

1996

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gerald J. Lallatin; Sandra N. Dredge; Dredge & Lallatin; Attorneys for Respondent; Alan Hennebold; Industrial Commission of Utah; Attorney for Industrial Commission of Utah. Eugene C. Miller, Jr.; Attorney for Petitioner.

Recommended Citation

Brief of Appellee, *Olsen v. Samuel McIntyre Investment Co*, No. 960398 (Utah Court of Appeals, 1996).
https://digitalcommons.law.byu.edu/byu_ca2/321

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

**UTAH COURT OF APPEALS
BRIEF**

UTAH
DOCUMENT
K F U

IN THE UTAH COURT OF APPEALS

50

.A10

DOCKET NO. 960398-CA

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

Applicant and Petitioner,

vs.

SAMUEL MCINTYRE INVESTMENT
CO., WORKERS COMPENSATION
FUND OF UTAH, and INDUSTRIAL
COMMISSION OF UTAH

Defendants and
Respondents

Case No. 960398-CA
95-182

Priority 7

BRIEF OF RESPONDENTS

PETITION FOR REVIEW OF ORDER OF
INDUSTRIAL COMMISSION OF UTAH

GERALD J. LALLATIN
SANDRA N. DREDGE
DREDGE & LALLATIN, L.C.
226 West 2230 North, Suite 100
Provo, Utah 84604
Telephone: (801) 371-0306

ALAN L. HENNEBOLD
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111
Telephone (801) 530-6801

EUGENE C. MILLER JR.
40 East South Temple, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 328-5000

Utah Court of Appeals

SEP 25 1996

Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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

Applicant and Petitioner,

vs.

SAMUEL MCINTYRE INVESTMENT
CO., WORKERS COMPENSATION
FUND OF UTAH, and INDUSTRIAL
COMMISSION OF UTAH

Defendants and
Respondents

Case No. 960398-CA
95-182

Priority 7

BRIEF OF RESPONDENTS

PETITION FOR REVIEW OF ORDER OF
INDUSTRIAL COMMISSION OF UTAH

GERALD J. LALLATIN
SANDRA N. DREDGE
DREDGE & LALLATIN, L.C.
226 West 2230 North, Suite 100
Provo, Utah 84604
Telephone: (801) 371-0306

ALAN L. HENNEBOLD
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111
Telephone (801) 530-6801

EUGENE C. MILLER JR.
40 East South Temple, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 328-5000

TABLE OF CONTENTS

| | |
|---|----|
| JURISDICTION | 1 |
| QUESTIONS PRESENTED FOR REVIEW | 1 |
| DETERMINATIVE STATUTE | 2 |
| STATEMENT OF ADDITIONAL FACTS. | 4 |
| SUMMARY OF ARGUMENT | 5 |
| ARGUMENT | 5 |
| I. OLSEN WAS EXCLUDED AS AN EMPLOYEE FOR PURPOSES OF WORKERS COMPENSATION BECAUSE THE EMPLOYER GAVE NOTICE TO BOTH THE FUND AND THE COMMISSION THROUGH THE FUND. | 5 |
| A. The Employer Was Required to Give Only One Written Notice to Both the Fund and the Commission.. . . . | 5 |
| B. Allowing the Employer to Obtain Coverage Without Paying Premiums Produces an Absurd Result Which Is Inequitable and Should Be Estopped.. . . . | 9 |
| II. IN THE ALTERNATIVE, THE 1995 AMENDMENT TO § 35-1-43(3)(b), U.C.A.,WHICH ELIMINATED NOTICE TO THE COMMISSION WAS A CHANGE IN A PROCEDURE AND SHOULD BE APPLIED RETROACTIVELY. | 10 |
| III. PUBLIC POLICY DICTATES THAT THE NOTICE BE RECOGNIZED AS EFFECTIVE. | 12 |
| A. A Decision That Olsen Was an Employee for Workers Compensation Purposes Would Create a Conflict Between the Fund and the Employer That Would be Contrary to Public Policy. | 12 |
| B. A Finding That the Established Notice Procedure is Ineffective Would Create Chaos With Regard to Coverage With All Corporate Employers Which Elected Not to Cover Officers. . . | 14 |
| CONCLUSION | 14 |

TABLE OF AUTHORITIES

CASES

| | |
|---|-------|
| <u>Beck v. Farmers Ins. Exch.,</u> 701 P.2d 795 (Utah 1985) | 13 |
| <u>Red Rover Copper Co. v. Industrial Com'n,</u> 58 Ariz. 203, 118 P.2d 1102 (1941). | 8 |
| <u>Burrow v. Vrontikis,</u> 788 P.2d 1046 (Utah App. 1990). | 9, 10 |
| <u>Foil v. Ballinger,</u> 601 P.2d 144 (Utah 1979) | 11 |
| <u>Hacker v. Industrial Commission of Arizona,,</u> 758 P.2d 662, 157 Ariz. 391 (Arizona App. 1988). | 8, 9 |
| <u>Lyon v. Hartford Accident and Indemnity Co.,</u> 25 Utah 2d 311, 480 P.2d 739 (1971).. . . . | 13 |
| <u>Midwest Realty v. City of West Jordan,</u> 541 P.2d 1109 | 5, 9 |
| <u>Nelson v. Jacobsen,</u> 669 P.2d 1207, (Utah 1983) | 6, 9 |
| <u>Nucor Corp v. State Tax Comm'n,</u> 832 P.2d 1294 (Utah 1992) | 1 |
| <u>Pilcher v. State,</u> 663 P.2d 450 (Utah 1983) | 11 |
| <u>RDG Assoc./Jorman Corp. v. Indus. Com'n,</u> 741 P.2d 948(Utah 1987) | 6, 9 |
| <u>Stahl v. Utah Transit Authority,</u> 618 P.2d 480 (1980) | 6 |
| <u>Washington Nat'l Ins. Co. v. Sherwood Assoc.,</u> 795 P.2d 665 (Utah App. 1990).. . . . | 11 |

| | |
|--|---|
| <u>Zissi v. Tax Comm'n,</u> 842 P.2d 848 (Utah 1992). | 2 |
|--|---|

STATUTES

| | |
|--|--------------------|
| <u>Utah Code Ann., § 35-1-45.</u> | 5 |
| <u>Utah Code Ann., 31A-22-1002</u> | 7 |
| <u>Utah Code Ann., § 35-1-43(3)(b).</u> | 1-7, 10, 14 |
| <u>Utah Code Ann., § 35-1-43(4)</u> | 1, 2, 5, 10-12, 14 |
| <u>Utah Code Ann., § 35-1-47</u> | 7 |
| <u>Utah Code Ann., § 35-1-57</u> | 13 |
| <u>Utah Code Ann., § 63-46b-16(4)(d)</u> | 1, 2 |

JURISDICTION

Respondent Workers Compensation Fund of Utah (the "Fund") and Samuel McIntyre Investment Co. (the "Employer") agree with and adopt the statement of jurisdiction in the brief of Petitioner Judean Olsen, widow of the deceased worker Gregory J. Olsen ("Olsen"), regarding Petitioner's appeal from a decision of Industrial Commission of Utah (the "Commission").

QUESTIONS PRESENTED FOR REVIEW

A. First Issue: The following issue was **preserved** before the Commission. See Defendants' Memorandum of Points and Authorities, Record at p. 57.

Whether the Industrial Commission of Utah correctly decided that Olsen was excluded from workers compensation coverage when it concluded the Employer was required to give only one written notice to the Fund and the Commission to satisfy the notice provisions of Utah Code Ann. § 35-1-43 (3)(b).

Standard of Review: The correctness standard is applied to questions of agency-specific law for which the agency has not been granted implicit or explicit discretion. Utah Code Ann. § 63-46b-16(4)(d); Nucor Corp v. State Tax Comm'n, 832 P.2d 1294, 1296 (Utah 1992).

B. Second Issue: The following issue was presented to the Commission by Respondent. See Defendants' Memorandum of Points and Authorities, Record at p. 59.

Whether, in the alternative, the revised notice provisions of Utah Code Ann. § 35-1-43(4) which eliminated any

requirement to give notice to the Commission should be applied retroactively to deny Petitioner's claims.

Standard of Review: The correction of error standard is applied to agency interpretations of general law. Utah Code Ann. § 63-46b-16(4)(d); Zissi v. Tax Comm'n, 842 P.2d 848, 852-53 & n. 2 (Utah 1992).

DETERMINATIVE STATUTE

Interpretation of then Utah Code Annotated § 35-1-43(3)(b) (1993) and application of the revised version of this statute, now designated as § 35-1-43(4), are determinative in the case. The 1993 version read as follows:

A corporation may elect to not 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 the notice has been given. (Emphasis added).

Utah Code Ann. § 35-1-43(3)(b)(1993).

The 1995 revision of this statute 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 naming the persons to be excluded from coverage. A director or officer of a corporation is considered an employee under this Chapter until the notice has been given. (Emphasis added).

Utah Code Ann. § 35-1-43(4)(1995).

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings and Disposition.

Applicant and Petitioner, the widow of Olsen, applied for workers compensation benefits as the surviving spouse of Olsen who died in an auto/train accident on June 3, 1994. At the time of the accident, Olsen was President of the Employer. The Fund denied the Applicants' claim for benefits because more than one year prior to the fatal accident, Olsen, as president of the Employer and pursuant to U.C.A. § 35-1-43(3), gave the Fund written notice to exclude Olsen as an employee for workers compensation purposes. Record at p. 66. The Fund then sent a computer tape as notice of Olsen's exclusion to the Commission as required by law. As a result of this notice, the Fund issued a rider to the Employer which formalized the exclusion of Olsen from coverage under the policy and the Fund discontinued collecting premiums for Olsen.

On November 16, 1995, Administrative Law Judge Barbara Elicerio (the "ALJ") ruled that both the Employer and the Fund were liable for paying the claimed death benefits because Utah Code Ann. § 35-1-43(3)(b) required the Employer to give separate written notice of the election directly to the Commission as well as to the Fund. (See Findings of Fact and Conclusions of Law and Order, Petitioner's "Addendum B".)

On November 30, 1995, the Fund and Employer filed a Motion for Review with the Industrial Commission. On June 10, 1996, the Commission reversed the ALJ's decision in its Order Granting Motion for Review (the

"Commission's Order")(See Addendum C, Petitioner's Brief) and denied Petitioner's claim for benefits. The Commission concluded that the notice provisions of Utah Code Ann. § 35-1-43(3)(b) had been satisfied by the Employer because the statutes did not require separate written notice to each the Fund and the Commission.

STATEMENT OF ADDITIONAL FACTS

The following additional facts are included in the Commission's Order:

In a letter dated January 1, 1992 and signed by Olsen as the Employer's president, the Employer instructed the Fund as follows: "Please exclude the undersigned, Gregory J. Olsen, an officer and director of the policy holder, from further coverage under the policy effective January 1, 1992 and until further notice." (Commission's Order, Record at p. 105, See Addendum C, Petitioner's Brief.) The Fund then mailed the Employer, to Olsen's attention, a form entitled "Corporate Officer/Director Exclusion Form" which explained that upon receipt by the Fund of the signed form from the Employers, any officers and directors of the Employer listed on the form would no longer be employees for purposes of workers' compensation benefits. (Commission's Order, Record at p. 106.) On February 3, 1992, the Employer returned the form signed by Olsen as president of the company and listing Olsen as the only officer/director to be excluded. (Commission's Order, Record at p. 106.) Although the Employer did not provide separate notice to the Commission that it had excluded Olsen from coverage, the Fund notified the Commission "in the usual and customary manner, by means of magnetic tape

which was downloaded into the Industrial Commission's records." (Commission's Order, Record at p. 106.)

SUMMARY OF ARGUMENT

The notice given by the Employer to exclude Olsen as a covered employee for workers compensation purposes was effective because either (1) the notice complied with the provisions of U.C.A. § 35-1-43(b)(3) which does not require separate notice, or in the alternative (2) the superseding provisions of U.C.A. § 35-1-43(4) as amended in 1995 should be given retroactive effect as a change in notice requirements without any change in substantive benefits.

ARGUMENT

I.

OLSEN WAS EXCLUDED AS AN EMPLOYEE FOR PURPOSES OF WORKERS COMPENSATION BECAUSE THE EMPLOYER GAVE NOTICE TO BOTH THE FUND AND THE COMMISSION THROUGH THE FUND.

A. The Employer Was Required to Give Only One Written Notice to Both the Fund and the Commission.

The Utah Workers' Compensation Act provides benefits to dependant survivors of employees covered by the Act who die as a result of an accident arising out of and in the course of employment. U.C.A. § 35-1-45. Officers and directors of corporations are covered employees unless the corporation elects to exclude them as employees by complying with the requirements for opting out of coverage. At the time of Olsen's accident, these opt out requirements were set forth in U.C.A. § 35-1-43(3)(b) which read as follows:

A corporation may elect to not 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 the notice has been given. (Emphasis added).

Utah Code Ann. § 35-1-43(3)(b), U.C.A. (1993). The primary question on appeal is whether the Employer's written notice to the Fund, which notice the Fund then transmitted to the Commission as required by law, was effective to exclude Olsen as an employee for workers' compensation purposes. The Commission decided the notice was effective because the statute does not require separate notice to each of the Fund and the Commission. The position taken by Petitioner, on the other hand, is that this statute required the Employer to give two written notices, one to each the Fund and the Commission.

The Utah Supreme Court has held that "proper construction of a statute must further its purposes." RDG Assoc./Jorman Corp. v. Indus. Com'n, 741 P.2d 948, 951 (Utah 1987). And, because a statute is to be construed in light of its intended purpose, substantial compliance with a notice statute may satisfy the statutory intent. Stahl v. Utah Transit Authority, 618 P.2d 480 (1980). The purpose of a requirement to give notice is for the benefit of the party who is to receive the notice, not for the benefit of the party giving the notice. Nelson v. Jacobsen, 669 P.2d 1207, 1212 (Utah 1983). And, effective notice need only "be of such nature as to reasonably to convey the required information....". Id.

In this case, there is no dispute that the Employer gave written notice to the Fund that it elected to have Olsen excluded as an employee for workers' compensation coverage. Petitioner's Statements of Facts; Record at p. 41. The Fund responded by cancelling coverage as to Olsen by issuing a rider to the Employer (General Endorsement, Record at p. 71, See Addendum) and gave notice to the Commission of the cancellation. (Affidavit of Brad Christenson, Record at pp. 37-38.) The Fund and Commission have elected this method of compliance with U.C.A. § 35-1-43(3)(b) (Commission's Order, Record at 106,) in part because the Fund is already required to provide exactly the same information to the Commission, pursuant to U.C.A. §§ 35-1-47¹ and 31A-22-1002², both of which require notice by the Fund to the Commission of all policy cancellations before such cancellations are effective. Therefore, by operation of these statutes, the Commission received the notice required by § 35-1-43(3)(b) through the Fund.

¹ Section 35-1-47 (1986) reads in part: (1) Every insurance carrier writing workers' compensation insurance coverage in this state or for this state, ... shall file notification of that coverage with the Industrial Commission or its designee with 30 days after the inception date of the policy on forms prescribed by the Workers' Compensation Division of the Industrial Commission. These policies will be in effect from inception until canceled by filing with the commission or its designee a notification of cancellation on forms prescribed by the Workers' Compensation Division within ten days after the cancellation of a policy.

² Section 31A-22-1002 : (1) Any insurer assuming a workers' compensation risk shall carry it until the policy is canceled, either:

- (a) by agreement between the Industrial Commission, the insurer, and the employer; or
- (b) after 30 days notice by the insurer to the employer, and after notice to the Industrial Commission as provided in Section 35-1-47.

Given these facts, the Commission correctly decided that the notice given by the employer was adequate to exclude Olsen as an employee for purposes of workers compensation benefits. This well-established method of giving notice to the Commission meets the purpose of such notice, allowing both the Fund and Commission to monitor coverage, and to do so without having to create a bureaucratic procedure of matching separate notices submitted to each entity. Where a notice requirement is intended to serve as a shield to the Fund and Commission, it should not now be allowed to serve as a sword against the Fund. This result cannot have been intended by the Legislature.

B. Allowing the Employer to Obtain Coverage Without Paying Premiums Produces an Absurd Result Which Is Inequitable and Should Be Estopped.

When a strictly literal interpretation of a statute produces results which are absurd, then the Commission and courts are entitled to narrow the literal scope of the statute. RDG Assoc./Jorman Corp. v. Indus. Com'n, 741 P.2d 948, 951 (Utah 1987). Utah law frowns on allowing a party to profit from its own mistakes. Midwest Realty v. City of West Jordan, 541 P.2d 1109 (failure of city to strictly comply with statute did not excuse city from making payment.)

Utah also recognizes the law of equitable estoppel "which precludes parties from asserting their rights where their actions render it inequitable to allow them to assert those rights." Burrow v. Vrontikis, 788 P.2d 1046, 1048 (Utah App. 1990). Estoppel requires proof of three elements: (1) an act or statement by one party inconsistent with a later asserted claim; (2) the other party's reasonable action or

inaction based on the first party's action or statement, and (3) injury to the second party that would result from allowing the first party to repudiate its act or statement. Id.

Petitioner's reliance on an Arizona case, Hacker v. Industrial Commission of Arizona, 758 P.2d 662, 157 Ariz. 391 (Arizona App. 1988) is misplaced. First, the Arizona case does not provide a precedent for Utah. Second, the issues in the Hacker case are not the same as here. There, the question was whether the person giving the notice had the capacity to give such notice. That is not at issue in this case. Pursuant to Arizona statute an employee could make a pre-injury election of remedies for work related injuries, i.e. receive workers' compensation or, in the alternative, retain the right to sue the employer. Hacker, 758 P.2d at 664. The insurers raised estoppel and equity arguments that notice was effective even though the employee did not give the notice. The Arizona court rejected these arguments because this election of remedies resulted from a constitutional amendment which the court found to be an expression of public policy; and, "no contractual consent, no laches nor estoppel can prevail against public policy. Hacker, 758 P.2d at 665, *citing* Red Rover Copper Co. v. Industrial Com'n, 58 Ariz. 203, 118 P.2d 1102, 1107 (1941). In this case, there is no such constitutional mandate barring equitable considerations.

The Arizona court also found that, in addition to giving notice, the statutory notice formality in the Hacker case may help to protect the employee from his own improvidence or folly in electing remedies. Hacker, 758 P.2d at 665. In the

present case, the employer can make the election without any notice or consideration to the employee, so guarding against improvidence or folly on the part of the employee cannot be a purpose of the Utah statute. In this case the notice requirement is strictly for the benefit of the party receiving the notice.

Nelson v. Jacobsen, 669 P.2d at 1212.

Here, the Employer clearly had the burden to give the required notice and was in the best position to ensure that it complied with any notice requirement. The Fund was entitled to and did rely on the notice it received by reducing premiums, issuing an exclusion to coverage and notifying the Commission of the exclusion. To now allow the Employer in this case to obtain coverage from an insurer without paying premiums because the Employer itself failed to comply with a notice requirement imposed on the Employer would produce an absurd and inequitable result not intended by the Legislature. To rule otherwise would be to allow the fox to police the henhouse.

II.

IN THE ALTERNATIVE, THE 1995 AMENDMENT TO § 35-1-43(3)(b), U.C.A., WHICH ELIMINATED NOTICE TO THE COMMISSION WAS A CHANGE IN A PROCEDURE AND SHOULD BE APPLIED RETROACTIVELY.

In 1995, the legislature amended U.C.A. § 35-1-43(3)(b), now designated as § 35-1-43(4), to read 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 naming the persons to be excluded from coverage. A director or

officer of a corporation is considered an employee under this Chapter until the notice has been given. (Emphasis added).

Utah Code Ann. § 35-1-43(4) U.C.A. (1995). This amendment was clearly intended to eliminate the requirement to give notice to the Commission, either directly or indirectly. Consequently, Applicant's claim must be denied if the revised statute is applied retroactively.

The general rule is that revision of a statute "cannot be given retroactive effect unless the legislature expressly declares such an intent in the statute." Washington Nat'l Ins. Co. v. Sherwood Assoc., 795 P.2d 665, 667 (Utah App. 1990). However, as an exception to the general rule, a statute is applied retroactively where it changes only procedural law by providing a different mode for enforcing substantive rights:

[P]rocedural statutes enacted subsequent to the initiation of a suit which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions as well.

Id., *citing* Pilcher v. State, 663 P.2d 450, 455 (Utah 1983). An amendment to a statute is a procedural change where it "merely affects the legal machinery by which the parties enforce their rights under the contract, " Id. *citing* Pilcher v. State, 663 P.2d at 455, "or simply clarifies the legislature's previous intentions." Id. The Utah Supreme Court has specifically held that an amendment to a statute which changed and clarified a notice requirement was retroactive and applied to a case then pending. Foil v. Ballinger, 601 P.2d 144, 151 (Utah 1979).

On its face, the amendment to § 35-1-43(4) U.C.A. was a clarification that notice to the Commission was not required for an employer to make an effective election to exclude an officer from the definition of "employee." The requirement to give separate notice to the Commission has never served any purpose or even been observed except as the Fund has notified the Commission by computer tape. Even prior to the amendment, the Commission did not approve or disapprove coverage of corporate officers. The Commission has used the computer tape only as evidence of statutory compliance by the Fund. Clearly the procedure established between the Fund and Commission recognizes that no separate notice be given from an employer.

Therefore, the amendment to U.C.A. § 35-1-43(4) should be applied retroactively. The Employer was only required to give notice to the Fund and the alleged failure to give notice to the Commission did not make the Employer's election to exclude Olsen ineffective.

III.

PUBLIC POLICY DICTATES THAT THE NOTICE BE RECOGNIZED AS EFFECTIVE.

- A. A Decision That Olsen Was an Employee for Workers Compensation Purposes Would Create a Conflict Between the Fund and the Employer That Would be Contrary to Public Policy.

The Commission's decision should not be set aside for public policy reasons. A decision to the contrary would be to interfere with the contractual relationship between the Fund and the Employer. The insurance policy between the Fund and the Employer creates a "duty [of the Fund] to defend at our expense any claim,

proceeding, or suit against the Employer for benefits payable by this insurance."

(Policy, Coverage A, Record at p. 69, See Addendum.) The Utah Supreme Court has ruled that this duty requires the insurer to "be as zealous in protecting the interests of the insured as it would be in regard to its own." Beck v. Farmers Ins. Exch., 701 P.2d 795, 799 (Utah 1985); *citing* Lyon v. Hartford Accident and Indemnity Co., 25 Utah 2d 311, 319, 480 P.2d 739, 745 (1971).

If Olsen were found to be an employee, rather than guarding the interests of the Employer, the Fund would be placed in the position of having to challenge the Employer as to whether the policy of insurance covered Olsen. Being a covered employee and an insured employee are two different considerations. It does not necessarily follow that the Employer had insurance for Olsen.

An employer has the option of buying insurance or, if qualified, being self-insured for its liability for employees' workers compensation benefits. If the employer fails to insure or qualify for self-insurance, it is liable for tort remedies as well as compensation benefits. U.C.A. § 35-1-57. The question of whether an employee is insured is a matter of contract between the insurer and the employer. Because the Fund relied on the Employer's notice that Olsen was to be excluded from coverage under the policy, it would have to take the position that Olsen was an uninsured employee and Applicant must look only to the Employer and not the Fund for the claimed benefits. Such a dispute would put the Fund in conflict with its duty to Employer which is contrary to public policy.

B. A Finding That the Established Notice Procedure is Ineffective Would Create Chaos With Regard to Coverage With All Corporate Employers Which Elected Not to Cover Officers.

A decision against The Fund and the Commission would also create a potentially wide-spread chaotic situation regarding the exposure of the Fund to claims of any insured which had not given the required notice. To protect against a new area of risk without having provided actuarially determined reserves, the Fund would have to attempt to collect premiums from all such employers retroactively since it relied on the established notice procedure to reduce premiums. Even though the Fund has retroactively assessed premiums in the past, the public will not be served if the Fund, which insures over 26,500 employers, most of which are small companies, is required to identify all employers which have elected out of coverage for officers and directors and then attempt to assess premiums retroactively to cover its risk. Such a result has the potential to tie up significant amounts of court time, would be inequitable to all employers who acted in good faith in giving notice through the established procedure, and is contrary to public policy.

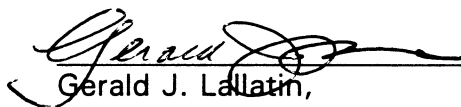
CONCLUSION

The well-established and long-observed method of transmitting notice of the Employer's election to exclude workers compensation coverage for officers and directors meets the requirements of U.C.A § 35-1-43(3)(b). In the alternative, the provisions of the revised notice requirement, U.C.A § 35-1-43(4) which eliminates any notice to the Commission should be applied retroactively to deny Petitioner's

claimed benefits. If the notice was ineffective, it is equitable that the burden of failing to properly exclude an officer of the company from coverage as an employee for workers compensation purposes should fall on the Employer who had the duty to give proper notice to the required parties. The Employer, not the Fund, was in the best position to see that the notice burden was satisfied. This is especially true in the present case where Olsen himself was the person who personally requested that he be dropped from coverage; where he signed two documents to that effect; and, where he was also the president of the company and an attorney who is presumed to know the law.

The Fund asks the Court to affirm the decision of the Commission that neither the Employer nor the Fund are liable for the claimed compensation, and for such other and further relief as the Court deems just and proper under the circumstances.

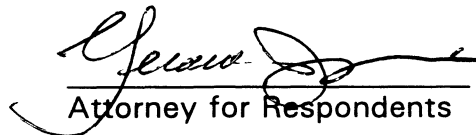
DATED this 25th day of September, 1996.


Gerald J. Lallatin,
DREDGE & LALLATIN, L.C.
Attorneys for Defendants and Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 25th day of September 1996 to the following:

Eugene Miller
Attorney at Law
311 South State, Suite 240
Salt Lake City, UT 84111
Attorney for Applicant


Attorney for Respondents

gal\dsen3.brf

ADDENDUM

1. AFFIDAVIT OF BRAD CHRISTENSEN, Record at pp. 37-38.
2. POLICY, COVERAGE A, Record at p. 69.
3. GENERAL ENDORSEMENT, Record at p. 71.

JANET L. MOFFITT, No. 2287
Attorney for Defendants
392 East 6400 South
Salt Lake City, UT 84107
Telephone: (801) 288-8149

BEFORE THE INDUSTRIAL COMMISSION OF UTAH

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

Applicant,

v

COMPANY
and/or
WORKERS COMPENSATION FUND OF
UTAH,

Defendants.

*
*
*
*
*
*
*
*
*
*
*
*
*
*
*

AFFIDAVIT OF
BRAD CHRISTENSON

Case No. 95-182

STATE OF UTAH)
 :ss
COUNTY OF SALT LAKE)

I, BRAD CHRISTENSON, having been duly sworn upon oath, does depose and say:

1. That I am employed by the Workers Compensation Fund of Utah with offices at 392 East 6400 South, Salt Lake City, Utah, 84107, telephone number 288-8077.

2. That in connection with my employment, I have access to and am familiar with the preparation of weekly computer tapes sent to the Industrial Commission and that said tapes contain all transactional information and coverage alterations concerning individual policyholders.

00036

3. That information concerning the deletion of coverage for corporate officers for Samuel McIntyre Investments was received by the Workers Compensation Fund and entered into the computer on March 30, 1993.

4. That a copy of the computer tape containing the deletion information was provided to the Industrial Commission in the tape transmitted during the week following the entry.

5. That the same information has been transmitted on a repeated basis to the Industrial Commission via the weekly tape thereafter.

DATED this 18 day of September, 1995.



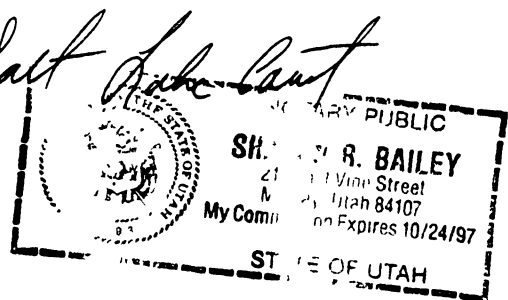
BRAD CHRISTENSON

SUBSCRIBED AND SWORN to before me this 18 day of September, 1995/



NOTARY PUBLIC

Residing in: Salt Lake County





**Workers
Compensation
Fund of Utah**

Workers Compensation and Occupational Disease Policy

ISSUED BY

Workers Compensation Fund of Utah
392 East 6400 South
P.O. Box 57929
Salt Lake City, Utah 84157-0929

INSURED EMPLOYER

IMPORTANT — PLEASE READ YOUR POLICY and become thoroughly familiar with its provisions. A few moments attention right now may save misunderstanding in the future.

This policy is a contract of insurance between the Employer listed on the declaration page and the Workers Compensation Fund of Utah, hereinafter referred to as the "Fund." The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except

by endorsement issued by the Fund to be part of this policy.

In return for the payment of the premium and subject to all the terms of this policy, the Fund agrees with the employer as follows:

COVERAGE A WORKERS COMPENSATION INSURANCE COVERAGE

The Fund does hereby agree with the Employer named on the declaration page to insure the employer against liability for compensation under the Utah Workmen's Compensation Act and the Utah Occupational Disease Disability Law, as provided in Chapters 1, 2, and 3 of Title 35, Utah Code Annotated 1953, and all amendments thereto and other relevant Utah statutes, including liability to pay for medical and other treatment and care of injured employees as required by said Acts. Workmen's compensation acts and laws from jurisdictions other than the State of Utah shall not govern this policy.

This Workers Compensation Insurance applies to bodily injury by accident or bodily injury by disease as those terms are defined in the Utah Workmen's Compensation Act, the Utah Occupational Disease Disability Law, and by the Utah Supreme Court. Bodily injury includes injury resulting in death. Bodily

injury by accident must occur during the policy period. Bodily injury by disease must be caused or aggravated by the conditions of employment (See Sec. 35-2-1, et seq. Utah Code Annotated). The employee's last injurious exposure to the conditions giving rise to the claim must occur during the policy period.

The Fund will pay promptly, when due, the benefits required by the Utah Workmen's Compensation Act and/or the Utah Occupational Disease Disability Law. The Fund has the right and duty to defend at our expense any claim, proceeding, or suit against the Employer for benefits payable by this insurance. It is specifically understood that the Fund has the right to choose counsel to represent the Employer in any cause of action covered under this policy. The Fund has the right to investigate and settle claims, proceedings, or suits as appropriate.



Workers
Compensation
Fund of Utah

Safe and Sound Thinking

GENERAL ENDORSEMENT
Date Issued: 01/30/95

Attention: WILLIAM QUINCY
SAMUEL MCINTYRE INVESTMENT CO
11009 ARCH TERRACE
AUSTIN TX 78750

Policy No: 1349373
Telephone No: (410) 721-9171

THIS ENDORSEMENT CHANGES YOUR POLICY - PLEASE READ IT CAREFULLY

Coverage has been added for GREGORY J OLSEN effective 9/19/1971. Coverage will be discontinued 2/4/1992.

Coverage has been discontinued for GREGORY J OLSEN effective 2/4/1992.

: BNIELSEN

00071