2001

# CARLYLE F. GRONNING, in his official capacity as Chairman Commissioner of the Industrial Commission of Utah v. HERBERT F. SMART, in his official capacity as Director of Finance, Department of Finance, State of Utah, and Administrator of the State Insurance Fund; DAVID S. MONSON, State Auditor; and DAVID L. DUNCAN, State Treasurer : Brief of Appellant

Utah Supreme Court



A. Wally Sandack; Special Assistant Attorney General; Attorneys for Respondents.
Robert B Hansen; Attorney General; Joseph P. McCarthy; Assistant Attorney General; Attorneys for Appellants.

IN THE SUPREME COURT OF THE STATE OF UTAH

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| CARLYLE F. GRONNING, in his official capacity as Chairman Commissioner of the Industrial Commission of Utah, | |
| Plaintiff-Respondent, | Case No. 14846 |
| -vs- | |
| HERBERT F. SMART, in his official capacity as Director of Finance, Department of Finance, State of Utah, and Administrator of the State Insurance Fund; DAVID S. MONSON, State Auditor; and DAVID L. DUNCAN, State Treasurer, | |
| Defendants-Appellants. | |

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REPLY BRIEF OF APPELLANTS

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Appeal from a declaratory judgment by the Third Judicial District for Salt Lake County, State of Utah, Honorable Stewart M. Hanson, Sr., holding House Bill No. 373, 41st Legislature and House Bill No. 91, 41st Legislature 1976 constitutional.

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# REPLY BRIEF OF APPELLANTS

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## ARGUMENT

### POINT I

SINCE THE MONEY IN THE INSURANCE FUND BELONGS TO CONTRIBUTING EMPLOYERS, THE STATE CANNOT TAKE MONEY FROM THE INSURANCE FUND EXCEPT TO PAY THE BENEFITS DUE TO EMPLOYEES, AND THE COSTS OF ADMINISTRATION OF THE FUND. THE DIVERSION OF TRUST FUND MONEY FOR THE

OPERATION OF GOVERNMENT WITHOUT COMPENSATION, DENIES DUE PROCESS OF LAW TO CONTRIBUTING EMPLOYERS. THIS DIVERSION CANNOT BE JUSTIFIED BY THE DESIRABILITY OF THE INTENDED USE, INDIRECT NON-EXCLUSIVE BENEFIT, OR CLAIMS OF ADMINISTRATIVE CONVENIENCE.

Respondent seeks to avoid the clear holding of Chez v. Industrial Commission, 90 U. 447, 62 P.2d 549 (1936), by asserting that the case has no applicability to "administration" of the State Insurance Fund [R.B. p. 10]. The argument starts with the supposition that because sixty percent of the State's employers insure with the Fund, that the Fund should pay sixty percent of the costs of the Industrial Commission's safety programs. [R-54, R.B. p. 3]. The next step in the reasoning is that because the Fund may employ inspectors (§ 35-3-1, U.C.A. 1953) and do things necessary or convenient to the administration of its insurance business (§ 35-3-3, U.C.A. 1953), it may pay over funds to the Industrial Commission to pay for sixty percent of the costs of carrying out the functions of Commission inspections. [R.B. pp. 6-7]. The position is that the administrative convenience is supported by prior disbursements or so called "public funds" [R.B. p. 11] by the Fund which is an "instrumentality of the government" [R.B. p. 9-10]

although the Fund has no responsibility for the work of the Industrial Commission [R.B. p. 10]. Since there is no sense in duplicating costly safety programs, the Fund should pay part of the costs of the Commission's programs since the Commission has the expertise and capability to conduct all phases of the program and authority to enforce regulations and safety orders while the Fund does not. Since the Legislature has declared the programs to be in the public interest and since the Fund has an interest in safety programs, and since "Due Process is a rule of reason and utilization of Fund resources in a reasonable manner partially supporting safety related programs established by the Industrial Commission throughout the state does not violate that rule." [R.B. p. 16], no important rights or constitutional issues are involved and the expenditures are proper Legislature determinations.

While admiration must be expressed for the ingenuity of the arguments, the Appellants must respectfully disagree with the conclusion and with the reasoning employed since the cases cited by Respondent really do not support the essential positions taken in Respondent's arguments.

State v. Musgrave, 370 P.2d 778 (Idaho, 1962) is cited by Respondent [R.B. pp. 9-10] as authority that

the Fund is an instrumentality of the government, thus, somehow implying that transfer of its funds to the Industrial Commission would be proper. The case actually holds that the employment of an attorney by the Fund manager for prosecution of subrogation claims on a contingent fee basis was lawful since the money did not belong to the State. The case discloses that the Idaho law sets up a Fund very similar to our own statutory plan as interpreted in Chez v. Industrial Commission, supra. The court holds that "The money in the fund does not belong to the state and is not in the state 'treasury' within the meaning of Art. 7, § 13, of the Constitution. It is deposited with the state 'treasurer' as 'custodian' and is held by him as such for the contributing employers and the beneficiaries of the compensation law, and for the payment of the costs of operation of the fund." State v. Musgrave, supra at 782. To the extent that the fund may be considered as an instrumentality of government, the court said that the ". . . fund is an agency of the state for the purpose of carrying on and effectuating a proprietary function as distinguished from a governmental function. It serves a 'public purpose' but not a 'governmental purpose' ". State v. Musgrave, supra at 782 (emphasis added).

Snow v. Keddington, 113 U. 325, 195 P.2d 234 (1948), in so far as it is applicable, states a rule that a statute is presumed to be constitutional. Appellants concede this rule to be correct, but assert that the decision otherwise has no application to thecase now before the Court.

Another Utah case, Wilstead v. Industrial Commission, 17 U.2d 214, 407 P.2d 692 (1965), is a review of an award of the Industrial Commission. Wilstead briefly states that appellant's argument for more compensation would make the Workmen's Compensation Act an unemployment compensation act and briefly states the purposes of the Act to be the assurance of income to the injured employee during total disability, to compensate for permanent disability, to provide a simple and speedy procedure, and to place the burden of injury on industry. Again, Appellants have no disagreement with this case, believing that the purposes so announced echo the holding of Chez v. Industrial Commission, supra.

Trade Commission v. Skaggs Drug Centers, 21 U.2d 431, 446 P.2d 958 (1968) upheld the State Unfair Practices Act respecting sale of merchandise at less than cost plus 6% as "loss leaders". This case again recites the presumptions of constitutionality of statutes, declares

that judicial determinations of wisdom or desirability of legislation should not be indulged. It also contains a definition of due process (21 U.2d 431, 441) which certainly does not preclude the protection of individual rights which Appellants here claim belong to the paying employers to have the Fund's expenditures confined to the purposes of the Fund.

Sims v. Moeur, 19 P.2d 679 (Ariz. 1933), held that Commissioners could not expend money belonging to the Insurance Fund on request of some individual employers to defeat an iniative measure which proposed to abolish their offices and to repeal the Workmen's Compensation Law. Technically, the case permitted the Governor to dismiss the Commissioners who expended $16,326.60 of the Fund's reserve in legal fees and in other efforts to defeat the iniative, and were therefore guilty of inefficiency and malfeasance in office. The court said ". . . This fund the law intends shall be sacredly and carefully protected and conserved. The relation of the commission to the fund is one of particular confidence and trust. The commission may not use the fund for any purpose other than expressed or necessarily implied in the act creating the fund. . ." 19 P.2d 679, 682, emp. added.

Woldberg v. Industrial Commission, 74 U. 309, 279 P. 609 (1929), simply held that the Supreme Court had no jurisdiction to review a decision of the Commission when the petition for review was filed more than thirty days after the Commission had denied a petition for rehearing.

M & K Corporation v. Industrial Commission, 112 U. 488, 189 P.2d 132 (1948), related entirely to the question whether a death arose out of or in connection with employment. In this connection, this Court held that the Act should be liberally construed.

Ogden Iron Works v. Industrial Commission, 102 U. 492, 132 P.2d 376 (1942), presented two questions for review. ". . . (1) Does the evidence justify the finding of the Commission. . . . (2) If such injury was suffered, does the record justify the finding that such injury was a proximate cause of death. . . ." 132 P.2d 376, 377. With respect to Commission's receipt of hearsay, this court said, "Legislation such as this Act, made with a view to further social interests, must be interpreted not only from the judicial, but also the social point of view, and so as to give material justice its due, while formal jurisprudence has to stand back. . . ." 132 P.2d 376, 379.

With respect to Respondent's position, it is apparent that taxation of employers, employees and the

public generally, including taxation of employers who insure with the Fund, would be the source of the money necessary to supply the 40% of the cost of the Commission's safety programs. The employer who selects the Fund to cover his requirement to assure that workmen who are injured or become diseased from their occupations would be denied the equal protection of the law if they had to pay their money (Chez v. Industrial Commission, supra) through the Fund to support 60% of the programs while other employers pay nothing through private insurers, or nothing if self insured. To say that the Fund has an interest in safety is not to say that the other employers or the public do not.

Moran v. State, (Okl. 1975) 534 P.2d 1282, 1288, would hold that such a diversion of Fund money would impair the obligation of the insurance contract between employers who pay premiums and the Fund.

Appellants submit that no concept of administrative convenience or indirect non-exclusive benefit to the Fund can justify taking funds which belong to private persons (those employers who pay premiums into the Fund) for public use (the payment

of Industrial Commission expenses incurred in the exercise of State police power) without compensation. Such action clearly denies these employers due process of law, and the Legislature may not disregard these rights when the State is the Trustee.

Respectfully submitted,

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