

1993

Magnesium Corporation of America v. Industrial Commission of Utah : Reply Brief

Utah Court of Appeals

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Priority No. 7

Petition for review of the Order Granting Motion For Review entered by the Industrial Commission of Utah on December 17, 1992, and the Order Granting Motion For Extension Of Time issued by the Industrial Commission of Utah on October 20, 1993, after limited remand from the Court of Appeals.

FILED
Utah Court of Appeals

JUL 01 1994

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Petition for review of the Order Granting Motion For Review entered by the Industrial Commission of Utah on December 17, 1992, and the Order Granting Motion For Extension Of Time issued by the Industrial Commission of Utah on October 20, 1993, after limited remand from the Court of Appeals.

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DETERMINATIVE AUTHORITIES

STATUTES:

Utah Code Ann., § 63-46b-1(9) (Supp. 1992):

Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time period established for judicial review.

Utah Code Ann., § 63-46b-12(1)(a) (1988):

If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.

Utah Code Ann., § 63-46b-17(1)(b) (1987):

In granting relief, the court may:

- (i) order agency action required by law;
- (ii) order the agency to exercise its discretion as required by law;
- (iii) set aside or modify agency action;

- (iv) enjoin or stay the effective date of agency action; or
- (v) remand the matter to the agency for further proceedings.

RULES:

Rule 6(b), Utah Rules of Civil Procedure:

When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), (d) and (e), 60(b) and 73(a) and (g), except to the extent and under the conditions stated in them.

Rule 81(d), Utah Rules of Civil Procedure:

These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules.

REPLY ARGUMENTS

- I. THE COMMISSION ERRED AS A MATTER OF LAW WHEN IT REVERSED THE ALJ'S ORDER AND ENTERED SUMMARY JUDGMENT AGAINST MAGCORP AND ALSO WHEN IT ORDERED MAGCORP TO PROVIDE AND PAY FOR LAUNDRY SERVICES FOR ITS EMPLOYEES.

Respondent, Industrial Commission of Utah, concedes the legal and factual correctness of the argument raised in Point II of Magnesium Corporation of America's ("Magcorp") opening brief. Respondent's Brief at 5, 6-8. Based on similar legal principles, respondent also necessarily concedes the argument raised in Point III of Magcorp's opening brief. In fact, respondent fails to address Magcorp's Point III. It is therefore undisputed that the Industrial Commission erred as a matter of law when it summarily reversed the ALJ's June 10, 1992 Order and entered summary judgment against Magcorp and also when it ordered Magcorp to provide and pay for laundry services for its employees.

With those concessions having been made, only two main issues remain to be decided by this court. Those issues - whether this court should remand the case for further evidentiary hearing and whether the Commission properly exercised jurisdiction over this matter - are further addressed in Points II and III of this Reply Brief.

II. REMAND OF THIS MATTER TO EITHER THE COMMISSION
OR THE ALJ IS IMPROPER IN THIS CASE.

Respondent requests, in Point Two of its Brief, that the proceeding "be remanded to the Commission." Respondent's Brief at 8. This request contradicts the statement made earlier in Respondent's Brief that "the Commission should have remanded the case to the ALJ for a full evidentiary hearing on the merits." Respondent's Brief at 7. Because UOSH's Motion For Review was filed more than 30 days after the Order and the Findings Of Fact And Conclusions Of Law were signed by the ALJ and issued by the Commission on June 10, 1992, the Industrial Commission lacked jurisdiction to consider the Motion For Review. Accordingly, both the Order Granting Motion For Review entered by the Industrial Commission on December 17, 1992, and the Interim Order Denying Motion To Dismiss entered on October 9, 1992, are null and void. Therefore, the proper remedy is that those orders be declared void for lack of jurisdiction and the ALJ's June 10, 1992, Order be reinstated as the final judgment in this case. Magcorp's arguments addressing the jurisdictional issues are set forth in Point I of Magcorp's opening brief at pp. 14-34 and in Point III of this Reply Brief.

Utah Code Ann., § 63-46b-17(1)(b) (1987), states the kinds of relief that may be granted on judicial review of agency proceedings:

- (b) In granting relief, the court may:
 - (i) order agency action required by law;
 - (ii) order the agency to exercise its discretion as required by law;
 - (iii) set aside or modify agency action;
 - (iv) enjoin or stay the effective date of agency action; or
 - (v) remand the matter to the agency for further proceedings.

Magcorp requests this court to grant relief pursuant to § 63-46b-17(1)(b)(i) and (iii). The Industrial Commission's actions should be set aside and the ALJ's June 10, 1992 Order and the Findings Of Fact And Conclusions Of Law should be reinstated. Respondent's request that the case be remanded for an additional evidentiary hearing pursuant to § 63-46b-17(1)(b)(v) contradicts its earlier statement that the Industrial Commission's decisions should be "set aside", presumably pursuant to § 63-46b-17(b)(iii). Respondent's Brief at 8. In addition, there are no disputed questions of fact that were preserved by UOSH and then detailed in an orderly fashion in its Brief to support the claimed need for an evidentiary hearing.

Even if this court were to determine that the Industrial Commission properly exercised jurisdiction over this matter, a remand to the Commission for any purpose other than to direct the Commission to return the case to the ALJ for a full hearing addressing the merits of the Citation And Notification Of Penalty at issue would be improper and would substantially prejudice

Magcorp by depriving it of the initial hearing before the A.L.J. to which it otherwise clearly would have been entitled if the ALJ had not entered summary judgment in Magcorp's favor.

III. BECAUSE UOSH FILED ITS MOTION FOR REVIEW THIRTY-SIX DAYS AFTER THE UNDERLYING ORDER WAS "ISSUED," THE INDUSTRIAL COMMISSION COULD NOT EXERCISE JURISDICTION OVER THIS CASE, AND THIS COURT'S LIMITED REMAND COULD NOT INVEST THE INDUSTRIAL COMMISSION WITH JURISDICTION TO ENTER ITS ORDER GRANTING MOTION FOR EXTENSION OF TIME.

Respondent incorrectly claims that UOSH's failure to file its Motion For Review within the time provided by Utah Code Ann., § 63-46b-12(1)(a) (1988), should be excused due to "human error" and "a change in the law." Respondent's Brief at 9. While it is true that this appeal involves human error or omission by UOSH, it is equally clear that the determinative law has not changed. Dusty's v. Utah State Tax Commission, 842 P.2d 868 (Utah 1992) (per curiam), clearly establishes that the term "issuance" as used in Utah Code Ann., § 63-46b-12(1)(a), has always referred to the date the order bears on its face.

It appears to this court that the statutory instructions are quite straightforward.

Dusty's argument that the date of issue is ambiguous and subject to several inconsistent interpretations is not persuasive.

[W]e hold that the date the order constituting the final agency action issues is the date the order bears on its face. Support for that conclusion is found in the UAPA itself.

Section 63-46b-21 governs agency action on declaratory orders. After receiving petitions for declaratory orders, agencies may again *issue* written orders. Copies of all orders *issued* in response to requests for declaratory proceedings must be *mailed promptly* to petitioners or other parties. Inasmuch as declaratory orders have the same status and binding effect as any other orders *issued* in an adjudicative proceeding, it follows that the differentiation between *issuance* and *mailing* may not be limited to declaratory orders alone.

Dusty's 842 P.2d at 870. Furthermore, like the petitioner in Dusty's, UOSH had actual and constructive notice of the June 10, 1992 date appearing of the ALJ's Order and the Findings Of Fact And Conclusions Of Law. Dusty's 842 P.2d at 870. The analysis utilized by the Utah Supreme Court in Dusty's is consistent with general principles of statutory construction:

[I]t is helpful to examine preceding sections within the same Act. Indeed, to interpret section 16-11-13, basic rules of statutory construction compel us to look at the Professional Corporation Act in its entirety. See *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 591 (Utah 1991) ("[T]erms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion."); *CP Nat'l Corp. v. Public Serv. Comm'n*, 678 P.2d 519, 523 (Utah 1981) (doubtful words are to be determined in light of their association with surrounding words and phrases).

Berrett v. Purser & Edwards, 240 U.A.R. 4, 5, ___ P.2d ___ (Utah 1994).

At the heart of respondent's argument that its Motion For

Review was timely filed and therefore the Industrial Commission retained jurisdiction of this case is UOSH's flawed reading of Utah Code Ann., § 63-46b-1(9) (Supp. 1992). UOSH's reliance on § 63-46b-1(9) is flawed for several reasons, primary among them the assertion that "Nothing in § 63-46(b)-1(9) compels a conclusion that [a] requests for extension must be filed [b] within a particular time." Respondent's Brief at 11. It is axiomatic that a presiding officer would not normally lengthen time unless he was requested by a party to do so. In this case UOSH did not request an enlargement of time until nearly eleven months after the ALJ's Order was issued and more than four months after Magcorp filed its Petition For Writ Of Review. In addition, the Motion For Extension Of Time was directed to the Industrial Commission, rather than the ALJ, the "presiding officer." See § 63-46b-1(9). The request for enlargement of time was not properly raised before the lower tribunal and preserved for appeal.

Respondent's contention that § 63-46b-1(9) allows a party to request an enlargement of time at any time after the 30 day period provided by § 63-46b-12(a)(1) creates a compelling problem respondent ignores.

A cardinal rule of statutory construction is that courts are not to infer substantive terms into the text that were not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an

intention not expressed. *Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n*, 155 P.2d 184, 185 (Utah 1945); see *Trittipio*, 561 N.E. 2d at 1203 ("The statute should be interpreted on the basis of what was written, and courts should not search for subtle or not readily apparent intention of the legislature.").

Berrett v. Purser & Edwards, 240 U.A.R. at 6. Section 63-46b-1(9) is not a specific grant of authority to do anything. The clear language of § 63-46b-12(1)(a) allowing 30 days should control. Respondent has made no effort to counter Magcorp's argument that the strained interpretation the Industrial Commission adopted and that respondent advances now on appeal is simply inconsistent with sensible notions of finality and judicial economy. Under the rule for which respondent argues, the result would be chaotic administrative and judicial appellate procedure. See e.g. Silva v. Dept. of Employment Security, 786 P.2d 246, 247 (Utah App. 1990) (per curiam); Isaacson v. Dorious, 669 P.2d 849, 851 (Utah 1983). "Endorsing such a procedure would allow mischievous counsel to use the right... [to belatedly request an enlargement of time] as a tool for needless, and in some cases harmful delay." Maverik Country Stores v. Industrial Commission, 860 P.2d 944, 951 (Utah App. 1993) (addressing a party's failure to comply with rules for getting an extension of filing deadline).

Also conspicuously absent from respondent's brief is any effective response to Magcorp's argument that Rules 6(b) and 81(d),

U.R.C.P., apply to require UOSH to show excusable neglect before an extension of time could be granted. Rule 81(d) provides:

These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules. (emphasis added).

It is only through application of Rule 6(b) that the needed certainty with respect to the time for review may be had in cases such as this where a party seeks an enlargement of time after the specified 30 days provided by § 63-46b-12(1)(a) has expired. Rule 6(b) provides:

When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b) and 73(a) and (g), except to the extent and under the conditions stated in them. (emphasis added).

If this court determines that a motion to enlarge the time provided by § 63-46b-12(1)(a) is permissible, it necessarily follows that

the motion must be made in accord with Rule 6(b) and that excusable neglect must be shown. Respondent has made no attempt to show, and under the facts of this case respondent cannot establish, excusable neglect. "A flat mistake of counsel about the meaning of a statute or rule may not justify relief: *relief is not extended 'to cover any kind of garden variety oversight.'*" Prowswood, Inc., v. Mountain Fuel Supply Co., 676 P.2d 952, 960 (Utah 1984) (footnote omitted). (citing Feltch v. General Rental Co., 383 Mass. 603, 421 N.E. 2d 67, 73 (1981)). The kind of human error that occurred here is not sufficient to warrant relief. See Varian-Eimac v. Lamoreaux, 767 P.2d 569, 571 (Utah App. 1989); Nunley v. Stan Katz Real Estate, Inc., 15 Utah 2d 126, 388 P.2d 798, 801 (1964); In re: Bundy's Estate, 121 Utah 299, 241 P.2d 462 (1952).

Maverik v. Industrial Commission, relied on by respondent for the proposition that good cause is the applicable standard, does not consider, and indeed does not preclude, the application of Rule 6(b) via Rule 81(d) to enlargements of time sought in administrative proceedings after the specified window has closed.

Respondent also fails to address Magcorp's argument that the Industrial Commission's October 20, 1993 Order Granting Motion For Extension Of Time [R. 533-537] is an improper nunc pro tunc order. This court should therefore assume respondent has no justifiable or meritorious response. UOSH did not file a motion for extension of

time with either the ALJ or the Industrial Commission prior to filing its Motion For Review with the Industrial Commission, and neither the ALJ nor the Commission addressed the issue at that time. The request was not properly raised or preserved by respondent in the administrative proceeding, therefore, the Order Granting Motion For Extension Of Time reflected only "what... [the Industrial Commission] might or should have done had there been a motion or a hearing.] Southwick v. Leone, 860 P.2d 973, 978 (Utah App. 1993); see also Preece v. Preece, 682 P.2d 298, 299 (Utah 1984); Bagshaw v. Bagshaw, 788 P.2d 1057, 1061 (Utah App. 1990). This court's limited remand could not revive the jurisdiction the Industrial Commission was divested of when UOSH failed to file its Motion For Review in time.

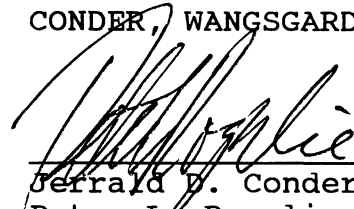
CONCLUSION

Magcorp requests this court to reinstate the ALJ's June 10, 1992 Order and to declare three orders issued by the Industrial Commission null and void. The Interim Order Denying Motion To Dismiss [R. 288-291] entered on October 9, 1992, and the Order Granting Motion For Review [R. 336-341] entered on December 17, 1992, were made after the Industrial Commission had lost jurisdiction over the case because UOSH failed to file its Motion For Review within the 30 day window provided by law. This court's April 29, 1993 limited remand could not, independent of the

Industrial Commission's statutory jurisdiction, confer jurisdiction upon the Industrial Commission. Thus, the Order Granting Motion For Extension Of Time [R. 533-538] entered on October 20, 1993, is also null and void. The ALJ's June 10, 1992 Order should be reinstated as, and thereafter remain, the final disposition of this proceeding.

RESPECTFULLY SUBMITTED this 15th day of July, 1994.

CONDER, WANGSGARD & TSAKALOS

A handwritten signature in dark ink, appearing to read "Peter L. Rognlie", is written over a horizontal line.

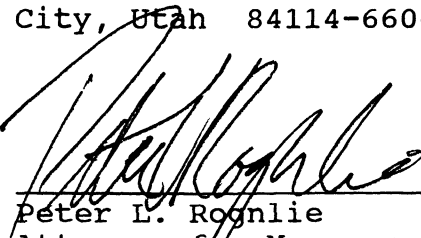
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CERTIFICATE OF MAILING

I, Peter L. Rognlie, certify that on the 15th day of July, 1994, I served 2 copies of the attached Petitioner's Reply Brief, upon Alan L. Hennebold, counsel for the Occupational Safety and Health Division and Sharon J. Eblen, counsel for the Industrial Commission of Utah, by mailing the copies to them by ~~first-class~~ ^{had delivery} mail, ~~with sufficient postage prepaid~~, to the following address:

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