(3)(b), he was, therefore, still considered an employee of the corporation.

Defendants also claim that notice is for the benefit of the party who is to receive the notice. This is simply not true under the Worker's Compensation Act. Utah Code Ann. §35-1-97(2) requires an employee to give the employer or the Commission notice of an injury within 180 days of the injury or the employee is barred from any claim of benefits. However, §35-1-97(4)(a) also requires the employer to give notice of an accident to the Industrial Commission within seven days of any of the following: a) the occurrence of the injury; b) the employer's first knowledge of the injury; or c) after the employee's notification of injury to the employer. The notice the employer must give to the Industrial Commission neither tolls the statute of limitations for the employee's benefit nor can it be used as a defense by the employer, if the employer fails to give the notice. (See, Kennecott Corp. V. Industrial Comm'n. 740 P.2d 305 (Utah App. 1987)). For whatever reason, the legislature requires the employer to give the Commission notice of every injury

and death arising out of and in the course of employment. This notice does not benefit either the Industrial Commission or the employee. Likewise, the legislature required, in Utah Code Ann. §35-1-43(3)(b), that the employer give written notice to the Commission when an officer or director was no longer covered by compensation insurance. Until this written notice is given the officer or director is considered an employee.

The defendants also claim that because the notification requirements of Utah Code Ann. §§35-1-47 and 31A-22-1002 were met, that somehow the written notice of §35-1-43(3)(b) was also met. Defendants fail to point out, however, that the notice requirements of §§35-1-47 and 31A-22-1002 do not require written notice, which is required in §35-1-43(3)(b). Essentially, the defendants are trying to bootstrap the required written notice of §35-1-43(3)(b) onto two different statutes that require different types of notice. The legislature used different language for the different statutes and despite compliance with §§35-1-47 and 31A-22-1002, this Court, "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). As pointed out in applicants' first brief and it was not disputed in defendants' brief, the reading of Utah Code Ann. §35-1-43(3)(b) is not unreasonably confused or inoperable. Therefore, written notice had to be given by the employer to the Industrial Commission and computer tapes sent by the Fund to the Commission do

not satisfy that requirement. Therefore, defendants' argument that notice was given must fail.

Defendants' next claim that Ms. Olsen and her three children are using the statute as a sword instead of a shield and that to grant benefits would be akin to allowing the fox to police the henhouse. Both of these arguments are very misleading and offensive. There is absolutely no evidence of fraud or misrepresentation by the employer. Defendants' statement implies that Mr. Olsen gave the Fund notice and then went out and intentionally got run over by a train so that his family could have benefits. Defendants' argument also implies that officers and directors have given notice with the intent to get injured. Defendants' argument borders on the absurd.

On the other hand, the Fund was perfectly capable of "policing the henhouse" and simply failed to do so. The Fund admits that it never observed the requirement of giving written notice to the Industrial Commission (Defendants' Brief p. 12) and it may have done this as many as 26,500 times. (R. 63) This is remarkable admission of neglect, because the Fund has an entire department of legal counsel, the Fund only provides worker's compensation insurance, and the Fund is the largest workers' compensation carrier in the state. The Fund had 26,500 opportunities to see to it that the statutory requirements were met and the Fund freely admits that it never observed the statutory requirement of written notice to the Commission. All the Fund had to do is ask the employer to send a copy of the Industrial Commission's written

notice to the Fund or it would continue to charge the employer a premium. Or, the Fund could have simply called the Industrial Commission and asked if a corporation exclusion form had been received. If the Commission had not received one, then the Fund could inform the employer that premiums will continue. Instead, the Fund chose to disregard the clear language of the statute and to stop collecting premiums without any assurance that the statute was complied with. The Fund does not seem to understand that noncompliance with Utah Code Ann. 35-1-43(3)(b) has a direct impact on them as well as on the officer or director. The Fund was in the best position to "police the henhouse" and the Fund not only failed to do so, but wilfully chose not to on every occasion.

**B. Strict Statutory Requirements Are Not "Absurd"
Unless One Party Wilfully Disregards Them and Defendants
Did Not Reasonable Rely On The Employer's Notice**

As shown in applicants' first brief and above, the plain and clear language of §35-1-43(3)(b) requires written notice be given to both the insurance carrier and the Industrial Commission, otherwise the corporate officer is still considered an employee. Nevertheless, the fact that the employer gave notice to the Fund and not the Industrial Commission does not create an "absurd" result. In Lamarr v. Utah State DOT, 828 P.2d 535 (Utah App. 1992) this Court ruled that a plaintiff must give notice to UDOT and the Attorney General's office, even though the Attorney General is counsel for UDOT. Id. at 541. In fact, the court in Lamarr cited, in footnote 6, a Utah Federal District court decision, which states:

The court agrees with the defendants that the plain meaning of section 63-30-12 requires that two notices of claim should have been filed by plaintiff: one to the Attorney General and one to the University of Utah. Although this statutory requirement may result in redundant notice being given, such redundancy apparently is mandated by the statute inasmuch as the Utah Attorney General is the agent and legal counsel for all state agencies, including the University of Utah. In this pendant state law claim, the court is unwilling to ignore the unambiguous language of the Utah statute requiring two separate notices, especially where the Utah Supreme Court has repeatedly held that strict compliance with the notice of claim provision is essential to maintain a suit pursuant to the Governmental Immunity Act. (Emphasis added)

Kavwasa v. University of Utah, 785 F. Supp. 1445, 1446-7 (D.Utah 1990). Although the above case involves a different statute, the legal principle is the same. The legislature requires that notice be given to two entities even though it appears to be redundant.

In the case at hand, the legislature mandated notice be given to both the Fund and the Industrial Commission otherwise the decedent would still be considered an employee. Failure to give notice to two entities, even if it appears to be redundant, is not "absurd." What is absurd is the Fund admitting that it has never followed the statutory directive and it now asks this Court to create a remedy for the Fund because the Fund disregarded the statutory requirements.

The defendants also claim that Mr. Olsen's family should be denied his death benefits because of equitable estoppel. The Utah Supreme Court stated, in Warren v. Provo City Corp. 838 P.2d 1125, 1130 (Utah 1992) (footnote 16), that a party, "claiming an estoppel cannot rely on representations or acts . . . if he had the means by which with reasonable diligence he could ascertain the true

situation." (citations omitted). The Fund cannot claim estoppel because the Fund knew the true situation. Moreover, the Fund admittedly chose to disregard the language of the statute and by doing so, helped create the situation that it now asks this court to deliver it from. It is startling that the Fund can claim estoppel when it knew full well that Mr. Olsen was considered an employee until the Commission received written notice. Therefore, the Industrial Commission's order granting review should be reversed and the ALJ's order reinstated, which grants the decedent's family death benefits.

REPLY POINT II

THE STATUTORY CHANGES CANNOT BE RETROACTIVELY APPLIED BECAUSE IT WOULD GIVE DEFENDANTS GREATER RIGHTS AND IMPOSE GREATER LIABILITY ON THE APPLICANTS

Defendants claim that the new statute should be retroactively applied in this case. Again, Utah law is very clear on this issue. In Kennecott Corp. v. Indus. Com'n of Utah, 740 P.2d 305 (Utah App. 1987), this Court stated, "[l]ater statutes or amendments may not be applied retroactively to deprive a party rights or impose greater liability unless the later statute or amendment clarifies or amplifies how the earlier law should have been understood." Id. at 308. If this Court were to apply the statute retroactively then it would deprive Mr. Olsen's family of rights and the statute does not clarify or amplify how the earlier law should have been

understood. None of the cases cited by defendants discuss the workers' compensation statutes, like the Kennecott case does. Consequently, the cases cited by defendants are inapposite. Moreover, the cases cited by defendants all agree that a statute cannot be applied retroactively if it deprives a party rights or imposes greater liability. As shown above, that is exactly what the defendants want this court to do: to apply that statute retroactively so that the defendants have greater rights and the applicants are deprived of theirs. Therefore, defendants' second argument must fail and the Industrial Commission's order must be overturned.

Moreover, the fact that the legislature changed the statute is a solid indication that it is the legislature's role to make that change and not the judiciary's or the defendants. In fact, the defendants implicitly concede that written notice was necessary and not given when they state, "[t]his amendment was clearly intended to eliminate the requirement to give notice to the Commission, either directly or indirectly." (Defendant's brief, p. 11). The statute in question requires written notice from the employer. Only if the statute has not been satisfied, such as in the present case, can "indirect" notice by computer tape be claimed. The Industrial Commission followed the defendants' erroneous argument when it concluded that indirect notice via a computer tape satisfies the statutory requirement of written notice. The Commission erred because, "courts are not to infer substantive terms into the text that are not already there. Rather, the

interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed." Berrett v. Purser & Edwards, 876 P.2d 367, 370 (Utah 1994). Although that language is addressed to district courts, the Industrial Commission does not have power to legislate either.

The defendants also argue that the Fund and the Commission have established an accepted procedure of notice through the computer tape. Again, this claim ignores Ms. Winkler's affidavit. Besides, the defendants are admitting that the Fund and the Commission have rejected the legislature's requirement and have established their own procedure. In Bevans v. Industrial Comm'n, 790 P.2d 573 (Utah App. 1990), this Court stated, "[t]he 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). The Industrial Commission and the Fund cannot totally disregard the statutory requirement of written notice. If this Court affirms the Industrial Commission's order, then such a decision would give the Industrial Commission and the Fund the power to alter any statutory language at their convenience. Therefore, defendants' argument is without merit and the Commission's decision must be reversed.

REPLY POINT III

DEFENDANTS' PUBLIC POLICY ARGUMENT IS MERITLESS BECAUSE THE DEFENDANTS WILFULLY DISREGARDED THE STATUTORY REQUIREMENT OF WRITTEN NOTICE

Lastly, the defendants claim that public policy dictates that Mr. Olsen's family be denied death benefits. This would be inconsistent with Utah law, which states:

While such an approach may occasionally result in decisions that seem harsh or unfair, it is for the legislature, not the judiciary, to remedy such results by amending or repealing the statute. Indeed, "if the act is unjust, amendments to correct the inequities should be made by the legislature and not by judicial interpretation." Masich v. United States Smelting, Ref. & Mining Co., 113 Utah 101, 126, 191 P.2d 612, 625, appeal dismissed, 335 U.S. 866, 93 L. Ed. 411, 69 S. Ct. 138 (1948); see also Condemarin v. University Hosp., 775 P.2d 348, 377 (Utah 1989) (Hall, C.J., dissenting). ("It is not our prerogative to question the wisdom, social desirability, or public policy underlying a given statute. Those are matters left exclusively to the legislature's judgment and determination."); Utah Mfrs.' Ass'n v. Stewart, 82 Utah 198, 204, 23 P.2d 229, 232 (1933) (Fairly debatable questions as to reasonableness, wisdom, or propriety [of legislative action] are not for the courts but for the Legislature."); (Citations omitted and emphasis added).

White v. Deseelhorst, 879 P.2d 1371, 1378 (Utah 1994) (Justice Russon's dissenting opinion, footnote 2). The defendants state that, "if Olsen were found to be an employee . . . the Fund would be placed in the position of having to dispute coverage under the plan rather than guarding the interest of the Employer."

(Defendants' brief, p. 12)¹. This claim is completely meritless. What defendants' are essentially arguing is that statutory language that directly impacts a contract must be disregarded, otherwise the parties will have a dispute about the contract. Insurance companies routinely deny coverage and base the denial on statutory language. Then either the insurance company or the insured file a declaratory action to determine if there is coverage or not. Ofttimes if an insurance company wins the declaratory action, then insured is exposed to liability or excess liability. See, Wagner v. Farmers Ins. Exch., 786 P.2d 763 (Utah App. 1990). In following the Fund's logic, then anytime an insured and the insurance company have a dispute over coverage that is affected by statute, then as a matter of public policy the statute must be ignored so there is no interference with the contract. Defendants do not cite a single case in support of this unfounded position and it is meritless. See, Neel v. State, 889 P.2d 922 (Utah 1995); State Farm Mut. Auto. Ins. Co. v. Mastbaum, 748 P.2d 1042 (Utah 1987). In the present case, the defendants ignored the statute, knowing that Mr. Olsen would still be considered an employee, and now want this Court's help because they claim it may affect their contract with the employer.

The defendants also try to create a sense of panic by claiming that if this Court decides that the Fund is liable in this case,

¹ The applicants question defendants' claim that if Mr. Olsen was found to be an employee, then the dispute between the Fund and the employer would create a situation that violates public policy. The fact that the Fund's legal counsel still represents both the employer and the Fund makes this claim questionable at best.

then the Fund is potential liability for thousands of claims. Also, the public would not be served if this occurs because there could be thousands of lawsuits. This is absurd. First, because the statute was amended in 1995 (more than 1½ years ago) any claim that may be raised must first get past the statute of limitations. Consequently, any claim for death benefits under the old statute is wholly barred because such a claim must be filed within one year of the employee's death. Also, if the director or officer did not report the injury to the employer within 180 days of the injury then any claim for benefits is wholly barred. Any claim more than six years old is also wholly barred if the employee did not file a claim with the Industrial Commission within six years. The Fund did not present any evidence to the Industrial Commission that additional claims have been filed or even would be filed. The Fund is asking this Court to make a decision based upon pure speculation, which "violates the basic premise upon which our judicial system is founded." Willey v. Willey, 914 P.2d 1149, 1151 (Utah App. 1996).

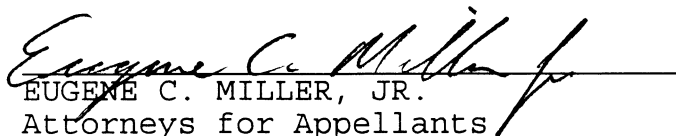
Furthermore, if anyone were successful in getting past the statute of limitations, then the Fund would only have to collect past premiums from those employers. Additionally, the more time that passes the smaller the risk. What is truly ironic is that the defendants candidly admit that they wilfully disregarded clear statutory requirements, perhaps as many as 26,500 times, which directly put defendants this situation, and now they ask this Court to bail them out because public policy dictates it. Applicants

fail to see how defendants misfeasance can protect the public and promote public interest. Therefore, the defendants' argument is meritless and the Industrial Commission's order must be overturned and the ALJ's order reinstated.

CONCLUSION

The Industrial Commission's order that states that the computer tape satisfies the written notice requirement of Utah Code Ann. §35-1-43(3)(b) is erroneous. To allow that order to stand would give power to the defendants to rewrite statutes at their convenience. Utah law simply does not allow the Industrial Commission and the Fund to legislate. The legislature has changed the statute, which is the legislative role, not the judiciary's. Utah law does not allow a statute to be applied retroactively if greater rights are given or if others are deprived of theirs, which would happen in the case at hand. The defendants' admission that they never observed the statutory requirement, not only in this case, but in as many as 26,500 cases, defeats their argument that the Commission's order should be upheld for public policy reasons. Defendants should be held accountable for their misfeasance. Therefore, the Industrial Commission's order must be overturned and the ALJ's order reinstated, which orders the Fund to pay the death benefits to Mr. Olsen's widow and their three children.

DATED this 24th day of October, 1996.



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CERTIFICATE OF SERVICE

I hereby certify that 4 true and correct copies (two each) of the Reply Brief of Appellant were mailed to the attorneys at the addresses listed below, on the 24th day of October, 1996.

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