

1948

# The State Insurance Fund v. Thomas L. Dykes, The Industrial Commission of Utah, and Intermountain Service Bureau, Inc. : Brief of Plaintiff

Utah Supreme Court

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F. A. Trottier; Attorney for Plaintiff;

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## Recommended Citation

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

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THE STATE INSURANCE FUND,  
administered by the Commission of  
Finance of Utah,

*Plaintiff,*

vs.

THOMAS L. DYKES, THE INDUS-  
TRIAL COMMISSION OF UTAH,  
and INTERMOUNTAIN SER-  
VICE BUREAU, INC., doing busi-  
ness as Merchants Police,

*Defendants.*

No. 7196

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**PLAINTIFF'S BRIEF**

**FILED**

**AUG 13 1943**

**F. A. TROTTIER,**  
*Attorney for Plaintiff.*

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**CLERK, SUPREME COURT, UTAH**

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PLAINTIFF'S BRIEF

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STATEMENT

Thomas L. Dykes, on December 11, 1947, filed with the Industrial Commission of Utah a workmen's compensation claim in which he alleged that he had received accidental injuries on November 11, 1947, and November 25, 1947, while in the employ of Merchants Police at Salt Lake City, Utah. On January 28, 1948, the In-

dustrial Commission held a hearing, in the course of which the evidence showed that Dykes' employer was the Intermountain Service Bureau, a corporation using the trade name of "Merchants Police." Dykes' employment commenced in August 1947 and was terminated by his employer about December 2, 1947. Prior to July 1, 1947, J. Martin Stock had been operating a police patrol business under the trade name of "Merchants Police." Effective July 1, 1947, Mr. Stock transferred his ownership and operation of this business to the corporation, the Intermountain Service Bureau, which after that date operated the same type of business as one of its activities.

Mr. Stock had procured a workmen's compensation insurance policy with the State Insurance Fund to cover his operations of the "Merchants Police" on August 20, 1946, and by the terms of the policy this insurance coverage automatically terminated when J. Martin Stock transferred his ownership and operation of the business on July 1, 1947.

The Intermountain Service Bureau, for which Mr. Dykes worked, procured a policy with the State Insurance Fund on January 14, 1948, covering the workmen's compensation liability of the corporation from that date on. The record is silent as to whether the Intermountain Service Bureau had any workmen's compensation insurance between July 1, 1947, and January 14, 1948.

The Industrial Commission on April 12, 1948, rendered its decision in which it ordered "the defendants" to pay hospital and medical expenses and compensation

to Thomas L. Dykes for a hernia which the Commission decided Mr. Dykes sustained in his employment by accidental injuries on November 11, 1947, and November 25, 1947. The Commission of Finance of Utah, which administers the State Insurance Fund, has brought the case to the Supreme Court for review.

## ARGUMENT

As was stated in our petition for the Writ of Certiorari, the Industrial Commission's decision was erroneous and illegal in several respects. The one which we consider the most important is set forth as our first point.

### POINT 1

THE INDUSTRIAL COMMISSION WAS IN ERROR IN CONCLUDING THAT THE WORKMEN'S COMPENSATION LIABILITY OF THE INTERMOUNTAIN SERVICE BUREAU, DYKES' EMPLOYER, WAS COVERED BY THE STATE INSURANCE FUND IN NOVEMBER, 1947.

### POINT 2

THE INDUSTRIAL COMMISSION'S DECISION WAS AMBIGUOUS, UNCERTAIN AND INCOMPLETE.

### POINT 3

THE AWARD CONTAINED IN THE INDUS-

## TRIAL COMMISSION'S DECISION WAS NOT SUPPORTED BY THE EVIDENCE IN THE RECORD.

Each of these points is so interwoven that we shall discuss them together. The Industrial Commission's decision was ambiguous, uncertain and incomplete with respect to the matter of who was Dyke's employer and as to whether his employer had any workmen's compensation insurance coverage at the time of Dykes' alleged accidental injuries.

When Mr. Dykes filed his written application with the Industrial Commission he filed it under the title of "Thomas L. Dykes, Applicant, vs. Merchant Police, Defendant." At the commencement of the hearing we called the presiding commissioner's attention to the fact that the applicant had not made the State Insurance Fund a party to the proceeding. (Tr. 2). We also specifically denied that the State Insurance Fund was the insurance carrier on the date of the alleged injury. (Tr. 3.) At the commencement of the afternoon session of the hearing (Tr. 46), Commissioner Egan stated, "The question before the Commission is one of liability." Practically all of the rest of the testimony from that point to the end of the hearing related to the question of liability and coverage, or non-coverage. But when the Industrial Commission rendered its decision on April 28, 1948, it made no finding or conclusion whatsoever relating to the matter of insurance coverage or liability, or non-coverage. However, in its decision, the title of the case had been amended by the Commission to read,

“Thomas L. Dykes vs. Merchants Police and/or Intermountain Service Bureau, Inc., and The State Insurance Fund, Defendants.” Following the title, the Commission’s decision consists of the following:

“The above entitled cause came on for hearing before the Industrial Commission of Utah on the 28th day of January, 1948, at 10:00 A. M., Room 422 State Capitol Building, Salt Lake City, Utah, pursuant to Order and Notice of the Commission. The applicant was present and not represented by counsel; defendants were represented by H. F. Coray, attorney, and F. A. Trottier, attorney.

This hearing came on by virtue of an application filed by the applicant on December 11, 1947, in which applicant alleges he sustained an injury by accident arising out of or in the course of his employment on November 11, 1947, and further aggravated on November 25, 1947, while employed by the defendant Merchants Police and/or Intermountain Service Bureau, Inc., at Salt Lake City, Utah, as a patrolman, when he slipped and fell, sustaining a left inguinal hernia in the left groin.

Following the taking of testimony, each of the parties in the case rested and the case was submitted for a decision.

## FINDINGS

After hearing the testimony in the case and reviewing the same as set forth in the transcript, and other documentary evidence received and made a part of the record, the Commission finds that the Merchants Police was an employer of



three or more persons on the dates of the alleged injuries and are, therefore, subject to the Utah Workmen's Compensation Act; that the applicant did sustain an injury arising out of or in the course of his employment on the 11th day of November, 1947, and again on November 25, 1947; that as a result thereof he suffered a left inguinal hernia, and therefore, he is entitled to the benefits under the Workmen's Compensation Act, i.e. payment for temporary total disability from the 2nd day of December, 1947, to January 21, 1948.

IT IS THEREFORE ORDERED that the defendants pay for all hospital and medical expense incurred in connection with this injury, and compensation as follows:

7 2/7 weeks at \$22.50	\$163.93
12-2-47 to 1-21-48	
Payment lump sum"	

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After the errors and ambiguity of the Commission's decision were called to its attention by the State Insurance Fund's application for rehearing, the Industrial Commission failed to make any correction of the errors and refused to give any explanation as to what it meant in those parts of its decision which were uncertain and incomplete. Instead, the Commission on May 17, 1948, issued the following:

"IT IS ORDERED that the Application for Rehearing filed herein by the defendants on the 1st day of May, 1948, be, and the same is hereby denied."

The Industrial Commission's award is subject to be-

ing annulled because of its ambiguity and insufficiency. The Supreme Court of Utah has declared, in substance, that the Commission is not legally required to make written findings, but when findings are made they must be complete and definite.

*Jones vs. Ind. Comn.*, 90 Utah 121, 61 Pac. (2nd) 10.

*Putnam vs. Ind. Comn.*, 80 Utah 187, 14 Pac. (2nd) 973.

*A. S. & R. Co. vs. Ind. Comn.*, 79 Utah 302, 10 Pac. (2nd) 918.

However, we are not particularly interested in having this case decided on technical grounds. Here we have a clear-cut situation where there was no coverage by the State Insurance Fund of the employer involved in the claim, at the time of the alleged accidental injuries of the claimant. That is the most important reason why the Commission's decision should be annulled, insofar as it applies to the State Insurance Fund.

Throughout the Industrial Commission's handling of this case there was no discussion and no evidence as to whether Dykes' employer, the Intermountain Service Bureau, had procured any workmen's compensation insurance in a private insurance company for the period from July 1, 1947, until January 14, 1948. But the evidence is clear and undisputed that this employer did not request or obtain any workmen's compensation insurance policy from the State Insurance Fund until January 14, 1948. (Tr. 53.)

The Intermountain Service Bureau had its own attorney, Mr. Coray, appear at the hearing. They resisted Mr. Dykes' claim on the merits, apparently under the well justified impression that if Dykes did establish a compensable claim, his employer would be required to pay it, inasmuch as it had no workmen's compensation insurance in the month of November, 1947.

Neither the Commissioner who conducted the hearing, nor the Industrial Commission in its decision, have explained how they arrived at the conclusion that Dykes' employer came under State Insurance coverage in the month of November, 1947. They certainly could not amend or change the Fund's policy dated January 14, 1948, so as to make it retroactive to include the month of November, 1947.

In the case of *Continental Casualty Co. vs. Ind. Comm.*, 61 Utah 16, 210 Pac. 127, the Supreme Court of Utah held that the Industrial Commission is without authority to change the date of a workmen's compensation policy.

Referring again to the policy which Mr. Stock obtained from the State Insurance Fund in August, 1946, it contained the provision, as do all Fund policies, that

"If the employer shall transfer his or its ownership or operation of the business insured by this policy, this policy shall automatically become cancelled." (Tr. 51.)

After the Fund had billed Mr. Stock for the premium to cover the period from July 1, 1947, to December 31,

1947, and he did not pay it, the Fund sent him a written notice that the policy would be cancelled at midnight, November 12, 1947, unless the premium was paid prior to that time. When the premium was not paid, written notices were mailed to Mr. Stock and to the Industrial Commission that the policy had been cancelled November 12, 1947. In the month of December the Fund's policy department was informed of the transfer by Mr. Stock of his business and operations on July 1, 1947, and he stated that was the the reason he had not paid the premium. A corrected notice was then sent out, in order to clarify the record that Mr. Stock's policy with the Fund was automatically cancelled midnight, June 30, 1947, because he had "ceased operations." (Tr. 47-66; and Deft's Exhibit 4.) The matter of cancellation of a Fund policy on account of the assured's failure to pay premium is therefore not involved in this case.

If the Industrial Commission was laboring under the erroneous idea that a workmen's compensation insurance policy, written to cover an individual, must automatically cover the purchasers and successors to whom that individual transfers his business, the following citations are in point:

In the *Continental Casualty Co.* case, *supra*, at 61 Utah 21, the Court's opinion contains this observation,

"The (Industrial) commission was without authority to construe and apply the contract of insurance to include or cover workmen in the employ of either an individual or corporation not named as the insured in the policy of insurance."

At 45 C. J. S. §427, page 49,

A workmen's compensation insurance policy is a personal contract which is not assignable without the consent of the insurer, \* \* \*

A provision in the policy prohibiting assignment without consent (of insurer) is valid and enforceable.

At 45 C. J. S. § 433, page 58, the following two cases are cited:

*Yoselowitz vs. Peoples Bakery*, 277 N. W. 221, 201 Minn. 600.

Where workmen's compensation insurance policies contained provision against assignment without insurer's consent, contracts were personal ones, and benefits thereof did not extend to successors of insured companies, even though successors were organized for express purpose of taking over all assets and business of the insured companies.

*Dyson vs. Gano*, 127 So. 411, 13 La. App. 358.

That buyer of gravel pit thought he bought seller's interest in workmen's compensation policy, did not justify judgment against insurer for employee's injuries.

Also see 29 American Jurisprudence, §514, page 415.

In *Schneider on Workmen's Compensation*, volume 2, §468, page 1588, it says:

The commission has the power to determine whether a policy of insurance has been cancelled, but in doing so must arrive at its conclusion according to recognized legal principles. So where

a policy contained a provision that upon transfer of interests the policy to become, ipso facto, void, the commission would have to recognize this reasonable provision and upon finding that there had been a change of interests to declare the policy as non-existent.

*Kolb vs. Brummer*, 185 App. Div. 835, 173 N. Y. S. 72, 18 N. C. C. A. 573.

The most recent case we have located involving this general subject is *Anderson vs. Dutch Maid Bakeries, Inc.*, 102 Pac. (2nd) 740, 106 Colo. 201.

The Colorado State Insurance Fund had issued a workmen's compensation policy to cover an individual. Later he took in a partner. Later the partnership sold the bakery to another party. At the time of the sale the purchaser paid the seller the amount of the unearned premium on the policy, but no assignment of the policy was made, nor was the Fund notified of the change of ownership, although the policy required that both of these steps be taken and the assignment approved by the State Insurance Fund. After the change of ownership and before Anderson was injured, another employee, Skoglund, had an accident which was reported to the Industrial Commission and the Fund. On the claim blank in the Fund file, someone had inserted over the name of the employer, Dutch Maid Bakeries, the name, Wigwam Bakery. Anderson was injured and made claim against his employer and the State Insurance Fund. The Industrial Commission awarded compensation against the employer and dismissed the case as to the Fund. The Colorado Supreme Court declared that the Commission was correct



on both points. The Court also said that there was no estoppel to make the Fund liable for the injury to Anderson.

In the case at bar, the Industrial Commission did not find that there was any estoppel against the State Insurance Fund so as to compel coverage by the Fund of Mr. Dykes' employer in the month of November, 1947, but that appears to be the only theory upon which the Commission might attempt to justify its award against the Fund. There were no elements of estoppel present in this case. Neither the applicant nor any one else made any allegation that the Fund or any of its representatives misled him to his detriment. Mr. Dykes gave no testimony at all relating to the State Insurance Fund or its coverage. The record shows that Dykes was hired by Mr. Lowry, the general manager of the Intermountain Service Bureau, about August, 1947. (Tr. 42.) At no time had Mr. Dykes ever worked for Mr. Stock when Mr. Stock was operating as an individual prior to July 1, 1947. (Tr. 66.)

At 44 C. J. S. §275, page 1094, it says:

The (insurance) company will not be estopped where none of its acts has misled the insured or applicant for insurance or caused any change of position in reliance on the company's acts, \* \* \*.

In *Fidelity & Cas. Co. vs. Baker*, 18 Pac. (2nd), 894, the Oklahoma Supreme Court, among other things, said:

“In our opinion the conduct of the petitioner (insurance company) does not create an estoppel

in pais because the employee was not induced to enter upon the employment, or to incur any obligation, or to change or alter his position for the worse in any material respect because of the existence of the particular policy of insurance shown in the record.”

This same statement can appropriately be made, referring to the State Insurance Fund and Mr. Dykes, in our present case.

Inasmuch as no one ever requested, or paid for, workmen's compensation insurance coverage of Dykes' employer by the State Insurance Fund prior to January 14, 1948, and inasmuch as there was no allegation or evidence of an estoppel against the Fund which could bring about such coverage during the month of November 1947, we are at a loss to understand why the Industrial Commission did not dismiss the claim insofar as the State Insurance Fund was concerned. The record clearly shows misunderstanding and confusion in the mind of the presiding commissioner at the hearing, on the matter of insurance coverage or non-coverage. (Tr. 46-63.)

There are numerous cases in which the Supreme Court of Utah has declared, in substance and effect, that if there is no competent evidence in the record to sustain the findings or decision of the Industrial Commission, the Supreme Court will annul the Commission's decision. Putting it another way, the Industrial Commission may not, without any reason or cause, arbitrarily and capri-



ciously make a decision which is contrary to the uncontradicted evidence in the case. A few such cases are:

*Kavalinakis vs. Ind. Comn.*, 67 Utah 174, 246 Pac. 698.

*Harness vs. Ind. Comn.*, 81 Utah 276, 17 Pac. (2nd) 277.

*Park Utah Cons. Mng. Co. vs. Ind. Comn.*, 84 Utah 481, 36 Pac. (2nd) 979.

*Norris vs. Ind. Comn.*, 90 Utah 256, 61 Pac. (2nd) 413.

*Tintic Standard Mng. Co. vs. Ind. Comn.*, 100 Utah 96, 110 Pac. (2nd) 367.

## DISCUSSION REGARDING "EXHIBIT B"

Up to this point this Brief contains a discussion of all the points we feel are necessary for a proper consideration and determination of the questions involved in this case. However, there was another matter which the Industrial Commissioner who conducted the hearing, brought into the proceedings, which requires some discussion to show why we do not think it was or is relevant or material insofar as Mr. Dykes' claim was concerned.

On his own motion the presiding commissioner placed in the record, over our objection, a sheet of paper which he marked "Exhibit B." (Tr. 55 & 63.) It purported to be a copy of a Motion passed by the Industrial Commission on October 14, 1947, relating to insurance companies writing workmen's compensation insurance and occupational disease insurance in the State of Utah.

The contents of that document do not appear to have any applicability to the situation involved in Mr. Dykes' case; and we made that observation when "Exhibit B" was first mentioned.

It would not make any difference to the case at bar how "Exhibit B" might be interpreted. We have shown in the first part of this Brief that the State Insurance Fund policy which covered J. Martin Stock's business, by its own terms automatically became cancelled when he transferred his business to the Intermountain Service Bureau on July 1, 1947, and there was no estoppel having the effect of transferring the insurance coverage under that policy to Mr. Stock's successor, which later became Mr. Dykes' employer. Therefore, the matter of cancellation of an insurance policy for non-payment of premium is not involved in the case at bar. But inasmuch as the commissioner gratuitously injected "Exhibit B" into the record, we feel impelled to make the following observations.

There was no evidence that the Industrial Commission ever held any hearing or other preliminary proceedings or gave any notice to interested parties before the Commission adopted the Motion (Exhibit B) on October 14, 1947. The record merely shows, and the Motion itself indicates, that on that date the Industrial Commission passed a Motion for the purpose of attempting to revive certain provisions which had formerly been a part of the insurance laws of Utah as Sections 43-3-36 and 43-3-37, Utah Code Annotated 1943. These two sections were repealed by the 1947 Legislature when it enacted the new

insurance code found in Chapter 63 of the 1947 Session Laws. We are not particularly concerned with whether the Industrial Commission had jurisdiction to pass such a Motion as "Exhibit B." By its own wording, it did not apply to the State Insurance Fund. In the first place, the Motion does not mention the State Insurance Fund. It refers to 'insurance companies.' The State Insurance Fund is not an insurance company. In the second place, the provisions relating to cancellation of policies mentioned in the paragraph numbered 1 in the Motion, which was formerly Section 43-3-36, Utah Code Annotated 1943, could not and do not relate to Fund policies, because the Legislature has provided in other parts of the statutes for premium payments and for termination of Fund policies in an entirely different manner than that which applies to policies in private insurance companies.

Prior to 1941 the State Insurance Fund was administered by the Industrial Commission. The 1941 Legislature, in its First Special Session, (Chapter 15), transferred the administration of the State Insurance Fund to the Commission of Finance, and removed from the Industrial Commission any authority or jurisdiction over the Fund's policies, premiums, terminations, cancellations, rates and classifications, and placed those matters in the hands of the Commission of Finance.

Most of the Fund's policies are issued on a semi-annual basis. The statute provides that a policy in the Fund becomes effective when the initial premium is

paid. The policy automatically renews and remains in force, provided a payroll report is made and a renewal premium is paid by the policy holder on or before the following January 31st or July 31st as the case may be, "or at such other times as may be prescribed by the commission of finance." (See Sections 42-1-49 and 42-2-7 Utah Code Annotated 1943.) It also follows that the insurance coverage of each of the Fund's policies on a semi-annual basis, terminates at midnight, January 31, or July 31, as the case may be, if the policy holder has not made the payroll report and paid the premium required by the sections mentioned, unless the Commission of Finance grants an extension of time beyond such date. And if such extension of time is granted by said commission, it likewise follows that the insurance coverage terminates at the time designated in the extension unless the terms of the extension are complied with by the policy holder. Section 42-2-7 makes it discretionary with the Finance Commission whether an extension of time is to be granted and how much the time shall be extended in any particular situation. The matter of termination or cancellation of the Fund's policies on account of insured employers' failure to make payroll reports or failure to pay premiums, has therefore been provided for by the Legislature.

Section 42-2-11 provides that "The commission of finance shall adopt rules and regulations with respect to the collection, maintenance and disbursement of the state insurance fund." Section 42-2-3 provides that the Commission of Finance shall administer the State Insurance

Fund, "and it is vested with full authority over said fund." Section 42-2-4 provides that the Commission of Finance shall determine the classifications and fix the premium rates for State Insurance Fund policies. These three sections, along with the provisions of Section 42-2-7, would seem clearly to preclude some other commission or agency from making rules and regulations relating to Fund policies, premium collections and termination or cancellation of Fund policies, even if such other commission or agency might feel inclined to do so.

The only jurisdiction over the State Insurance Fund which the Legislature left with the Industrial Commission, is the determination of contested claims under the Workmen's Compensation and Occupational Disease laws and the authority to provide methods to be used in making payment of compensation benefits and to approve compromises involving compensation claims.

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For the foregoing reasons the award of the Industrial Commission should be annulled, insofar as it applies to the State Insurance Fund.

Respectfully submitted,

F. A. TROTTIER,  
*Attorney for Plaintiff.*