

1978

# Interstate Electric Company and Home Insurance Company v. Industrial Commission of Utah and Michael E. Inskeep : Plaintiffs' Brief

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

INTERSTATE ELECTRIC COMPANY and )  
HOME INSURANCE COMPANY, )

Plaintiffs, )

vs. )

Case No. 15791

INDUSTRIAL COMMISSION OF UTAH )  
and MICHAEL E. INSKEEP, )

Defendants. )

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PLAINTIFFS' BRIEF

---

REVIEW OF FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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Clerk, Supreme Court, Utah

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PLAINTIFFS' BRIEF

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NATURE OF CASE

This is a review of the Findings of Fact, Conclusions of Law, and Order of the Industrial Commission of Utah, wherein it refused to reduce the award of defendant Michael E. Inskeep pursuant to Section 35-1-99, Utah Code Annotated (1953), as amended.

DISPOSITION BY INDUSTRIAL COMMISSION OF UTAH

The Industrial Commission of Utah denied plaintiffs' Motion for Review and affirmed the Order of the Administrative Law Judge.

RELIEF SOUGHT BY PLAINTIFFS

Plaintiffs seek to set aside the award of the

Industrial Commission of Utah insofar as it fails to reduce the award of defendant Michael E. Inskeep pursuant to Section 35-1-99, Utah Code Annotated (1953), as amended.

#### STATEMENT OF FACTS

1. Defendant Michael E. Inskeep was working for plaintiff Interstate Electric Company on September 7, 1976, when his left foot slipped from a rung of a scaffold upon which he was climbing (R-28, 29 & 51).

2. When his left foot slipped from the rung of the scaffold, defendant Inskeep experienced immediate pain and felt as if he had strained a muscle and twisted himself (R-30).

3. No one, to the knowledge of defendant Inskeep, witnessed the incident upon the scaffold. However, he did mention it to three fellow workers during his lunch break and to his wife upon his return to his home (R-31, 32, 69, 77, 83 & 86).

4. Defendant Inskeep did not report the incident upon the scaffold to plaintiff Interstate Electric Company on September 7, 1976, because he thought that he had just sprained his back (R-33).

5. Defendant Inskeep continued to work for approximately one (1) week following the incident upon the scaffold (R-35).

6. Defendant Inskeep reported the incident upon the scaffold to his supervisor on the morning of September 10, 1976, approximately three (3) days after its occurrence (R-36 & 52).

7. On the Thursday after the incident upon the scaffold, the wife of defendant Inskeep, at his request, made an appointment to see Dr. Norman Beck (R-37). He saw Dr. Beck on September 13, 1976. Dr. Beck admitted him to the hospital and referred him to Dr. Peter M. Heilbrun (R-38 & 45). Dr. Heilbrun removed a disk between his fourth and fifth lumbar vertebrae and indicated in his histories that defendant Inskeep had a history of low back and right leg pain and that, upon September 6, 1976, defendant Inskeep noted a gradual onset of more severe pain (R-44, 2 & 4). According to defendant Inskeep, these histories are in error (R-67 & 68).

8. Defendant Inskeep first experienced back pain when he was about seventeen (17) years of age. He experienced further back and leg pain in 1974. Thereafter, his back and leg pains recurred at intervals until the date of the incident upon the scaffold (R-46, 47, 48 & 49).

9. The Administrative Law Judge who heard this matter determined, in his Findings of Fact, Conclusions of Law and Order, that while Section 35-1-99 might otherwise require a reduction in the compensation awarded to defendant Inskeep,



there was no showing of prejudice toward plaintiff Interstate Electric Company (R-203). Consequently, the Administrative Law Judge refused to reduce the award of defendant Inskeep in accordance with the provisions of Section 35-1-99 (R-203 & 204).

10. Plaintiffs filed a Motion for Review, wherein they requested that the Administrative Law Judge who heard this matter reduce the award to defendant Inskeep by fifteen (15) percent (R-207 through 211).

11. The Industrial Commission of Utah denied plaintiffs' Motion for Review and affirmed the Order of the Administrative Law Judge (R-214).

#### ARGUMENT

THE INDUSTRIAL COMMISSION OF UTAH ERRED IN ITS FAILURE TO REDUCE THE AWARD OF DEFENDANT MICHAEL E. INSKEEP PURSUANT TO THE PROVISIONS OF SECTION 35-1-99, UTAH CODE ANNOTATED (1953), AS AMENDED.

Section 35-1-99 in pertinent part, states as follows:

When an employee claiming to have suffered an injury in the service of his employer fails to give notice to his employer of the time and place where the accident and injury occurred, and of the nature of the same, within forty-eight (48) hours, when possible, or fails to report for medical treatment within said time, the compensation provided for herein shall be reduced 15 percent; provided, that knowledge of such injury obtained from any source on the part of such employer, his managing

agent, superintendent, foreman or other person in authority, or knowledge of any assertion by the injured sufficient to afford an opportunity to the employer to make an investigation into the facts and to provide medical treatment shall be equivalent to such notice; and no defect or inaccuracy therein shall subject the claimant to such reduction, if there was no intention to mislead or prejudice the employer in making his defense, and the employer was not, in fact, so misled or prejudiced thereby.

In Salt Lake City v. Industrial Commission, 104 Utah 436, 140 P.2d 644 (1943), the Utah Supreme Court, speaking through Justice Wolfe, discussed the purpose and intent of the predecessor to Section 35-1-99. At pages 440 and 441, the Court stated:

. . . the cases uniformly hold that such statutes were designed to give the employer an opportunity to make an early investigation of the circumstances surrounding the alleged accident and to assure him the opportunity of giving prompt and proper medical aid where it is deemed necessary. Such statutes also protect employers against fraudulent claims and give them an opportunity to remedy defects so as to prevent similar accidents in the future.

While the Court in the Salt Lake City case dealt with that portion of Section 35-1-99 which denies compensation to an employee who, claiming injury, fails to notify his employer of the accident and injury within one (1) year, its comments refer to the intent and purpose of the statute as a

whole. Consequently, the requirement that an employee who claims injury notify his employer of the accident and injury or report to his employer for medical treatment within forty-eight (48) hours is designed to enable the employer to make early investigation of the alleged accident so as to foreclose fraudulent claims, afford an opportunity to the employer to provide prompt and proper medical aid to the employee, and to enable the employer to remedy any defects which may have caused the accident and injury so as to prevent the occurrence of similar accidents and injuries.

Further, the statutory requirement that the compensation, if any, paid to an employee claiming injury be reduced fifteen (15) percent upon his failure to notify his employer of the alleged accident and injury or his failure to report to his employer for medical treatment within the forty-eight (48)-hour period subsequent to the alleged accident or injury provides a convenient means of redressing the prejudice which can result to an employer when an injured employee fails to notify him of the accident and injury or report to him for medical care as provided by the statute.

#### POINT I

DEFENDANT INSKEEP NEITHER NOTIFIED PLAINTIFF INTER-STATE ELECTRIC COMPANY OF THE ACCIDENT AND INJURY NOR REPORTED TO IT FOR MEDICAL TREATMENT WITHIN THE TIME PRESCRIBED BY SECTION 35-1-99, UTAH CODE ANNOTATED (1953), AS AMENDED.

As the language of Section 35-1-99 makes clear, an employee who claims to have suffered an injury in the service of his employer must, within forty-eight (48) hours of the time of the alleged injury, (1) notify his employer of the nature of the accident and injury, the time and place of the accident, and the time and place of the injury, or, (2) report to his employer for medical treatment. Otherwise, the compensation, if any, provided to him by the Utah Workmen's Compensation Act shall be reduced fifteen (15) percent.

At the hearing of the matter at bar, defendant Inskeep testified that while the accident and injury occurred at approximately 11:00 a.m. on September 7, 1976, he did not report the accident and injury to plaintiff Interstate Electric Company until the morning of September 10, 1976. Further, he did not report to it for medical treatment within forty-eight (48) hours after the occurrence of the accident and injury and did not report anywhere for medical treatment until September 13, 1976. He has testified that his wife, at his request, made an appointment with Dr. Norman Beck on the Thursday after the occurrence of the accident and injury. However, he did not present any evidence at the hearing of this matter as to whether such appointment was made within forty-eight (48) hours of the occurrence of the accident and

injury. Further, the burden of producing such evidence was upon defendant Inskeep, as the Utah Supreme Court has indicated in the case of Whertritt v. Industrial Commission, 100 Utah 68, 110 P.2d 374 (1941), which is set forth and discussed hereinafter at page 10.

Even if it is assumed, arguendo, that the making of the appointment with his physician constitutes a "report for medical treatment" on the part of defendant Inskeep, it is clear that such action on his part does not comport with the purpose and intent of Section 35-1-99, as set forth in the Salt Lake City case, for the following reasons. First, were an employee who claims injury required to report only to any medical practitioner for treatment, his employer likely would not receive notice of the alleged accident and injury for some time, effectively denying the employer the opportunities to investigate the alleged accident and injury and to remedy any defective condition which may have caused the alleged accident and injury. Second, in the event the employee claiming injury sees a practitioner who lacks the ability to properly treat the injury, the employer will be denied the opportunity to see that the employee gets proper, as well as prompt, medical care and mitigate the medical complications which may otherwise result to the employee. Consequently, it is clear that if an employee who claims injury does not report the accident and injury to his employer or report to his empl

for medical treatment within forty-eight (48) hours, the intent and purpose of Section 35-1-99 will be frustrated.

Consequently, as defendant Inskeep neither notified plaintiff Interstate Electric Company of the accident and injury nor reported to it for medical treatment within forty-eight (48) hours after the occurrence of the accident and injury, the compensation provided to him by the Workmen's Compensation Act must be reduced fifteen (15) percent, unless otherwise provided by Section 35-1-99.

## POINT II

DEFENDANT INSKEEP HAS PRODUCED NO EVIDENCE INDICATING THAT PLAINTIFF INTERSTATE ELECTRIC COMPANY RECEIVED THE STATUTORY EQUIVALENT OF NOTICE, AS DEFINED BY SECTION 35-1-99, UTAH CODE ANNOTATED (1953), AS AMENDED.

In order to mitigate the result occasioned by the failure of an employee claiming injury to notify his employer of the accident and injury or report to his employer for medical treatment within the period prescribed by Section 35-1-99, it further provides that (1) knowledge of the injury obtained from any source on the part of the employer, his managing agent, his superintendent, foreman or other person in authority or (2) knowledge of any assertion by the injured sufficient to afford an opportunity to the employer to make an investigation into the facts and to provide treatment, shall satisfy the notice requirement of Section 35-1-99.

However, in the matter at bar, defendant Inskeep offered no testimony or other evidence which indicates that plaintiff Interstate Electric Company obtained knowledge of the injury from anyone, let alone the sources prescribed by Section 35-1-99, or that it had knowledge of any assertion made by him which would afford it the opportunity to make an investigation of the facts or provide medical treatment to him. Further, the burden of providing such evidence as is deemed by Section 35-1-99 to be the equivalent of actual notice to plaintiff Interstate Electric Company of the accident and injury is upon defendant Inskeep. In Wherritt vs. Industrial Commission, 100 Ut. 68, 110 P.2d 374 (1941), the Utah Supreme Court spoke generally regarding the allocation of the burden of proof in workmen's compensation cases. There, at page 70, the Court stated:

The burden of proof is upon applicant to establish her claim for compensation. Higley vs. Ind. Comm., 75 Ut. 361, 285 P. 306; Bingham Mines Co. v. Allsop, 59 Ut. 306, 203 P. 644.

The Utah Supreme Court has never dealt with the specific question of whether a claimant in a workmen's compensation case has the burden of proof regarding the question of whether his employer has received the statutory

equivalent of actual notice. However, 83 AmJur. 2d 220 sets forth the general rule in this regard. There, Section 456 states:

As a general rule, the burden is upon the applicant to show that notice of injury was given within the proper time, or, if there was delay in giving or failure to give the notice, to show that such delay or failure was due to mistake or other reasonable cause, that the employer or his representative had knowledge thereof, or that the want of notice has not prejudiced the employer.

The record in the case at bar contains no indication whatsoever that defendant Inskeep has even attempted to show that plaintiff Interstate Electric Company obtained knowledge of his alleged accident and injury from any source, let alone those prescribed by Section 35-1-99, or that plaintiff Interstate Electric Company had knowledge of an assertion by defendant Inskeep which would allow it to investigate the facts and provide medical treatment to him. Consequently, he has not only failed to meet his burden in this regard, but he has not even tried to do so. As the record details, defendant Inskeep told only three fellow employees and his wife about his claimed accident and injury. There is no indication in the record that his wife told plaintiff



Interstate Electric Company or any of its agents about the accident and injury. Further, while he told the three fellow employees about the accident and injury, there is no indication in the record that any of them told plaintiff Interstate Electric Company or its agents about such accident and injury. Further, no where in the record is there any indication that such persons were other than co-employees of defendant Inskeep. Consequently, under the provisions of Section 35-1-99, plaintiff Interstate Electric Company did not receive what the statute deems to be the equivalent of the required notice within the time period prescribed by the statute so as to avoid a 15% reduction in the award of defendant Inskeep.

### POINT III

DEFENDANT INSKEEP HAS NOT SHOWN THAT HIS FAILURE TO NOTIFY PLAINTIFF INTERSTATE ELECTRIC COMPANY OF THE ACCIDENT AND INJURY OR TO REPORT TO IT FOR MEDICAL TREATMENT WITHIN FORTY-EIGHT (48) HOURS AFTER THE OCCURRENCE OF THE ACCIDENT AND INJURY WAS NOT INTENDED TO MISLEAD OR PREJUDICE PLAINTIFF INTERSTATE ELECTRIC COMPANY IN ITS DEFENSE OF HIS CLAIM AND DID NOT IN FACT MISLEAD OR PREJUDICE IT.

Section 35-1-99 further provides that, irrespective of whether an injured employee fails to notify his employer

of the accident and injury or report to his employer for medical treatment within forty-eight (48) hours, the compensation provided by the Workmen's Compensation Act shall not be reduced fifteen percent (15%) unless (1) such employee did not intend to mislead or prejudice his employer in making a defense and (2) his employer was not in fact mislead or prejudiced.

In the case at bar, defendant Inskeep presented no testimony or other evidence that his failure to notify plaintiff Interstate Electric Company of the accident and injury or report to it for medical treatment within forty-eight (48) hours was not intended by him to mislead or prejudice it in its defense, and did not in fact mislead or prejudice it. This conclusion is amply supported by the Administrative Law Judge who heard this matter. In his Findings of Fact, Conclusions of Law and Order, he stated:

One of the chief aims of this section (35-1-99) is to insure that the employer will not be prejudiced in his right to defend against these actions. In the instant matter there has been no showing of prejudice toward Interstate Electric Company by the one day delay, and this writer feels that no amount of extrapolation of the record will reveal such prejudice as to justify this harsh result.

The Administrative Law Judge clearly did not understand that defendant Inskeep has the burden of showing that his failure to give notice to plaintiff Interstate Electric Company of the accident and injury or report to it for medical treatment within the prescribed period was not intended to, and did not in fact, prejudice plaintiff Interstate Electric Company. In this regard, 3 Larson's Workmen's Compensation Law 15-63 states:

Once the record shows that the required notice has not been given, the fatal effect of this showing must be off-set by definite findings showing the kind of excuse or lack of prejudice that will satisfy the statute. The Commission cannot remain silent on the issue of excuse or prejudice and leave appellate courts to infer that some excuse must be found. Moreover, the subsidiary findings of fact and evidence supporting the finding on lack of prejudice should be set forth, since this finding, like any other finding of fact, must be supported by some evidence.

In the absence of a specific statutory provision casting the burden of proof of prejudice upon the employer, which is to be found in some states, the burden is upon the employee to prove facts establishing an excuse once a failure to comply with the statute has been shown.

In Mistletoe Express Service and Reliance Insurance Company v. Bond and State Industrial Corp., 455 P.2d 90 (1969), the Oklahoma Supreme Court affirmed the above rule. There, a widow filed a claim under the Oklahoma Workmen's Compensation Act alleging that she was entitled to benefits as a result of the death of her husband. The trial judge held that was entitled to such benefits, but made no mention of her failure to give formal written notice of her claim within thirty (30) days after his death. Upon appeal to the State Industrial Court, the order was modified so as to indicate that neither her husband's employer or insurance carrier were prejudiced by such failure to give notice. Upon appeal to the Oklahoma Supreme Court, the award was vacated by it. At page 92, the Court stated:

Since respondent did not have notice that decedent sustained an accident injury arising out of and in the course of his employment, the burden was on claimant to establish to the satisfaction of the State Industrial Court that respondent was not prejudiced thereby. See Title 85 O.S. 1961, Sec. 24, and Atkins v. Colonial Baking Company, Okl., 287 P.2d 450.

Neither claimant not respondent submitted evidence concerning whether respondent was or was not prejudiced for lack of notice. There being no evidence concerning this issue, the record will not support a finding that respondent was not prejudiced by claimant's failure to give notice. Inasmuch as the burden was upon claimant to prove respondent was not prejudiced by lack of notice, and claimant's entitlement to the award was dependent upon her making such proof, the order awarding death benefits must be vacated.

Other than discussed above, Section 35-1-99 excuses an employee claiming injury from the requirement that he notify his employer of the accident and injury or report to him for medical treatment within forty-eight (48) hours only under circumstances wherein it is impossible for the employee to so report. However, as earlier indicated, the burden of showing such impossibility is upon the employee. In this case defendant Inskeep has introduced no evidence whatsoever that it was not possible for him to report to his employer within the forty-eight (48)-hour period prescribed by Section 35-1-99. In fact, the record shows that defendant Inskeep continued to work for plaintiff Interstate Electric Company for approximately a week following the occurrence of the accident and injury. Hence, he clearly had ample opportunity to report the accident and injury to plaintiff Interstate Electric Company or report to it for medical treatment prior to the expiration of the forty-eight (48)-hour period. Hence, not only has he failed to meet the burden of proof as to impossibility, but the record indicates that it was entirely possible for him to report to his employer within the prescribed time.

In conclusion, Section 35-1-99 was intended to afford the employer of a person claiming injury the opportunity

to make early investigation of the facts of the claim so as to foreclose fraudulent claims, the opportunity to provide prompt and proper medical care, and the opportunity to remedy any defect or problem which may have contributed to or caused the accident and injury. For these reasons, Section 35-1-99 requires an employee who claims injury to notify his employer of the accident and injury or report to his employer for medical treatment within forty-eight (48) hours. In an effort to encourage the employee to take such action and fulfill the statutory purpose and intent, Section 35-1-99 further provides that if the employee claiming injury fails to so report, the compensation which he would otherwise receive shall be reduced fifteen percent (15%) unless he did ~~not~~ intend to prejudice and in fact did not prejudice his employer.

In essence, Section 35-1-99 creates a presumption that an employer is in fact prejudiced by the failure of an employee claiming injury to notify him of the accident and injury or report to him for medical treatment within the period prescribed by the statute. This presumption, of course is rebuttable. However, the burden is upon the

employee to show that he did not intend to so prejudice his employer and that his employer was in fact not prejudiced. To hold otherwise would nullify the purpose and intent of Section 35-1-99 and severely hamper an employer's obligation to provide prompt and proper medical treatment to an injured employee and to rectify the situation which caused or contributed to the injury in an effort to prevent similar accidents and injuries.

#### SUMMARY

The Order of the Industrial Commission of Utah should be vacated insofar as it fails to reduce the award of defendant Inskeep by fifteen percent (15%) for the following reasons:

1. He did not notify plaintiff Interstate Electric Company of the accident and injury, or report to it for medical treatment, within forty-eight (48) hours after the occurrence.

2. He did not meet the burden of showing that plaintiff Interstate Electric Company or its statutory agents knew of the accident and injury within the forty-eight (48) hour period prescribed by Section 35-1-99, nor did he show that

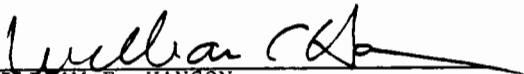
plaintiff Interstate Electric Company had knowledge of any assertion by him sufficient to enable it to investigate the accident and provide medical treatment for him.

3. He did not meet the burden of showing that the notice which was given to his employer, defective because not given within the time prescribed by Section 35-1-99, was not intended to mislead and prejudice plaintiff Interstate Electric Company and in fact did not mislead and prejudice it.

Wherefore, for the reasons set forth herein, plaintiffs respectfully pray that this Court vacate the award of the Industrial Commission of Utah insofar as it fails to reduce the award of defendant Michael E. Inskeep by fifteen percent (15%), as provided by Section 35-1-99, Utah Code Annotated (1953), as amended.

RESPECTFULLY submitted this 23rd day of June, 1978.

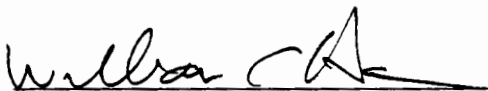
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed, postage prepaid, two (2) copies of the foregoing Plaintiffs' Brief to A. Wally Sandack, attorney for defendant Inskeep, 370 East 500 South, Salt Lake City, Utah 84111 and to Robert B. Hansen, attorney for defendant Industrial Commission of Utah, 236 State Capitol, Salt Lake City, Utah 84114 this 23rd day of June, 1978.

  
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