1986

Mini Spas INC. v. Board of Review of The Industrial Commission of Utah, Deparment of Employment Security, and Kathryn F. Preece : Reply Brief

Utah Supreme Court

W. Andrew McCullough; McCullough, Jones, Jensen, and Ivins; Attorneys for Petitioner.
Winston M. Faux; Special Assistant Attorney General; Attorneys for Respondent.

IN THE SUPREME COURT OF UTAH

860212

STATE OF UTAH

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MINI SPAS, INC.,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, AND KATHRYN F. PREECE,	:	Case No. 860212 (Category #6)
	:	
Defendants.	:	

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PLAINTIFF'S REPLY BRIEF

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Petition for Review of a Decision of the Board of Review of the Industrial Commission of Utah, Department of Employment Security

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Attorney for Defendants

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SUMMARY OF ARGUMENTS

POINT I

Plaintiff is not asking this Court, as Respondents contend, to overrule the Commission's Findings of Fact. Plaintiff is simply asking this Court to set a proper standard of review in questions concerning late filing by an employer who, as with any other party, deserves a fair opportunity to be heard. The facts, as determined by the Commission, support Plaintiff's claim.

POINT II

The proper standard to be used by lower tribunals within the Department of Employment Security, as with lower courts, is the statement of public policy set forth in Rule 60(b) U.R.C.P., which allows a litigant to have his day in court, on a showing of mistake or excuseable neglect for not filing within the original time limit.

ARGUMENT

POINT I

THE COMMISSION'S FINDINGS OF FACT DO NOT SUPPORT RESPONDENTS' POSITION.

In Point I of their Brief, Respondents state that it is the duty of this Court to uphold the Commission's Findings of Fact. In so contending, Respondents wish to draw the Court off from the issues at hand. The Findings of Fact of the Commission, and the Administrative Law Judge, were that the employer's late filing was not due "to circumstances beyond the control of the Appellant, and were not for circumstances which were 'reasonable and compelling'". If that had been the proper standard of review, perhaps the Respondents would be correct in their contention. Respondents, in Point II of their Brief, set forth in some detail the facts as ascertained at the hearing in front of the Administrative Law Judge. While these facts were not gone into in great detail in the employer's previous Brief, perhaps a further reiteration of them is appropriate here, in reply. the employer contends that this whole problem was the result of the negligence of Respondents. The employer's place of business has long been headquartered at 3265 Richards Street, #1, Salt Lake City, Utah 84115. The employer's business interests included businesses located at some, but not all, of the suites at 60 West 3300 South, Salt Lake City, Utah 84115. Because Respondents became aware that some business was done at the latter address, mail was regularly sent by Respondents to the employer at the generic address. No suite number was ever listed. Several

requests were made through counsel to change the address to the proper one for the corporation, all to no avail. Therefore, Respondents mail to the employer was delivered on a hit and miss basis. Previous to the hearing by the Administrative Law Judge, a finding of default against employer had been made in this case, and vacated, when it was determined that notices sent to the employer had never been received, due to faulty addressing. It was only after counsel for the employer tired of the continual unsuccessful attempts to get mail sent to the proper address that he asked that mail be delivered directly to him. Unfortunately, the first time this was done, there was apparently a further foul up in forwarding from his office to the proper address of his client. According to the client, at the hearing (as indicated on page 23 of Respondents' Brief) the mail from counsel to client was set aside and remained unopened and unnoticed for a period of time. The Findings of Fact on the part of the Administrative Law Judge and the Commission are not disputed. The facts themselves are not disputed. Only the invalid conclusion based on Rule "H" of the Unemployment Insurance Rules is disputed. Certainly the facts make out a good case for inadvertance or excuseable neglect. Certainly the bureaucratic incompetance and negligence which originally caused the communication problem militate in favor of giving the employer his day in Court. That does not require the Court to ignore the Commission's Findings of Fact.

POINT II

RULE 60(b) U.R.C.P. DOES APPLY TO THIS CASE AS A STATEMENT OF PUBLIC POLICY.

In Point III of Respondents' Brief, the contention is made that the Utah Rules of Civil Procedure apply only in such cases as the instant one when they do not conflict with the unemployment insurance rules. It is contended that the Department of Employment Security, pursuant to statute, is given rule making authority which gives the Department the right to supercede a rule of procedure. That, it is contended has been done by the adoption of Rule "H", which supercedes the policies of Rule 60 U.R.C.P. The employer does not deny that the Department is given rulemaking authority, so long as those rules are reasonable and do not produce results that are contrary to public policy. The employer has cited the Rule of Civil Procedure, and cases construing it, in which it is stated that it is the public policy of this State to give litigants a day in court, when it appears a valid controversy exists. The California Court of Appeals, in the previously cited case of United States Postal Service vs. California Unemployment Insurance Appeals Board, has appeared to take the position that the public policy argument cannot be overidden by more restrictive wording of an unemployment insurance rule. That Appellate Court interpreted the unemployment insurance rule in conformity with the public policy of Rule 60(b) of our Rules of Procedure. The employer contends that this can be done here, or in the alternative, that the Department of Employment Security

can be told to redraft their rule to express the proper public policy. In either case, Appellant would be given its day in Court, and allowed to express its very valid concerns about the payment of an invalid claim to Ms. Preece.

Respondents go into some detail in their Brief in an effort to convince the Court that it should not disturb the lower tribunal in the proper use of its discretion. The standard for review, it is contended, is that the lower tribunal has abused its discretion. Once again, Respondents are trying to divert attention from the real issue. The Administrative Law Judge, and the Commission in upholding him, used an invalid standard. The standard used by the commission did not allow it to validly exercise its discretion. Appellant is not asking this Court to overrule the Commission within its discretion. Appellant is asking this Court to advise the Commission on how its discretion must be exercised and then allow it to do its job properly.

CONCLUSION

For the reasons stated above, the employer's contention that he was not given a fair opportunity to be heard and to present his side of the issues should be upheld, and this matter should be remanded to the Board of Review of the Industrial Commission

with instructions to grant Plaintiff a hearing.

RESPECTFULLY SUBMITTED this 27th day of October, 1986.

MCCULLOUGH, JONES, JENSEN & IVINS

W. Andrew McCullough
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I mailed four true and correct copies of the foregoing Plaintiff's Reply Brief, postage prepaid, to Winston M. Faux, Special Assistant Attorney General, 1234 South Main Street, Salt Lake City, Utah 84147, this 27th day of October, 1986.