Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1983

George Brockel v. Industrial Commission of Utah : Appellant's Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the Law Commons

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.
Michael E. Bulson; Utah Legal Services, Inc.; Attorney for Appellant;
K. Allan Zabel; Attorney for Respondent;

Recommended Citation
Reply Brief, *Brockel v. Industrial Comm. Of Utah*, No. 18233 (Utah Supreme Court, 1983).
https://digitalcommons.law.byu.edu/uofu_sc2/2922

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE BROCKEL,

Plaintiff - Appellant,

-vs-

INDUSTRIAL COMMISSION OF UTAH, Department of Employment Security,

Defendant - Respondent.

Case No. 18233

APPELLANT'S REPLY BRIEF

Appeal from a decision of the Industrial Commission of Utah affirming the transfer of funds to the North Dakota State Employment Security Agency.

MICHAEL E. BULSON
UTAH LEGAL SERVICES, INC.
Attorney for Appellant
385 - 24th Street
Suite 522
Ogden, Utah 84401-1477

DAVID L. WILKINSON
Attorney General

FLOYD G. ASTIN
K. ALLAN ZABEL
Special Assistants Attorney General
Attorneys for Respondent
INDUSTRIAL COMMISSION OF UTAH
174 Social Hall Avenue
Salt Lake City, Utah 84147

FILED

JUL 5 - 1983

Clerk, Supreme Court, Utah

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE BROCKEL,

Plaintiff - Appellant,

-vs-

INDUSTRIAL COMMISSION OF UTAH, Department of Employment Security,

Defendant - Respondent.

Case No. 18233

APPELLANT'S REPLY BRIEF

Appeal from a decision of the Industrial Commission of Utah affirming the transfer of funds to the North Dakota State Employment Security Agency.

MICHAEL E. BULSON
UTAH LEGAL SERVICES, INC.
Attorney for Appellant
385 - 24th Street
Suite 522
Ogden, Utah 84401-1477

DAVID L. WILKINSON
Attorney General

FLOYD G. ASTIN
K. ALLAN ZABEL
Special Assistants Attorney General
Attorneys for Respondent
INDUSTRIAL COMMISSION OF UTAH
174 Social Hall Avenue
Salt Lake City, Utah 84147

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

Other Authorities

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE BROCKEL, Plaintiff - Respondent,	)	
-vs-	)	Case No. 18233
INDUSTRIAL COMMISSION OF UTAH, Department of Employment Security, Defendant - Respondent.	)	

APPELLANT'S REPLY BRIEF

Appellant, by and through his attorney of record, Michael E. Bulson of Utah Legal Services, Inc., submits the following reply to respondent's brief, received by appellant's counsel on June 6, 1983.

POINT I.

MATTERS NOT RAISED IN THE PLEADINGS NOR PUT IN ISSUE AT TRIAL CANNOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

In its brief, the respondent concedes that the State of North Dakota was not a transferring State and that the Utah Industrial Commission lacked authority under 20 C.F.R. §§616 et. seq. to recover an overpayment for North Dakota. The respondent then attempts to revise the history of the case to establish that the Utah Board of Review did

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

not base its decision on the regulations contained at 20 C.F.R. §616. The respondent suggests for the first time that the State of Utah based its action on Utah Code Annotated §35-4-21(c). A review of the record reveals the lack of support for respondent's argument.

The initial document utilized by the State of Utah in determining the appellant's eligibility for unemployment compensation benefits was entitled, "Request for Transfer of Wages, Interstate Arrangement for Combining Employment and Wages" (R. 50) This form was submitted to the State of North Dakota and returned with the notation that no wages for transfer were available. (R. 50) Upon receipt of the necessary information, the respondent prepared a document entitled, "Report on Determination of Combined-Wage Claim". Included in the document is a reference to "transferring State". (R. 48) Clearly, the respondent initiated and processed appellant's claim as an interstate combined wage claim.

That the State of North Dakota also sought assistance under the Interstate Combined Wage Agreement is evident from the letter of May 12, 1981 by a representative of the North Dakota Job Service to the Utah Department of Employment Security. (R. 44) In that letter, North Dakota Job Service states:

> We request your assistance under section 5928 E(1 & 2) Part V, ES Manual. (R. 44)

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

As the respondent has acknowledged in its brief, the sections of the Employment Security Manual quoted above are the same as those found at 20 C.F.R. Part 616, the regulations defining "transferring state".

At the hearing on appellant's claim, the appeal referee was questioned by appellant's representative concerning the authority to recover an overpayment for the State of North Dakota. Although somewhat vague in his response, the record shows that the appeal referee was referring to the federal regulations found at 20 C.F.R. Part 616 as a basis for the State's authority to make such a transfer. (R. 35) Attached to the transcript of the hearing, and specifically cited in the appeal referee's decision, are portions of Part V of the Employment Security Manual, including Sections 5907E and 5930E which provide for the recovery of overpayments between States. (R. 31, 37-39) In his comments, the appeal referee again cites Part V of the Employment Security Manual, Section 5930E, applying to requests for recovery of an overpayment. It is clear from the decision that the appeal referee based his conclusion that Utah has jurisdiction to recover an overpayment for North Dakota on the aforecited section of the Employment Security Manual. Since that portion of the Employment Security Manual is identical to the regulations at 20 C.F.R. §616, the conclusion is uncontradicted that the respondent initiated and prosecuted its recovery of the overpayment pursuant to the federal regulations cited. The record is

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

devoid of any reference by the respondent to U.C.A. §35-4-21(c). No reference was made by the appeal referee or any other representatives of the respondent to that section of the Utah Code, nor was the appellant or his representative advised that the respondent was proceeding on that basis. It is submitted that the respondent did not consider §35-4-21(c) as possible authority for its actions until it discovered that its recovery of an overpayment for the State of North Dakota was not permitted under 20 C.F.R. §§616 et. seq.

In its final decision of January 26, 1982, the Board of Review held, in part:

> After careful consideration of the record and testimony in this matter, the Board of Review hereby affirms the decision of the Appeal Referee which held that Utah does have jurisdiction to recover the funds due the North Dakota agency by the claimant. (R. 13)

Since the appeal referee based his conclusion concerning Utah's jurisdiction to recover an overpayment on the regulations contained in 20 C.F.R. Part 616, the conclusion follows that the Board of Review adopted that specific decision. The respondent's suggestion that the form of the language used in the Board of Review's decision somehow transforms that decision into a holding based on sections of the Utah Code, rather than the federal regulations found at 20 C.F.R. Part 616, is specious at best.

It is well established in Utah and in other jurisdictions that a matter not raised in the pleadings nor

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

put at issue at trial cannot be considered for the first time on appeal. Since, as shown herein, the respondent's proceedings and actions were based solely on the regulations found at 20 C.F.R. Part 616, it cannot now suggest that the actual authority for its action was in the cited sections of the Utah Code. To do so would permit the respondent to relitigate on appeal an issue which it more properly should have raised at the lower level upon proper notice to the appellant and his representative. Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702 (1971); Edger v. Wagner, 572 P.2d 405 (Ut. 1977); Osuala v. Olsen, 609 P.2d 1325 (Ut. 1980).

POINT II.

SECTION 35-4-21 OF THE UTAH CODE ANNOTATED DOES NOT PERMIT A RECOVERY OF OVERPAYMENTS AS SUGGESTED BY RESPONDENT.

Even assuming arguendo that the respondent may raise the issue of authority under §35-4-21 of the Utah Code, a review of that section and related sections shows that the respondent's reliance thereon is misplaced. Although the cited section does authorize such actions as investigations, transfers of information, and other services, there is no specific authority for the collection and transmission of overpayments by the State of Utah.

A review of the entire section cited by respondent shows that it authorizes the Industrial Commission to enter into reciprocal arrangements with agencies of other States or the federal government. U.C.A. §34-4-21(a) It is pursuant to this authority that the State entered into the

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

reciprocal arrangement with the State of North Dakota for the recovery of overpayments under 20 C.F.R. §616 et. seq. applying to combined wage claims. Section 35-4-21(2) specifically authorizes this type of a reciprocal arrangement. The section in question goes on to allow reimbursement to the State of Utah for compensation paid to an individual for benefits under an Unemployment Compensation law of another State or federal government. U.C.A. §35-4-21(3), (4)(b). Although Utah law contemplates reimbursement for funds payable under other state's laws, the section contains no language authorizing transfer of funds by the State of Utah for an alleged overpayment in another state, absent a reciprocal agreement to that effect. The respondent has not contended that a reciprocal agreement for non-combined wage claims exists with the State of North Dakota. Therefore, even the cited authority raised by the respondent is inapplicable and does not support the respondent's argument.

DATED this 24th day of June, 1983.

Respectfully Submitted:

UTAH LEGAL SERVICES, INC.

Michael E. Bulson

MICHAEL E. BULSON
Attorney for Appellant

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.