1980

The State Insurance Fund v. E-Z Way Construction, Inc., Chris L. anderson and the Industrial Commission of Utah : Brief of Plaintiffs

Utah Supreme Court

M. David Eckersley; Attorney for Plaintiff Andrew R. Hurley, Mike M. Boley, Frank v. Nelson; Attorneys for Defendants

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IN THE SUPREME COURT

OF THE STATE OF UTAH

THE STATE INSURANCE FUND, Plaintiff,	:	
vs.	:	Case No. 16878
E-Z WAY CONSTRUCTION, INC., CHRIS L. ANDERSON and THE INDUSTRIAL COMMISSION OF UTAH, Defendants.	:	

WRIT OF REVIEW FROM AN ORDER OF

THE INDUSTRIAL COMMISSION OF UTAH

BRIEF OF PLAINTIFFS

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STATE OF THE NATURE OF THE CASE

Plaintiff State Insurance Fund is seeking review of an Order of the Industrial Commission of Utah imposing liability upon the State Insurance Fund for payment of workmen's compensation benefits to Chris L. Anderson.

DISPOSITION BY THE INDUSTRIAL COMMISSION

On January 16, 1978 Chris L. Anderson filed an application with the Industrial Commission for compensation benefits payable by virtue of an injury he suffered in the course and scope of his employment with E-Z Way Construction, Inc., which company was alleged to be uninsured for compensation purposes. Thereafter, on February 9, 1978, Anderson

moved to include the State Insurance Fund as a party to the claim as a possible insurer of E-Z Way Construction, which motion was granted by the Commission on March 22, 1978.

A hearing was held on the claim on June 30, 1978 before Administrative Law Judge Keith E. Sohm. Following the presentation of evidence, the State Insurance Fund moved to be dismissed from the action. On August 28, 1978 the Administrativ Law Judge entered Preliminary Findings of Fact, Conclusions of Law, and an Order which dismissed the State Insurance Fund as a defendant. Anderson made a motion to have this action reviewed by the Commission as a whole and following submission of memoranda by the parties the Commission denied the motion in an Order dated December 4, 1978.

The application remained in force against Anderson's employer, E-Z Way Construction, and on July 12, 1979 the Administrative Law Judge issued an Order granting Anderson benefits against his employer. Anderson again moved for review of that Order for its failure to include the State Insurance Fund as a party defendant. On December 28, 1979 the Industrial Commission reversed its earlier decision, granted the motion and Ordered the State Insurance Fund to pay Anderson the compensation benefits previously awarded. Commissioner Hadley dissented.

RELIEF SOUGHT ON APPEAL

Plaintiff is seeking to have the Order of the Industrial Commission imposing liability on the State Insurance Fund vacated.

FACTS

Chris L. Anderson was injured on January 6, 1978 at 8:30 in the morning while working for E-Z Way Construction, Inc. (R. 351) That company had obtained a policy of insurance for workmen's compensation coverage from the State Insurance Fund on August 16, 1977, but had failed to make any further premium payments between that date and the date of Anderson's accident. On October 1, 1977 the State Insurance Fund mailed a quarterly payroll report form to E-Z Way at the company's business address, and as no premium payment was received by November 30, 1977, a 30 day notice indicating the intent of the State Insurance Fund to cancel the policy of E-Z Way was mailed to the same address, and a copy hand carried to the Industrial Commission, on December 1, 1977. No further report or payment was received by the Fund prior to December 31, 1977 and the policy was cancelled as of January 1, 1978 and a notice of cancellation mailed to the company on January 4. (R. 196-97) After the occurrence of the accident in question, a representative of the company reinstated the policy by payment of overdue premium payments.

In his decision of August 28, 1978 the Administrative Law Judge found that the State Insurance Fund had done all

that was required to give notice of intent to cancel and to in fact cancel the policy. (R. 353) The Industrial Commission as a whole also reached the same conclusion (R. 377).

Following the issuance of a final award to Anderson imposing liability against his employer, Mr. Anderson again sought review of the Commission's decision dismissing the State Insurance Fund. The Commission then reversed their earlier unanimous decision and imposed liability upon the State Insurance Fund. Commissioner Hadley, the only law trained member of the Commission, dissented and filed a written opinion. (R. 424)

ARGUMENT

POINT I

THE RULING OF THE INDUSTRIAL COMMISSION THAT AN INSURER CANNOT CANCEL COVERAGE FOR NONPAYMENT OF PREMIUMS IS CLEARLY ERRONEOUS.

In both his Motions for Review to the Industrial Commission, Mr. Anderson asserted that the State Insurance Fund may not cancel an employer's workmen's compensation policy for failure to pay premiums but must keep coverage in force at all times after the issuance of the policy and seek reimbursement of unpaid premiums from the employer in a civil action. The Commission, after initially rejecting this contention, adopted the applicant's theory in an Order dated December 28, 1979. (R. 423)

As support for this theory, Anderson cited Utah Code Ann. §35-3-17 (1953), which provides that:

> If any employer shall default in any payment required to be made by him to the state insurance fund, the amounts due from him, with interest thereon at the rate of twelve per cent per annum, shall be collected by civil action against him in the name of the commission of finance. Any employer's compliance with the provisions of this title requiring payments to be made into the state insurance fund shall date from the time of payment to the commission of finance for credit to the state insurance fund.

Anderson claimed that the import of this section is that the State Insurance Fund, when unpaid by its insureds, cannot cancel their coverage but can only sue for monies owed. The Industrial Commission adopted this interpretation of the statute.

Such a holding is clearly at odds with the express provisions of Utah Code Ann. §31-19-14 (1953):

> Every insurance company, including the state insurance fund, authorized to transact the business of workmen's compensation insurance and occupational disease insurance must write and carry all risks or insurance for which application is made to it, and any such insurance company, including the state insurance fund, assuming such a risk shall carry it to the conclusion of the policy period unless canceled, either by agreement between the industrial commission and the employer or in case of non-payment of premium by thirty days' notice by such insurance company, including the state insurance fund, to the industrial commission and the employer. (emphasis added)

Anderson argued that these two statutes were contradictory and §35-3-17 controlled. He cited as authority for this proposition the case of University of Utah v. Industrial Comm'n, 64 Utah 273, 229 P. 1103 (1924), which case merely holds that the Industrial Commission had no jurisdiction to order an employer to pay premiums to the State Insurance Fund. It was not implied or suggested in that case that the Fund could not cancel an existing policy for nonpayment of premiums due.

Two decisions of this Court, while not specifically addressing the question presented here, have at least implicitly acknowledged that compliance with Utah Code Ann. §31-19-14 (1953) would allow the State Insurance Fund to cancel an employer's policy. In both Commission of Finance v. Industrial Comm'n, 12 Utah 2d 415, 367 P.2d 455 (1962) and Employers Mutual Liability Ins. Co. V. Industrial Comm'n, 20 Utah 2d 192, 436 P.2d 228 (1968), this Court noted that the proper procedure, as defined by statute, for cancelation of compensation policies was contained in Utah Code Ann. §31-19-14 (1953). Adoption of Mr. Anderson's novel theory would make it entirely impossible for the State Insurance Fund to ever cancel a policy for nonpayment and would compel the Fund to protect every employer from liability for industrial accidents regardless of the employer's contribution, by premium, to the fund from which such liability can

be paid. There is absolutely no statutory or case law support for such a proposition, and the Order of the Industrial Commission so holding is patent error which demands reversal.

It should also be noted that following the Commission's original Order denying liability against the Fund, Anderson took no action to seek a rehearing before the Commission on the issue of the plaintiff's liability or to have that Order reviewed by this Court or to preserve that issue for appeal pending the issuance of a final Order in the matter as required by Rule 72(a) of the Utah Rules of Civil Procedure. Rather, Anderson simply awaited the issuance of an award against his employer and then moved for review of that award on the basis of his original objection to the dismissal of the Fund.

Utah Code Ann. §35-1-82.54 (Supp. 1975) provides that orders of the Industrial Commission shall become final unless action is taken to have them set aside by this Court pursuant to Utah Code Ann. §35-1-83 (Supp. 1977), which requires the filing of an action in this Court within thirty (30) days from the date the Commission give notice of its Order. Such action was never taken by Anderson and the Order dismissing the State Insurance Fund became final five months prior to Anderson's second request that the Commission reinstate the Fund as a party defendant. Under such a state of facts, the Commission had no authority to reverse its earlier

final order in this matter and its action in so doing was arbitrary and capricious.

CONCLUSION

The Industrial Commission has adopted the position that the State Insurance Fund may not cancel a workmen's compensation policy for nonpayment of premiums, and has done so more than a year subsequent to its own decision rejecting that position in the very same case. This holding is contrary to the express provisions of Utah Code Ann. §31-19-14 (1953) and was issued in a manner which totally ignores the statutory procedure established for the orderly presentation of claims before the Commission. The Commission's action, therefore, was in excess of its jurisdiction and should be set aside by this Court and the award of the Administrative Law Judge reinstated.

RESPECTFULLY SUBMITTED this _____ day of March, 1980.

BLACK & MOORE

M. DAVID ECKERSLEY
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing PLAINTIFF'S BRIEF was mailed, postage prepaid this _____ day of March, 1980 to the following:

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