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Mor-Flo Industries, Inc. and Polaris Water Heaters/ Arlington Place v. Industrial Commission of Utah : Reply Brief

Utah Court of Appeals

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Benjamin A. Sims; Attorney for Respondent.

A. Robert Thorup; Ray, Quinney & Nebeker; Richard S. Mitchell; Goodman Weiss Freedman; Attorneys for Petitioners.

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BRIEF

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900510-CA

IN THE UTAH COURT OF APPEALS

MOR-FLO INDUSTRIES, INC. and)	APPELLATE CASE NO. 900510-CA
POLARIS WATER HEATERS/)	
ARLINGTON PLACE,)	
)	
Petitioners)	(APPEAL FROM AN ORDER
(Respondents Below),)	OF THE INDUSTRIAL
)	COMMISSION OF UTAH)
v.)	
)	
INDUSTRIAL COMMISSION OF UTAH,)	
)	
Respondent)	PRIORITY NO. 7
(Charging Party Below).)	

REPLY BRIEF OF PETITIONERS

BENJAMIN A. SIMS
LEGAL COUNSEL
INDUSTRIAL COMMISSION
OF UTAH
160 East 300 South
Third Floor
Salt Lake City, Utah 84111
(801) 530-6864

Attorney for Respondent

A. ROBERT THORUP (A3258)
RAY, QUINNEY & NEBEKER
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385
(801) 532-1500

RICHARD S. MITCHELL
GOODMAN WEISS FREEDMAN
100 Erieview Plaza; 27th Floor
Cleveland, Ohio 44114-1824
(216) 696-3366

Attorneys for Petitioners

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Mary T. Noonan
Clerk of the Court

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BENJAMIN A. SIMS
LEGAL COUNSEL
INDUSTRIAL COMMISSION
OF UTAH
160 East 300 South
Third Floor
Salt Lake City, Utah 84111
(801) 530-6864

Attorney for Respondent

A. ROBERT THORUP (A3258)
RAY, QUINNEY & NEBEKER
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385
(801) 532-1500

RICHARD S. MITCHELL
GOODMAN WEISS FREEDMAN
100 Erieview Plaza; 27th Floor
Cleveland, Ohio 44114-1824
(216) 696-3366

Attorneys for Petitioners

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ARGUMENT

I. UNDER UTAH LAW, ANSI GOVERNS THE CONSTRUCTION OF WATER HEATERS THAT ARE USED TO PROVIDE BOTH POTABLE WATER AND SPACE HEATING.

The Industrial Commission does not contest the legal doctrine that when two statutory provisions conflict, the statute which is more specific will govern over that which is more general. See, e.g., Millett v. Clark Clinic Corp., 609 P.2d 934 (Utah 1980); see also Brief of Petitioners ("Mor-Flo's Brief"), Section I. Likewise, the Industrial Commission does not dispute that the American National Standards Institute ("ANSI") contains specific provisions for the construction and regulation of the use of water heaters to provide both potable water and space heating. Furthermore, the Industrial Commission does not dispute that the Utah Boiler and Pressure Vessel Rules and Regulations ("Utah Boiler Code") merely contain general provisions for boilers used to generate steam heat (but not potable water) and certain other types of irrelevant commercial water heaters. Accordingly, the Industrial Commission effectively concedes the substance of this argument.

The Industrial Commission, however, procedurally argues that ANSI is not applicable to this action because Sections 58-56-4 and 26-15-3 U.C.A. - the Utah statutes that adopt as law the Uniform Plumbing Code which in turn incorporates by reference ANSI - were not in effect when the Safety Division of the Industrial Commission of Utah (the "Division") ordered the removal from service the Polaris units. This assertion is incorrect.

As set forth in the Brief of Respondent ("Industrial Commission's Brief"), the current versions of Sections 58-56-4 and 26-15-3 U.C.A. became effective on April 24, 1989. Several months after that date, on August 30, 1989, the Division sent its letter ordering the removal from service of the Polaris water heaters that are the subject of this dispute. On September 27, 1989, Mor-Flo filed with the Industrial Commission its request for a hearing from the August 30, 1989 order for removal. (A copy of this letter is attached as Exhibit B to Mor-Flo's [Pretrial] Brief submitted to the Industrial Commission on November 30, 1989.) At no time during the administrative hearing of this action was this fact disputed. (R. 14).¹ There can be no dispute that Sections 58-56-4 and 26-15-3 U.C.A. were effective when the August 30, 1989, order for removal was issued, and, consequently, ANSI was and continues to be the specific statute governing the use and construction of water heaters that provide both potable water and space heating. Therefore, ANSI is the governing statute over the Polaris.

II. THE INDUSTRIAL COMMISSION HAS EXCEEDED ITS AUTHORITY.

As set forth in detail in Mor-Flo's Brief, Section II, the evidence in the record unequivocally demonstrates that nothing in the Utah Boiler Code addresses the use of a water heater to provide both potable water and space heating, and, consequently, the

¹The order for removal dated March 9, 1989, referred to in the Industrial Commission's Brief was not considered final. The parties agreed to hold that directive in abeyance during negotiations concerning this matter. After the parties reached an impasse, the August 30, 1989, order for removal was issued which states that it is the "final decision." Mor-Flo requested a hearing based on the final decision of August 30, 1989.

Industrial Commission exceeded its authority by regulating the Polaris. The Industrial Commission acknowledges in its Brief that the Utah Boiler Code does not address the use of water heaters to provide both potable water and space heating: "As can be seen by a review of the statutory provisions of the Boiler Act, the Act did not provide all the particulars required . . ." See Industrial Commission's Brief, p. 15. The Industrial Commission, however, then appears to argue that it has the ability in administrative hearings to create new rules to regulate products that are not covered by the Utah Boiler Code, such as the Polaris. The Industrial Commission cites no authority for this purported claim of legislative authority.² This is an improper statement of law. The correct statement of law is that agencies have no legislative authority and cannot supply something omitted from a statute. Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n, 107 Utah 502, 155 P.2d 184 (1945). As a matter of law, the Industrial Commission has no power to rewrite the Utah Boiler Code to regulate the Polaris

To further substantiate that the Industrial Commission exceeded its authority by "rewriting" the Utah Boiler Code to cover the Polaris, Mor-Flo notes in its Brief that the Utah Boiler Code contains no construction specifications for the Polaris. Accordingly, the Industrial Commission has expanded the Utah Boiler

²Indeed, the Industrial Commission is subject to the rule making procedure contained in the Administrative Rule Making Act contained in 63-46a-1 et seq. This Act, at a minimum, requires the Industrial Commission to conduct public hearings as a prerequisite to any changes in its rules.

Code by stating that it covers the Polaris, but the Code is void of construction specifications for the Polaris -- the whole purpose of the Utah Boiler Code is to provide safe construction standards. In an effort to circumvent this problem, the Industrial Commission relies on the testimony of Charles W. Allison ("Allison") of the National Board of Boiler and Pressure Vessel Inspectors, who testified on behalf of the Division, for the proposition that the Utah Boiler Code contains construction standards for the Polaris. (R. 2, 6, 28). Yet, in his testimony, Allison did not specify any construction standards for the Polaris. In fact, a review of the transcript reveals that Allison did not testify that the Polaris can be built to specifications of either the American Society of Mechanical Engineers ("ASME") Boiler and Pressure Vessel Code ("ASME Code") or the Utah Boiler Code. (R. 31-32). Moreover, Allison admitted that he was not familiar with the Polaris; he has not seen a Polaris; he does not know how it works; and he does not know whether it meets the water heater exemptions from the ASME Code. (R. 32-34). Consequently, Allison provided no support for the Industrial Commission's argument that the Utah Boiler Code contains construction provisions for the Polaris.

Finally, in an apparent effort to confuse this issue before the Court, the Industrial Commission completely misstates portions of the testimony of Gary J. Bosma ("Bosma"), Vice President - Sales, Engineered Products, of Mor-Flo, and claims that Bosma testified that the original Polaris was ASME certified. This claim is wrong. Bosma merely testified that certain water heaters manufactured by Mor-Flo are built to ASME standards and that

originally the Polaris was built in a Mor-Flo plant that builds other ASME-complying commercial water heaters. Bosma never testified that the Polaris was ever built to an ASME standard. The Polaris was never built to an ASME standard because there is no ASME standard that it could be built to. (R. 55).³

The Industrial Commission has not identified a single construction standard for the Polaris in the Utah Boiler Code. The Industrial Commission has attempted either to rely on defective testimony or to misstate testimony to disguise the fact that the Utah Boiler Code does not cover the Polaris. There can be no dispute that the Industrial Commission has attempted to rewrite the Utah Boiler Code to include a requirement that the Polaris be constructed in accordance with a nonexistent specification.

III. A WATER HEATER CONTINUES TO BE A WATER HEATER UNDER THE UTAH BOILER CODE EVEN WHEN IT IS USED TO PROVIDE BOTH POTABLE WATER AND SPACE HEATING.

The Industrial Commission continues to repeatedly argue in a conclusory fashion that when a water heater is used to simultaneously provide space heat and potable water that the water heater somehow becomes a hot water heating boiler. In making this argument, the Industrial Commission completely ignores and fails

³The Polaris is a residential size water heater that does not exceed any of the performance and size limitations contained in Utah Boiler Code, Part II, §16(i). The Division acknowledges that a water heater that does not exceed those standards is exempt from the construction requirements of the Utah Boiler Code. The ASME Code and the Utah Boiler Code have construction requirements for certain commercial size water heaters that exceed these limitations, but those construction specifications are irrelevant to this action. Finally, it should be noted that the record contains a transcribing error on page 55, line 8. The number "2" is improper and it should be the word "to."

to address the following issues: (1) residential size water heaters used to provide both potable water and space heating continue to satisfy the definitional requirements for a water heater under the Utah Boiler Code. See Mor-Flo's Brief, Section III(A); (2) the ASME has removed from its Code prior references to the use of a water heater for space heating. See Mor-Flo's Brief, Section III(B); (3) the Polaris, even when it is used to provide both potable water and space heating, does not satisfy the definition of a hot water heating boiler under the Utah Boiler Code. See Mor-Flo's Brief, Section III(C).

The Industrial Commission only argues that the INTRODUCTION to Part HLW of the ASME Code (1988 Addenda) -- which sets forth the criteria for distinguishing between a water heater and a hot water heating boiler -- does not apply to the Polaris because the Polaris is a water heater of a residential size, and, therefore, the Polaris is exempt from Part HLW of the ASME Code. See Industrial Commission's Brief, p. 28. It must be noted that Part HLW is the only section of the ASME Code that governs water heaters at all. See Part HG-100 of the ASME Code (1986 edition). Therefore, by making this argument, the Industrial Commission is conceding Mor-Flo's position that the Polaris is a water heater exempt from the ASME Code (and the Utah Boiler Code) because it is of a residential size, and, consequently, expressly exempt from the construction requirements of the Utah Boiler Code. See Utah Boiler Code, Part II, §16(i).

Under the Utah Boiler Code, it is clear and unambiguous that the Polaris continues to be a water heater even if it is used to

provide both potable water and space heating. Moreover, it is undisputed that the Polaris does not exceed any of the limitations set forth in the Utah Boiler Code, Part II §16(i). Therefore, the Polaris is a water heater that is exempt from the construction requirements of the Utah Boiler Code.

IV. NO LEGITIMATE HEALTH OR SAFETY CONCERN IS FURTHERED BY IMPOSING ON THE POLARIS THE EXCESSIVE AND COSTLY CONSTRUCTION REQUIREMENTS OF THE UTAH BOILER CODE.

The legislative purpose of boiler safety is in no way furthered by requiring the Polaris to be constructed as a hot water heating boiler; no other state has imposed the ASME construction requirements on the Polaris; the Industrial Commission's interpretation is contrary to interpretations made by the ASME Code.

First, the Industrial Commission correctly states that the legislative purpose of the Utah Boiler Code is safety. The Industrial Commission, however, presented no evidence whatsoever showing that the legislative purpose of safety is furthered by requiring the Polaris to somehow be constructed as a boiler. Rather, the Division testified that the Utah Department of Health has no safety concerns. (R. 25). Furthermore, the Division could not identify any safety concerns that it has with the Polaris. (R. 25-26). As set forth in detail in Section I of Mor-Flo's Brief, the Polaris is built to the ANSI standard that has been adopted by the Utah Department of Health, and the purpose of the ANSI standard is safety. Therefore, the safety of the Polaris is fully regulated by the ANSI standards. The legislative purpose of

the Utah Boiler Code is not served by the Industrial Commission's interpretation of the Utah Boiler Code.

Second, the Industrial Commission attempts to argue that Bosma's testimony is insufficient regarding the fact that 48 states have adopted the ASME Code. Initially, it should be noted that the Division had an opportunity to cross-examine Bosma on this issue and present rebuttal evidence if the Division questioned the veracity of this testimony. This did not happen. Regardless, Allison, who testified on behalf of the Division, also testified that the ASME Code has been adopted nationally. (R. 30). Nothing in the record disputes that 48 states have adopted the ASME Code; nothing in the record disputes that Utah stands alone in its imposition of the ASME Code on the Polaris; nothing in the record explains or justifies why Utah has varied from the interpretations of the other states.

Third, the record is undisputed that the ASME does not interpret its Code to impose boiler construction standards on water heaters that are used to provide both potable water and space heating. The Division offered no evidence that its interpretation is in any way consistent with interpretations made by the ASME Code. Accordingly, Utah's interpretation exceeds the interpretations made by the ASME. Additionally, the Industrial Commission is completely unable to explain why a water heater with a recirculation loop - which is virtually identical to a coil

attachment to a water heater for space heat - is exempt and a water heater with a coil for heat is not exempt from the ASME Code.⁴

V. NO DEFERENCE SHOULD BE GIVEN TO THE INDUSTRIAL COMMISSION.

The Industrial Commission should not be afforded any deference in this action because it has no expertise regarding the Polaris. A reviewing court should not defer to an agency when the agency has no expertise on the subject matter. Hurley v. Board of Review Indus. Com'n, 767 P.2d 524 (Utah 1988). In Hurley, the Utah Supreme Court extensively analyzed this issue:

The correction-of-error standard of judicial review applies to agency decisions involving statutory interpretations which an appellate court is as well suited to decide as the agency. In Bennett v. Industrial Comm'n, 726 P.2d 427, 429 (Utah 1986), the Court stated:

We do not defer to the Commission when construing statutory terms or when applying statutory terms to the facts unless the construction of the statutory language or the application of the law to the facts should be subject to the Commission's expertise gleaned from its accumulated practical, first-hand experience with the subject matter. [Emphasis added.]

The correction-of-error standard also applies when the issue is one of basic legislative intent. In Big K Corp. v. Public Serv. Comm'n, 689 P.2d 1349, 1353 (Utah 1984), we held that no deference was due agency construction of "statutory or case law" or of its organic statute unless it is clear that the agency is in a superior position by virtue

⁴The Industrial Commission attempts to discuss and refute the second request for interpretation contained in Trial Exhibit R-2. Mor-Flo never argued that this inquiry was support for its position, and, therefore, the Industrial Commission's discussion on this point is irrelevant.

of expertise to give effect to "the regulatory objective to be achieved." Id. Cf. Williams v. Mountain States Tel. & Tel. Co., 763 P.2d 796 (Utah 1988).

Id. at 527.

The Industrial Commission through the Division issued the Utah Boiler Code. See Utah Boiler Code. Accordingly, the Division is the group within the Industrial Commission that has expertise over the Utah Boiler Code. It is undisputed that the Utah Boiler Code does not address water heaters used to provide both potable water and space heating. (R. 19-20). Moreover, as revealed during the hearing of this action, the Division has no knowledge, let alone expertise, relative to the Polaris. The Division does not know what the Polaris is. (R. 20). The Division has merely seen the outside of the Polaris and does not know anything about its construction. (R. 25-26). Similarly, Allison, who testified on behalf of the Division, does not know anything about how the Polaris functions. (R. 32-33). Therefore, the Division (and, consequently, the Industrial Commission) has no expertise in this subject and, in fact, is not even familiar with the Polaris.⁵

In addition, the Industrial Commission and the Division do not even have experience with water heaters when they are of residential size and do not exceed the limitations set forth in the Utah Boiler Code, Part II, §16(i), such as the Polaris. Those

⁵The only relevant testimony about the Polaris was given by Bosma on behalf of Mor-Flo. He was the only person who testified that has worked with and is knowledgeable about the Polaris. The Division had no knowledge, let alone first hand knowledge of the Polaris. Consequently, Bosma's testimony was not and could not have been disputed by the Division.

residential size water heaters are exempt from the Utah Boiler Code and are not under the jurisdiction of the Division. (R. 26-27). The Division has no experience with the application of the ANSI standards to water heaters as well. (R. 23-24).

Finally, pursuant to 58-56-3 U.C.A., the Uniform Building Code Commission is the agency that regulates water heaters. Pursuant to 26-15-3 U.C.A., the Utah Department of Health has enforcement power over the Uniform Plumbing Code. Accordingly, the Department of Health is the agency that has expertise relative to water heaters, and the Division testified that the Department of Health has no objections to the Polaris. (R. 25). Therefore, the appropriate deference should be given to this determination by the Department of Health, the only agency with expertise in this matter.

The only expertise the Division has is with boilers. The Division has no expertise with water heaters that are used to provide space heat simultaneously with potable water. The Division has no expertise with water heaters that are of residential size, such as the Polaris. Therefore, no deference should be afforded the Industrial Commission in this matter.

CONCLUSION

For the reasons set forth in Mor-Flo's original Brief and for the reasons set forth in this Reply Brief, Mor-Flo respectfully requests this Court to reverse the Industrial Commission's Order and enter judgment in its favor.

Respectfully submitted,



A. ROBERT THORUP
RAY, QUINNEY & NEBEKER
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385
(801) 532-1500

RICHARD S. MITCHELL
GOODMAN WEISS FREEDMAN
100 Erieview Plaza; 27th Floor
Cleveland, Ohio 44114-1824
(216) 696-3366

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 1991, I caused the foregoing REPLY BRIEF OF PETITIONERS to be hand delivered to:

Benjamin A. Sims
Legal Counsel
Industrial Commission of Utah
160 East 300 South
Third Floor
Salt Lake City, Utah 84111



A. ROBERT THORUP