

1988

Wicat Systems and Hartford Insurance v. Sylvia Pellegrini : Brief of Defendant

Utah Court of Appeals

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Erie V. Boorman; Attorney for Defendants.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

880218-CA

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

WICAT SYSTEMS and HARTFORD
INSURANCE,

Plaintiffs,

vs.

SYLVIA PELLEGRINI, SECOND
INJURY FUND OF UTAH and THE
INDUSTRIAL COMMISSION OF UTAH,

Defendants.

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BRIEF OF DEFENDANT
SECOND INJURY FUND OF UTAH

Appeals Case No. 880218-CA

Priority #6

DEFENDANT'S BRIEF

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FILED

SEP 15 1988

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TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | ii |
| I. NATURE OF PROCEEDINGS BELOW AND JURISDICTION OF THE COURT | 1 |
| II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW | 1 |
| III. STATUTES WHOSE-INTERPRETATION IS DETERMINATIVE | 2 |
| IV. STATEMENT OF THE CASE | 2 |
| (a) Nature of the Case | 2 |
| (b) Course of Proceedings | 2 |
| (c) Disposition Below | 3 |
| (d) Statement of the Facts | 3 |
| V. SUMMARY OF THE ARGUMENTS | 5 |
| VI. ARGUMENT | 5 |
| POINT I - The application by the Industrial | 5, 6 |
| Commission of the Remedial Provisions of the 1984 Amendment to Section 35-1-69 was neither improper nor unreasonable in the allocation of liability between the Employer and the Second Injury Fund. | |
| VII. CONCLUSION | 10 |
| ADDENDUM | |
| Addendum - Exhibit A | |

TABLE OF AUTHORITIES

Cases

| | <u>Page</u> |
|--|-------------|
| Alter v. Hales Sand & Gravel Case No. 870013-Ca, Filed November 23, 1987 | 6, 7 |
| Jacobsen Construction v. Hair 667 P. 2d 25 (Utah 1985) | 6 |
| Kerans v. Industrial Commission 713 P. 2d 49 (Utah 1985) | 6, 8 |
| Marshall v. Industrial Commission 704 P. 2d 581 (Utah 1985) | 8 |
| Moore v. American Coal Company 737 P. 2d 989 (Utah 1987) | 7, 9 |
| Northwest Carriers, Inc. v. Industrial Commission and Herbert Merz, 639 P. 2d 138 (Utah 1981) | 6 |

Statutes

| | |
|---|---------------------------------|
| Utah Code Annotated, Section 35-1-69 as Amended 1984 | 1, 2, 3, 4, 5 6, 7, 8, 9, 10 |
| Utah Code Annotated, Section 35-1-83 (Repl. 1988) | 1 |

Other Authorities

| | |
|--|------|
| 73 Am. Jur. 2d <u>STATUTES</u> Section 11 (1974) | 6, 9 |
| Blacks Law Dictionary 1163 (5th Ed. 1983) | 6, 9 |

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BRIEF OF DEFENDANT
SECOND INJURY FUND OF UTAH

Appeals Case No. 880218-CA

Priority #6

DEFENDANT'S BRIEF

I. NATURE OF PROCEEDINGS BELOW AND JURISDICTION OF THE COURT

This Case originated with a claim for permanent total disability before the Industrial Commission of Utah under the Worker's Compensation Act. This Court has jurisdiction under Utah Code Annotated Section 35-1-83.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Did the Industrial Commission err as a matter of law when it applied the 1984 Amendment to Utah Code Annotated Section 35-1-69

in allocating permanent total disability and reimbursement liability between the Second Injury Fund on the one hand and the employer/carrier on the other?

III. STATUTES WHOSE INTERPRETATION IS DETERMINATIVE

Utah Code Annotated Section 35-1-69 (as amended, 1984), the full text of which is set forth in the Addendum.

IV. STATEMENT OF THE CASE

(a) Nature of the Case.

Sylvia Pellegrini sustained an industrial injury with Wicat Systems in June 1983. She filed an application with the Industrial Commission alleging permanent total disability from the accident. She had pre-existing impairments. The parties stipulated that she was permanently and totally disabled. The parties also stipulated to the impairment ratings. The only issue for adjudication was the apportionment between the employer and the Second Injury Fund.

(b) Course of Proceedings.

On January 2, 1987, Sylvia Pellegrini filed an application with the Industrial Commission of Utah alleging permanent total disability. (R. at 31-32) Following a prehearing attorneys' conference, (R. 49, 50.) the Administrative Law Judge entered his

Order on December 29, 1987. Plaintiffs moved for the review of the Administrative Law Judge's Order on the ground that the apportionment between the employer and the Second Injury Fund should have been on the basis of Utah Code Annotated Section 35-1-69 as it existed prior to the 1984 Amendment.

(c) Disposition Below.

On March 14, 1988, the Industrial Commission of Utah entered an Order denying Wicat Systems' and Hartford Insurance's Motion for Review, (R. at 65-66) holding that the allocation was proper under the 1984 Amendment to Section 35-1-69.

(d) Statement of the Facts.

1. On June 21, 1983, while employed by Wicat Systems, Sylvia Pellegrini injured her wrist while lifting a tray rack.

2. Wicat Systems and Hartford Insurance paid medical expenses and temporary total disability and permanent partial disability benefits to the applicant for which they now seek reimbursement from the Second Injury Fund.

3. On April 10, 1987, Mrs. Pellegrini filed an application for permanent total disability with the Industrial Commission of Utah.

4. The parties stipulated that Mrs. Pellegrini (a) had a 46% whole person permanent impairment for conditions existing prior to 1980 and an additional 12% whole person permanent impairment for a condition arising between 1980 and the industrial incident of 1983;

(c) and a 24% whole person permanent impairment for her 1983 industrial accident. The parties stipulated also that Mrs. Pellegrini's knee was permanently and totally disabled. (R. 50)

5. The parties could not agree on the apportionment of liability between the employer and the Second Injury Fund.

6. The Administrative Law Judge applied the 1984 Amendment to Utah Code Annotated Section 35-1-69 in apportioning liability between the employer and the Second Injury Fund, holding that the Amendment was remedial or procedural in nature and therefore, had application to the proceedings in this action which were all instituted after the 1984 Amendment to that Section. In so doing, the Administrative Law Judge assessed the employer liability for 24/64ths or 37.5% of Mrs. Pellegrini's permanent total disability award for the first 312 weeks. The Second Injury Fund was assessed 40/64ths or 62.5% of the first 312 weeks and was ordered to reimburse the employer for 62.5% of all medical expenses.

7. On January 14, 1988, Wicat Systems and Hartford Insurance filed a Motion for Review of the Administrative Law Judge's Order on the ground that the apportionment between the employer and the Second Injury Fund should have been made pursuant to the provision of Section 35-1-69 prior to the 1984 Amendment.

8. In its March 14, 1988 Order denying the Motion for Review, the Industrial Commission of Utah Stated:

The Commission finds the only issue on review is the

proper manner in which to figure the proportionate shares of the Second Injury Fund and the Carrier. The Commission finds the Administrative Law Judge correctly figured the proportionate shares per the provisions of the amended statute, U.C.A. 35-1-69. The Commission views the 1984 amendment as a procedural amendment and therefore finds that it is retroactive in nature and applies to all injuries adjudicated after passage of the amendment. . . . That amendment specifies that the percentage impairment attributable to the carrier is figured on an uncombined basis, while the overall impairment is figured on a combined basis.

(R. at 65-66.)

9. On April 8, 1988, Wicat Systems and Hartford Insurance petitioned this Court for a review of the March 14, 1988 Order of the Industrial Commission denying their Motion for Review. (R. at 68-69.)

V. SUMMARY OF ARGUMENTS

The Administrative Law Judge and the Industrial Commission properly applied the 1984 Amendment to Section 35-1-69 in their allocation of liability between the employer and the Second Injury Fund in this controversy.

VI. ARGUMENT

POINT I

THE APPLICATION BY THE INDUSTRIAL COMMISSION OF THE REMEDIAL PROVISIONS OF THE 1984 AMENDMENT TO SECTION 35-1-69 WAS NEITHER IMPROPER NOR UNREASONABLE IN THE

ALLOCATION OF LIABILITY BETWEEN THE EMPLOYER AND THE
SECOND INJURY FUND.

It is the position of the Industrial Commission and the Second Injury Fund that the 1984 Amendment to Section 35-1-69 was remedial in nature to resolve the confusion resulting from the Supreme Court decisions in the Northwest Carriers, Inc. v. Industrial Commission in the Merz case, 639 P. 2d 138 (December 1981) and Kerans v. Industrial Commission, 713 P. 2d 49 (Utah 1985) on the one hand, and Jacobsen Construction v. Hair, 667 P. 2d 25 (Utah 1983) on the other hand, with respect to apportionment of disability benefits between the employer and the Second Injury Fund . In support of its position that the 1984 Amendment to Section 35-1-69 was remedial in nature, defendant refers to the recent opinion of this Court in Edward Alter v. Hales, Sand & Gravel and/or Workers' Compensation Fund of Utah filed November 23, 1987, (Attached as Addendum, Exhibit A) in which this Court used the following language:

A remedial statute is one "That is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." Blacks Law Dictionary, 1163 (5th Ed. 1983). The changes to the statute made in HB208 appear to be remedial. The changes "redress an existing grievance" held by Mr. Hales and his insurer. The legislature, in passing the Bill, must have intended "to correct an existing law" and must have believed the changes would "introduce regulations conducive to the public good."

This Court further referred to 73 Am. Jur. 2d statute Section 11 (1974) describing remedial statutes as follows:

Legislation which has been regarded as remedial in its nature includes statutes which abridge superfluities of

former laws, remedying defects therein, or mischiefs thereof, whether the previous difficulties were statutory or were part of the common law. Remedial legislation implies an intention to reform or extend existing rights, and has for its purpose the promotion of justice and advancement of public welfare and of important and beneficial public objects. The term applies to a statute giving a party a remedy where he had none, or different one, before. Another common use of the term "remedial statute" is to distinguish it from a statute conferring a substantive right.

This Court also alluded to "Moore v. American Coal Company, 737

P. 2d 989, 990 (Utah 1987), where the Supreme Court wrote:

However, a statute that is procedural or remedial is applied to all cases arising after the effective date of the statute and to pending and accrued actions. Procedural statutes that do not "enlarge eliminate, or destroy vested and contractual rights" are applied to pending actions.

Applying the language of this Court in the Hales, Sand & Gravel case, supra, the Industrial Commission properly found that the 1984 Amendment to Section 35-1-69 was remedial in nature and, as such, applied to this action which was initiated after the passage of the 1984 Amendment. The effect of the remedial statute amendment was to clarify the confusion and uncertainly engendered by the cases referred to above and to provide a method certain for the allocation of liability between the employer and the Second Injury Fund in cases involving whole-man impairment caused by industrial injury on the one hand and combined impairment caused by the combination of the industrial injury and pre-existing impairments on the other hand. In this case, such application resulted in the assessment by the Industrial Commission of the whole-man impairment found by the

medical panel to be attributable to the industrial injury i.e. . . . 24% whole person impairment, as against the overall combined impairment of 64% whole person, for 37.5% of the applicant's initial 312 weeks of permanent total disability benefits, with the Second Injury Fund responsible for the 62.5% remaining portion as set forth in the statute.

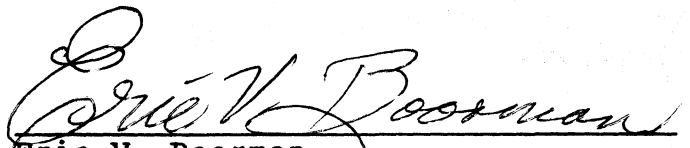
Defendant is well aware of the Supreme Court's language in Marshall v. Industrial Commission, 704 P. 2d 581, 582 (Utah 1985) that " . . . In Workers' Compensation cases the benefits to be awarded to an injured worker are to be determined on the basis of the law as it existed at the time of the injury." The application by the Industrial Commission in this case of the 1984 Amendment to Section 35-1-69 is wholly consistent with that statement and with the Marshall case. The injured worker will receive his maximum permanent total disability entitlement. Indeed, in all cases applying the 1984 Amendment the injured worker will receive compensation benefits from the employer based on the whole-man contribution of the industrial injury to the combined impairment rating in accordance with the legislative intent as held by the Supreme Court in the Karens case where the Supreme Court held (713 P. 2d at 53) that " . . . We, therefore, hold that plaintiff is entitled to compensation on the basis of the whole-man impairment ratings". Here again, it is defendant's position that the 1984 Amendment as applied by the Commission in this case as well as all

others arising after March 29, 1984 requires that the injured worker be paid by the employer for his industrial injury on a whole-man impairment basis and provides a uniform and consistent basis for the handling of all disability cases involving a compensable combination of impairment from the industrial injury on the one hand and pre-existing injuries or conditions on the other. Such uniformity and consistency protect completely the rights of the injured worker and, in addition, comply completely with the definitions of a "remedial statute" as set forth above. The 1984 Amendment indeed is a remedial statute and is one "that is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." Blacks Law Dictionary, supra. It is also a statute "which abridges superfluities of former laws, remedying defects therein, or mischiefs thereof, whether the previous difficulties were statutes or were part of the common law" as set forth in the definition found in 73 Am. Jur. 2d Section 11 (1974) describing remedial statutes. Thus, the 1984 Statutory Amendment to Section 35-1-69, having been determined to be remedial in nature, must be applied to all cases arising after the effective date of the statute and to pending and accrued actions. See Moore v. American Coal Company 737 P. 2d at 990 (Utah 1987). Since this controversy arose after the enactment of the 1984 Amendment the Industrial Commission properly applied its provisions to the allocation of liability made between the employer and the Second Injury Fund.

VII. CONCLUSION

The 1984 Amendment to Section 35-1-69 was remedial in nature and therefore is properly applicable to the allocation of liability between the employer and the Second Injury Fund in this controversy. The Industrial Commission properly applied the provisions of that 1984 Amendment in accordance with the language and the intent of the amendatory provisions. The contention by the employer that the Commission as a matter of law improperly applied the amendatory provisions of the 1984 statute to this controversy is untenable. The Order of the Industrial Commission, therefore, should be affirmed.

Respectfully submitted,


Erie V. Boorman
Attorney for defendant
Second Injury Fund

CERTIFICATE OF MAILING

I certify that on September 15, 1988
a copies of the attached BRIEF OF DEFENDANT SECOND INJURY FUND
was mailed to the following persons at the following
addresses, postage paid:

Stuart L. Poelman, SNOW, CHRISTENSEN & MARTINEAU, 10 Exchange
Place, 11th Floor, P. O. Box 45000, Salt Lake City, Utah 84145

Industrial Commission of Utah, Attention: Barbara Elicerio

THE INDUSTRIAL COMMISSION OF UTAH

BY

Stuart L. Poelman

ADDENDUM

35-1-69. Combined injuries resulting in permanent incapacity — Payment out of Second Injury Fund — Training of employee.

(1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which either compensation or medical care, or both, is provided by this chapter that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, compensation, medical care, and other related items as outlined in Section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation, medical care, and other related items shall be for the industrial injury only. The remainder shall be paid out of the Second Injury Fund provided for in Subsection 35-1-68 (1), and shall be determined after assigning the impairment for the industrial injury on a whole person uncombined basis and then deducting this percentage from the total combined rating. This combined impairment rating may not exceed 100%.

For purposes of this section, (a) any aggravation of a pre-existing injury, disease, or congenital cause shall be deemed "substantially greater", and compensation, medical care, and other related items shall be awarded on the basis of the combined injuries as provided in this Subsection (1), and (b) where there is no such aggravation, no award for combined injuries may be made unless the percentage of permanent physical impairment attributable to the industrial injury is 10% or greater and the percentage of permanent physical impairment resulting from all causes and conditions, including the industrial injury, is greater than 20%. In determining the impairment thresholds and assessment of liability in favor of the employee and apportionment between the carrier or employer and the Second Injury Fund, the permanent physical impairment attributable to the industrial injury or the pre-existing condition or overall impairment, shall be considered on a whole person uncombined basis. If the pre-existing incapacity referred to in this Subsection (1)(b) previously has been compensated for, in whole or in part, as a permanent partial disability under this chapter or Chapter 2, Title 35, the Utah Occupational Disease Disability Law, such compensation shall be deducted from the liability assessed to the Second Injury Fund under this paragraph.

If the payment of temporary disability benefits, medical expenses, or other related items are required as a result of the industrial injury subject to this

section, the employer or its insurance carrier shall be responsible for all such temporary benefits, medical care, or other related items up to the end of the period of temporary total disability resulting from the industrial injury. Any allocation of disability benefits, medical care, or other related items following such period shall be made between the employer or its insurer and the Second Injury Fund as provided for in this section, and any payments made by the employer or its insurance carrier in excess of its proportionate share shall be recoverable at the time of the award for combined disabilities if any is made.

A medical panel having the qualifications of the medical panel set forth in Section 35-2-56, shall review all medical aspects of the case and determine first, the total permanent physical impairment resulting from all causes and conditions including the industrial injury; second, the percentage of permanent physical impairment attributable to the industrial injury; and third, the percentage of permanent physical impairment attributable to the previously existing condition, whether due to accidental injury, disease, or congenital causes. The Industrial Commission shall then assess the liability for permanent partial disability compensation and future medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only and any amounts remaining to be paid shall be payable out of the Second Injury Fund. Medical expenses shall be paid in the first instance by the employer or its insurance carrier. Amounts, if any, which have been paid by the employer in excess of the portion attributable to the industrial injury shall be reimbursed to the employer out of the Second Injury Fund upon written request and verification of amounts so expended.

(2) The commission may increase the weekly compensation rates to be paid out of this special fund. This increase shall be used for the rehabilitation and training of any employee coming under this chapter as may be certified to the commission by the Rehabilitation Department of the State Board of Education as being eligible for rehabilitation and training. There may not be paid out of such special fund for rehabilitation an amount in excess of \$1,000.

History: L. 1917, ch. 100, § 79; C.L. 1917, § 3140, subsec. 6; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-65; L. 1945, ch. 65, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1969, ch. 86, § 7; 1973, ch. 67, § 6; 1981, ch. 287, § 4; 1984, ch. 79, § 1.

Compiler's Notes. — The 1981 amendment substituted "either compensation or medical care, or both" in the first paragraph of subsec. (1) for "compensation and medical care"; inserted "or which aggravates or is aggravated by such pre-existing incapacity" in the first paragraph of subsec. (1); substituted "compensation, medical care and other related items as outlined" in the first paragraph of subsec. (1) for "compensation and medical care, which medical care and other related items are outlined"; inserted "and other related items" before "shall be" in the first paragraph of subsec. (1); substituted "second injury fund" in the first and last paragraphs of subsec. (1) for "special fund"; deleted "hereinafter referred to as the 'special fund'" at the end of the first paragraph

of subsec. (1); inserted the second and third paragraphs of subsec. (1); inserted "permanent partial disability" in the second sentence of the last paragraph of subsec. (1); inserted "future" in the second sentence of the last paragraph of subsec. (1); substituted "any amounts remaining to be paid hereunder" in the second sentence of the last paragraph of subsec. (1) for "the remainder"; inserted the provisions of the present third sentence of the fourth paragraph of subsec. (1); inserted "upon written request and verification of amounts so expended" in the last sentence of the last paragraph of subsec. (1); and made minor changes in phraseology and punctuation.

The 1984 amendment substituted "chapter" for "title" in the first sentence of subsec. (1); added "and shall be determined after assigning the impairment for the industrial injury on a whole person uncombined basis and then deducting this percentage from the total combined rating" to the second sentence of subsec. (1); added the third sentence to subsec. (1); inserted the second sentence in the second para-

ADDENDUM - EXHIBIT A

IN THE UTAH COURT OF APPEALS

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Edward Alter, State Treasurer)
and Custodian of the Uninsured)
Employers' Fund and the)
Industrial Commission of Utah,)

Plaintiffs and Respondents,)

v.)

Hales Sand and Gravel and/or)
Workers Compensation Fund)
of Utah,)

Defendants and Appellants.)

OPINION
(Not For Publication)

Case No. 870013-CA

FILED

Before Judges Davidson, Greenwood and Orme.

NOV 23 1987

Timothy M. Shea
Clerk of the Court
Utah Court of Appeals

DAVIDSON, Judge:

Defendants appeal from the Industrial Commission's denial of their motion for review of the administrative law judge's order requiring them to pay into the Uninsured Employers' Fund the sum mandated by Utah Code Ann. § 35-1-68(2)(a) (1986). We reverse.

Randi Hales was fatally injured, as a result of an accident arising out of or in the course of her employment with defendant Hales Sand and Gravel (Hales), on July 31, 1986. At the time of her death, Randi was 17 years old, had never married, and had no dependents. Defendant Hales was insured by defendant Workers Compensation Fund of Utah. That fund accepted liability to the Industrial Commission for the no dependent death benefit provided for in § 35-1-68(2)(a). The temporary death benefits order was entered by the administrative law judge on August 21, 1986, directing the sum of \$30,000.00 be paid to the Uninsured Employers' Fund. Defendant Hales' motion for review was received by the Industrial Commission on September 9, 1986, as was a similar motion from Randi's mother. Both motions were denied and this appeal followed.

During the time this matter was proceeding, the father of the decedent, who owns defendant Hales Sand and Gravel, sought relief through the legislative process. Through his efforts, H.B. 208 was drafted and presented to the Utah Legislature. His lobbying efforts contributed substantially to its passage. On March 16, 1987, the bill was signed into law by the Governor. The new law eliminated the payment of death benefits to the 'Uninsured Employers' Fund when a decedent left no dependents and provided alternative sources of funding. It became effective on July 1, 1987, eleven months after Randi's death. Defendants now argue that the changes to the law are remedial and therefore control this action.

A remedial statute is one "that is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." Black's Law Dictionary 1163 (5th ed. 1983). The changes to the statute made in H.B. 208 appear to be remedial. The changes "redress an existing grievance" held by Mr. Hales and his insurer. The legislature, in passing the bill, must have intended "to correct an existing law" and must have believed the changes would "introduce regulations conducive to the public good."¹

In Moore v. American Coal Co., 737 P.2d 989, 990 (Utah 1987), the Court wrote:

In workers' compensation cases, we determine the rights and liabilities of the parties as of the date when the accident at issue occurred.

However, a statute that is procedural or remedial is applied to all cases arising after the effective date of the statute and to pending and accrued actions. Procedural statutes that do not "enlarge,

1. 73 Am. Jur. 2d Statutes § 11 (1974) describes remedial statutes as follows:

Legislation which has been regarded as remedial in its nature includes statutes which abridge superfluities of former laws, remedying defects therein, or mischiefs thereof, whether the previous difficulties were statutory or were part of the common law. Remedial legislation implies an intention to reform or extend existing rights, and has for its purpose the promotion of justice and the advancement of public welfare and of important and beneficial public objects. The term applies to a statute giving a party a remedy where he had none, or a different one, before. Another common use of the term "remedial statute" is to distinguish it from a statute conferring a substantive right.

eliminate, or destroy vested or contractual rights" are applied to pending actions.

(Citations omitted)(quoting State, Dep't of Social Serv. v. Higgs, 656 P.2d 998, 1000 (Utah 1982)).

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Higgs, 656 P.2d at 1002 (quoting Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117, 120 (1909)). If this action commenced with the temporary order, it was pending when the new law took effect on July 1, 1987. The new statute, being remedial in nature, applies to the action. The effect is to change the method of funding and to eliminate defendants' liability for the \$30,000.00 no dependent payment. The temporary order must therefore be voided.

The changes in the law may also be considered procedural because they change the method of funding the Uninsured Employers' Fund. If this is the case, the new law will be applied since no "vested or contractual rights" are held by the Industrial Commission until one year after the date of death; until July 31, 1987, one month after the new law took effect on July 1, 1987.

Because of our holding, it is not necessary to discuss the second issue raised by defendants.

The ruling of the Industrial Commission is reversed and the case is remanded for administrative action in accordance with the above.

This opinion is not regarded as adding anything significant to existing law and hence is not to be published in the Utah or Pacific Reporter.

Richard C. Davidson, Judge

WE CONCUR:

Pamela T. Greenwood, Judge

Gregory K. Orme, Judge