

1948

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

Utah Supreme Court

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I. A. Trottier; Attorney for Plaintiff;

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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 REPLY BRIEF**

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**FILED**

A. TROTTIER,  
*Attorney for Plaintiff.*

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**CLERK, SUPREME COURT, UTAH**

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PLAINTIFF'S REPLY BRIEF

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STATEMENT

We have recently been supplied with a copy of the Attorney General's brief, which he has entitled DEFENDANT'S BRIEF and in which he defends the Industrial Commission's decision in this case. After reading the

contents of his brief, we are not sure whether it is supposed to defend the defendant, Intermountain Service Bureau, Inc., but it is quite apparent that his brief attempts to sustain the Industrial Commission's award against the State Insurance Fund. We notice that the Attorney General accepts the statement of facts as given in our brief which we filed with the Supreme Court on August 13, 1948. We shall herein call attention to certain inferences of facts contained in the Attorney General's brief which are not supported by the evidence in the case.

In our main brief we discussed three points, Point No. 2 being that the Industrial Commission's decision was ambiguous, uncertain and incomplete. The Attorney General's brief contains no argument relating to that point. Therefore, we presume that the Attorney General is willing to admit that the Industrial Commission's decision was ambiguous, uncertain and incomplete in the particulars which we mentioned in our brief. We called attention to the failure on the part of the Industrial Commission to make any finding of fact or conclusion of law relating to workmen's compensation insurance coverage by the State Insurance Fund of Mr. Dykes' employer, the Intermountain Service Bureau, Inc. The Attorney General's brief has attempted to supply a finding of fact relating to this point. We do not know whether his finding is sufficient to satisfy the requirement that the Industrial Commission should have made the finding. But there can't be much argument against what we said about the ambiguity and uncertainty of the

Industrial Commission's decision. It speaks for itself.

In our original Brief (page 8), and in the Attorney General's Brief, the provision contained in the State Insurance Fund's policy covering J. Martin Stock from August 20, 1946, to June 30, 1947, is quoted:

"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.)

We argued that this provision automatically terminated Mr. Stock's policy when he transferred his ownership and operation of the business as of July 1, 1947, unless there were circumstances which would work an estoppel against the Fund applying that provision. We called attention to the fact that neither Mr. Dykes nor anyone else alleged or proved that there were any such circumstances. The Industrial Commission did not find any facts which would work such an estoppel. And the Attorney General's brief does not mention any such facts or circumstances as would constitute an estoppel. However, he argues that the above-quoted provision of the policy did not operate to terminate the policy coverage on July 1, 1947, because Mr. Stock became an officer of the corporation, Intermountain Service Bureau, and perhaps held some stock interest in the corporation, and that those facts are sufficient to constitute Mr. Stock as the "owner" and "operator" of the corporation, and therefore there was no "transfer" of Mr. Stock's "ownership" or "operation" of the business, contrary to Mr. Stock's testimony. (Tr. 66.)

As the basis for his conclusion, the Attorney General has surmised that Mr. Stock "was undoubtedly a prominent factor, if not the full owner and manager of the new company"; although in the same paragraph he admits that "there is no evidence in the record to show the respective interests of any stockholders in the new company." Where, then, does he have any basis for assuming or surmising anything at all relating to the stock ownership of the corporation? It would be just as reasonable to assume that Mr. Stock's ownership of the corporation's stock was on an equal basis with each of the other incorporators, one of whom was Mr. Earl Lowry, who was the General Manager of the corporation, and who hired Mr. Dykes in August, 1947. (Tr. 42.)

In several respects, more or less important, the Attorney General's argument contains erroneous statements of the evidence. He says, "The new company continued under the same name (Merchants Police) with no change in address, telephone number or telephone listing and with little or no change in letterheads or in methods of operation." The record shows that the corporation had a brand new name, Intermountain Service Bureau. (Tr. 62, 63, 65, 66 and Defendant's Exhibit 4.) It also shows that Mr. Stock had conducted his business in the Atlas Building; but the Corporation had its offices in the Hooper Building at 23 East 1st South. (Tr. 51 and 52.) There is no testimony as to the telephone number before the incorporation or afterwards; but the Salt Lake City telephone book shows the name and number of the Intermountain Service Bureau, which were not

listed or shown in the telephone book prior to July 1, 1947. We agree that the name, "Merchant's Police" is still listed in the telephone book as it was prior to July 1, 1947, because that is one of the trade names used by the Intermountain Service Bureau for part of its business operations. (Tr. 64, 65, 66.) It now has a different number than prior to July 1, 1947.

The Attorney General's Brief also says, "nor was it shown at any time in the record that the new corporation had any assets." We can just as truly remark that there was no evidence in the record to indicate that the corporation did not have a great wealth of assets. Apparently the corporation had enough assets to be concerned with whether the Industrial Commission might make an award against the corporation; because the corporation hired its own attorney to represent it in the hearing and to resist the claim on the merits. (Tr. 1 and 2.) There is absolutely nothing in the record to indicate that the corporation cannot readily pay the amount of the Industrial Commission's award to Mr. Dykes. In fact, if the Industrial Commission's decision were sustained, it would force the State Insurance Fund to pay the award, instead of requiring payment to be made by the Intermountain Service Bureau, where the liability properly belongs.

The Attorney General's Brief says, "It is a well accepted principle of law that the corporate entity will be disregarded by the courts when justice requires it." But he did not point to any evidence in the record which would require the disregard of the corporate entity of

the Intermountain Service Bureau in this case. Among other citations of authorities, he mentions 13 Am. Juris., page 160, §7. We here quote from that authority:

“The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for the purpose of convenience and to subserve the ends of justice. The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, will be disregarded by the courts. Thus in an appropriate case and in furtherance of the ends of justice, a corporation and the individual or individuals owning all its stock and assets will be treated as identical, the corporate entity being disregarded where used as a cloak or cover for fraud or illegality.”

(From here on is considerable discussion regarding the question of legality of mortgages, stock issues and corporate actions which might have the effect of defrauding creditors.)

It plainly can be seen that such a rule has no application to the situation in our present case. There was no allegation of illegality in the forming of the Intermountain Service Bureau; there was no evidence that anyone was defrauded or misled by the formation or the existence or the operations of this corporation; and the Industrial Commission's decision contains no findings that there was any fraud or misrepresentation or misleading actions by or on account of the corporation.

The case of *Putnam vs. Industrial Commission*, 80 Utah 187, 14 Pac. (2nd) 973, did not involve a corporation, but it did involve a situation which is somewhat

interesting in connection with our present discussion. The Industrial Commission there held that the injured man was in the employ of "the City Waste Paper Company and/or L. A. Putnam" and that a certain contract which "attempted to make F. D. Gray an independent contractor is a mere subterfuge designed to evade and defeat the provisions of the Workmen's Compensation Act." The Industrial Commission's award against "the City Waste Paper Company and/or L. A. Putnam" was annulled by the Supreme Court, as not being justified by the evidence in the record. At page 210 of the Court's opinion is the following:

"Thus, when the whole of the testimony is considered—as the commission was required to consider it—and undue weight not given to mere snatches of it to the exclusion of other evidence of equal if not greater importance, it is clear no finding is justified that the City Waste Paper Company was "owned" by Putnam, or that the business after January 5th or 6th was operated by him or by the City Waste Paper Company."

By the same kind of reasoning, it can be said here that neither the Industrial Commission nor the Attorney General are justified in finding that the business of the corporation, the Intermountain Service Bureau, was "owned" or "operated" by J. Martin Stock in the months of August or November, 1947, when Mr. Dykes was hired and injured respectively.

The Putnam case also contains a pertinent discussion of the ambiguous expression, "and/or" which is

found in two places in the Industrial Commission's decision in the Dykes case.

The argument contained on the second question in the Attorney General's brief relates to a consideration of "Exhibit B," which was introduced into the record by the presiding commissioner over our objection. (Tr. 55 and 63.) We put some discussion regarding this exhibit in our original brief commencing at Page 14. As we stated there, we did not consider that this exhibit was properly a part of the record in the case, because it had no applicability to the situation involved here. This exhibit does not need to be considered by the Court unless the Court should agree with the Attorney General's argument on the preceding point to the effect that the State Insurance Fund policy covering J. Martin Stock, an individual, must automatically cover the corporation, Intermountain Service Bureau, Inc., which was his business successor.

We have called attention to the wording of Exhibit B, which referred only to "insurance companies"; and to the fact that the State Insurance Fund is not an insurance company. We have also called attention to various sections in Title 42, Chapter 2, of the Utah Code Annotated, which provide for premium payments and termination of Fund policies in an entirely different manner than that which applies to policies in private insurance companies. In his brief the Attorney General has simply ignored the references which we made to Sections 42-1-49, 42-2-3, 42-2-4, 42-2-7 and 42-2-11 of the

Utah Code Annotated. In the latter part of his brief he quotes the wording of section 43-19-13 of Chapter 63, Laws of Utah 1947, which reads as follows:

All insurance companies writing workmen's compensation insurance and occupational disease insurance in this state and the Commission of Finance in connection with its administration of the State Insurance Fund, shall be subject to the rules and regulations of the Industrial Commission. *Said Commission may provide the methods to be used by them in the payment of compensation and benefits.* The Industrial Commission may provide uniform rates to be charged by such companies but such rates need not be uniform with the rates fixed for the State Insurance Fund.

Prior to the year 1941, when the State Insurance Fund was under the administration of the Industrial Commission, Section 43-3-38 read as follows:

All insurance companies writing workmen's compensation insurance in this state under the terms of the title Industrial Commission, shall be subject to the rules and regulations of the industrial commission. Said commission may provide uniform rates to be charged by such companies and the methods to be used by them in the payment of compensation and benefits, but such rates need not be uniform with the rates fixed for the state insurance fund.

The changes made by the 1941 Legislature transferred from the Industrial Commission to the Finance Commission the matter of making premium rates for the State Insurance Fund. But the power to make premium rates for "insurance companies" was left with

the Industrial Commission. And the methods to be used by insurance companies and the State Insurance Fund in making payment of compensation and benefits were left under the authority of the Industrial Commission.

In view of the changes which the 1941 Legislature made in the sections of Title 42, Chapter 2, removing the administration of the State Insurance Fund from the Industrial Commission, the middle sentence of Section 43-3-38, (which in 1947 became Section 43-19-13 as above-mentioned) :

*Said Commission may provide the methods to be used by them in the payment of compensation and benefits,*

is a very good example of a statute in which the rule, "*expressio unius est exclusio alterius*," is applicable. It is even more clear-cut than the statute involved in the case of *Hansen vs. Board of Education*, 101 Utah 15, 116 Pac. (2nd) 936.

The Legislature has provided in Section 42-2-3:

The commission of finance shall administer the state insurance fund, write compensation insurance therein, conduct all business thereto appertaining and belonging, and do any and all things in connection with all insurance business to be carried on, supervised or controlled by the commission of finance agreeably to the provision of this title, *and it is vested with full authority over said fund.*

This and the other sections of the same chapter, are inconsistent with the Industrial Commission exercising

supervision or control over the cancellation or termination of State Insurance Fund policies. The provisions of the section quoted by the Attorney General do not apply to the State Insurance Fund except as to *the methods to be used in the payment of compensation and benefits* under the workmen's compensation and occupational disease laws.

There are certain mis-statements of facts in the Attorney General's brief, relating to the matter of cancellation or termination of State Insurance Fund policies. On Page 2 of his brief he declares that the State Insurance Fund made no effort to advise the Industrial Commission of the lapsation of the policy of J. Martin Stock, operating as Merchant Police. This is contrary to the record. The State Insurance Fund did send to the Industrial Commission copies of each of the notices which were sent to the policy holder to the effect that his policy had been cancelled. (Tr. 48-51, and Deft's Exhibits 2 and 3.)

The State Insurance Fund has always followed the practice of sending copies to the Industrial Commission of the notifications that policies have been cancelled. Such copies are sent to the Commission immediately after the cancellation takes place. Therefore, the Industrial Commission has it within its power to take such steps as it deems proper, to prevent an employer from operating his business with three or more employees, without procuring workmen's compensation insurance to cover his employees, as provided by the statutes.

Assuming, for the purpose of further discussion, that the Supreme Court might hold that our argument is not well taken with respect to any of the points we have heretofore discussed, there are two further matters which would be proper to consider, relating to Exhibit B.

Exhibit B is, on the face of it, a motion passed by the Industrial Commission on October 14, 1947. It purports to be and clearly was intended to be a general order of the Industrial Commission, inasmuch as it attempts to apply certain rules generally to all insurance companies writing workmen's compensation insurance. Section 42-1-19 reads as follows:

All *general* orders of the commission shall take effect thirty days after their publication, unless otherwise provided, and special orders shall take effect as therein directed. The commission shall, upon application of any employer or any person, grant an extension of time for compliance with any order, if it finds such extension of time necessary.

Inasmuch as Exhibit B, being a general order of the Industrial Commission, did not specify any date when it should become effective, it would take effect thirty days after its publication. Therefore, its effective date could not be prior to November 13, 1947. Even if the State Insurance Fund's policy covering J. Martin Stock, doing business as Merchants Police, could be construed as remaining in force after July 1, 1947, it was cancelled midnight November 12, 1947, by reason of the notice of intention to cancel which had been previously mailed

to Mr. Stock by the State Insurance Fund. (Tr. 48, 49, 53, 57.) Consequently, under no theory or application of any of the argument contained in the Attorney General's brief could the terms of the Industrial Commission's order (Exhibit B) be construed as applying to the policy which covered J. Martin Stock, doing business as Merchants Police. That policy was already cancelled before the effective date of the Industrial Commission's order.

Even if the argument of the Attorney General was accepted to the effect that the policy covering J. Martin Stock must automatically continue to cover his successor, the Intermountain Service Bureau, Inc., and even though that policy would have remained in force until midnight November 12, 1947, under the possible theory above-mentioned, this policy could not have covered the hernia which Mr. Dykes claimed he sustained in the course of his employment for the following reasons: In his application for compensation he mentioned having had two accidents, one on the night of November 11, 1947, and the other one on the evening of November 25, 1947. His testimony at the hearing quite clearly shows that he did not sustain any hernia as the result of the accident which occurred on the night of November 11th. He testified that he had a fall on November 11th which knocked his breath out and this accident got his uniform all dirty. (Tr. 16, 17 and 23.) He also testified that it was the accidental fall which he received on the evening of November 25th which caused him to have a pain in his groin and which apparently resulted in his hernia. (Tr.

17, 18 and 30.) There is no possible theory by which the State Insurance Fund's policy covering J. Martin Stock could be construed as being in force and covering this accident on November 25, 1947.

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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.*