2000

Anabasis Inc. v. Utah Labor Commission, Utah Labor Commission Appeals Board : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ANABASIS, INC.,

Petitioner Appellant,

vs.

UTAH LABOR COMMISSION,
UTAH LABOR COMMISSION
APPEALS BOARD,

Respondent Appellee.

Case No. 20000832-CA

Priority 7

REPLY BRIEF OF PETITIONER

PETITION FOR WRIT OF REVIEW OF DECISION OF UTAH LABOR COMMISSION BOARD OF APPEALS

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ARGUMENT

SUMMARY OF ARGUMENT

New matter set forth in the Commission's Brief covers Anabasis' statement of facts, statutory language, legislative history, exercise of discretion, and the Small Business Equal Access to Justice Act. Anabasis submits its statement of facts is correct. The statutory language and legislative history support Anabasis' position. Anabasis is qualified to apply for attorney fees and costs pursuant to the Small Business Equal Access to Justice Act.

DETAIL OF ARGUMENT

Statement Of Facts

The labor commission claims the following part

of Anabasis' Statement of Facts is not supported by the record and should be disregarded.

> The following undisputed facts are in the record, but not set out in the above findings. Anabasis thought it had all necessary business insurance. Anabasis did not know it had a gap in business insurance coverage and obtained workers' compensation insurance soon after receiving notice of noncompliance from the labor commission. (Addendum 11, ¶6, R. 1-5.)

(Commission's Brief, p 7.) While it is true the appeals board did not include the above in its findings, this part of Anabasis' Statement of Facts is supported by the record cited above. In Point II of Anabasis' brief at page 24 Anabasis claims the labor commission erred in not addressing these undisputed facts in its findings and conclusions.

Statutory Language

The labor commission asserts the statutory words "during the period of noncompliance," "the period of the employer's noncompliance" and "the number of weeks of the employer's noncompliance" support its claim it can penalize for past noncompliance. (Commission's Brief, p 9.) These "noncompliance" references are abstracted from §§ 34A-2-210 & 34A-2-211 as follows:

> 34A-2-210. Power to bring suit for noncompliance.
>
> * * * * *
>
> (2) . . . . the division may give the employer five days written notice by registered mail of the noncompliance . . .
>
> * * * * *
>
> 34A-2-211. Notice of noncompliance to employer -- Enforcement power of division -- Penalty.

> (1) (a) . . . .division may give that employer written notice of the noncompliance by certified mail to the last-known address of the employer.
>
> * * * * *
>
> (ii)(b) The penalty imposed under Subsection (2)(a) shall be the greater of:
>
> (i) $1,000; or
>
> (ii) three times the amount of the premium the employer would have paid for workers' compensation insurance based on the rate filing of the Workers' Compensation Fund of Utah during the period of noncompliance.
>
> * * * * *
>
> (d) The payroll basis for the purpose of calculating the premium penalty shall be 150% of the state's average weekly wage multiplied by the highest number of workers employed by the employer during the period of the employer's noncompliance multiplied by the number of weeks of the employer's noncompliance up to a maximum of 156 weeks.

(All emphasis added.)

The above abstracted parts of the sections do not support the labor commission's argument that the use of the words "period of noncompliance," and like, indicate a penalty can be imposed for past noncompliance. The "period of noncompliance" is merely used in "calculating the premium penalty."

Legislative History

The labor commission cites comments by members of the Advisory Council before the Senate Business Labor and Economic Development Committee on February 17, 1995, in support of its interpretation of § 34A-2-211(2). (Commission's Brief, p 11.) The quoted parts of the hearing record indicate some commentators

wanted to "go after" the "small employers, less than 5 to 10 employees" like a "dog" with some "teeth so that we can go after that small minority." (The sequence of the quoted words is rearranged, but not the context and perceived meaning. The quoted words convey an *ad hominem* perception of small business owners by the commentator.)

This part of the legislative record shows what some commentators wanted, but it is not what the legislature passed. The legislature did not amend § 34A-2-211(1) to comply with the commentator's wishes. Instead the legislature added § 34A-2-211(2) authorizing administrative action in conformity with and notwithstanding § 34A-2-211(1), indicating legislative satisfaction with existing law, the commentators' dissatisfaction notwithstanding. If the legislature intended to change the time when a penalty could be imposed it could have amended § 34A-2-211(1) when it added § 34A-2-211(2). Failure to do so indicates a legislative intent to keep the same meaning of the word "is" in both sections. Adding § 34A-2-211(2) merely let the labor commission impose a penalty administratively without going to Court pursuant to § 34A-2-211(1). The added section is not malleable to changing its original meaning by the labor commission.

If the legislature wanted to change the law to address the concerns of the commentators it would have changed § 34A-2-211(1) when it added § 34A-2-211(2). Instead the legislature added § 34A-2-211(2) with the same language used in § 34A-2-211(1), even though the comments indicate a long history of District Courts interpreting § 34A-2-211(1) to mean what it says. This Court should continue this long judicial history by interpreting § 34A-2-211(2) to mean what it says.

Exercise Of Discretion

The labor commission cites only one decision to refute Anabasis' claim the record shows an administrative agency policy to never exercise administrative discretion. (In The Matter Of Arnold & Wiggins attached to the labor commission's brief as Addendum E. Commission's Brief, p 14.) The Arnold & Wiggins decision contains these findings:

> It is clear that Arnold & Wiggins did not have workers' compensation coverage from March 31 to August 6, 1998.
>
> * * * * *
>
> Arnold & Wiggins has provided copies of canceled checks showing that it paid its insurance premiums for March 31 through August 6, 1998 in a timely manner, and that the premium payments were accepted and cashed by the insurance company.

How generous of the labor commission. A penalty could not be imposed in the Arnold & Wiggins case as a matter of law. If Arnold & Wiggins timely paid

insurance premiums, then it had insurance as a matter of law. The Arnold & Wiggins decision is merely couched in discretionary language while the facts required a decision as a matter of law. There is no discernible indication of why Arnold & Wiggins had a problem with the labor commission. Perhaps an insurance policy was not formally issued. Whatever the problem was, Arnold & Wiggins had insurance as a matter of law. Anabasis' claim that the record shows the labor commission has a fixed policy to never exercise discretion still stands.

Small Business Equal Access To Justice Act

The labor commission claims Anabasis is not entitled to attorney fees pursuant to the Small Business Equal Access to Justice Act because it failed to prove it is not "a subsidiary or affiliate of another entity which is not a small business." (Commission's Brief, p 16.) If Anabasis is correct in thinking Rule 4-505 of the Code Of Judicial Administration "shall govern the award of attorney fees in the trial courts" (Anabasis Brief, p 31), then such proof would be offered by the supporting affidavit for attorney fees; and the labor commission can make proper good faith objections at that time. Counsel does not believe the record should be burdened with such proof prior to this Court first deciding

Anabasis may apply for attorney fees in compliance with the Small Business Equal Access to Justice Act. Proof of compliance and technical qualifications should be made pursuant to Rule 4-505 after Anabasis is allowed to apply by a Rule 4-505 motion.

CONCLUSION

The facts, record, statutory language, cases, and legislative history support Anabasis' position.

DATED: April 2, 2001.

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CERTIFICATE OF SERVICE

This certifies that the undersigned served the foregoing Reply Brief Of Petitioner this 2 day of April 2001, by mailing two copies first class mail with sufficient postage prepaid to the following:

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