

1969

**Melvin Miller, Dba S & E Distributing Company, and Lindsey Warehouse Company, Inc v. The Industrial Commission of Utah, Darlene F. Asay, Widow Of Leroy M. Asay, Deceased, Frank E. Martens, and The State Insurance Fund : Brief of Plaintiffs**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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MELVIN M. MILLER, dba S & E  
DISTRIBUTING COMPANY, and  
LINDSEY WAREHOUSE COM-  
PANY, INC,

*Plaintiffs,*

vs.

THE INDUSTRIAL COMMIS-  
SION OF UTAH, DARLENE F.  
ASAY, widow of LeRoy M. Asay, de-  
ceased, FRANK E. MARTENS, and  
THE STATE INSURANCE FUND,

*Defendants.*

Case No.  
11873

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## BRIEF OF PLAINTIFFS

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FILED

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Clerk, Supreme Court, Utah

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Case No.  
11873

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## BRIEF OF PLAINTIFFS

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### STATEMENT OF THE KIND OF CASE

This case is before the Court on a Writ of Review pursuant to Section 35-1-83, Utah Code Annotated, 1953, from an Award of the Industrial Commission of Utah.

## DISPOSITION BY THE INDUSTRIAL COMMISSION

On May 29, 1969, the Industrial Commission entered its Findings of Fact, Conclusions of Law, and Award against Melvin M. Miller (hereinafter called either "Miller" or "Plaintiff"), an individual doing business as S & E Distributing Company, an individual proprietorship (hereinafter called "S & E"), for allegedly failing to provide Workmen's Compensation Insurance for the employees of said Company as required by State law. The Commission, at the same time, dismissed the claims against Lindsey Warehouse Company, Inc. (hereinafter called "Lindsey Warehouse"), Frank E. Martens, and The State Insurance Fund (hereinafter called "The Fund"), all parties to the action. The Award was entered against Miller individually and awarded compensation to the claimant for a total of \$14,227.20.

Subsequently on July 23, 1969, Miller filed with the Industrial Commission of Utah a Motion for a Writ of Review on behalf of himself and Lindsey Warehouse, asking that the award be amended to provide compensation to the claimant under the provisions of the insurance policy held by Miller as an individual doing business as Lindsey Warehouse, or in the alternative, that the hearing examiner enter an order allowing the reopening of the record to allow introduction of additional, material evidence then available and which was not available at the time of the initial hearing. Such



Motion for a Writ of Review was denied by the Industrial Commission on September 12, 1969. This appeal relates to both the initial award and the denial of the Motion for a Writ of Review.

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks to set aside the order of the Industrial Commission as it relates to Miller's individual liability for payment of his claim, for the reason that the Commission's decision was contrary to the intent and purpose of the Workmen's Compensation Laws, was arbitrary and capricious, and contrary to the established facts. Plaintiff argues that The Fund is the party responsible for the payment of this claim and petitions this Court to direct the Commission to order The Fund to compensate claimant.

## STATEMENT OF FACTS

Sometime prior to June 13, 1966, Miller, who owned and operated Lindsey Warehouse, entered into negotiations with defendant Frank E. Martens for the purchase of a business owned by Martens, S & E Distributing Company. The S & E operation was basically a wholesale or jobber of pre-packaged candy, nuts, and popcorn (R. 403). A small part of the business consisted of roasting and popping popcorn and packaging these items. Other than these small manufacturing processes, the business consisted of rebagging or dis-

tributing from the S & E warehouse (R. 343). Lindsey Warehouse and S & E were located immediately adjacent to one another at 353 West Second South and 357 West Second South respectively. A preliminary agreement was signed on the 13th day of June, 1966, relating to the purchase of the business by Miller (R. 242 and 454). At that time, Martens cancelled his Workmen's Compensation Insurance covering the employees of S & E (R. 514).

On July 16, 1966, Miller filed his quarterly tax reports (due July 31, 1966) to the State and the Federal government based upon wages paid to employees. At the same time he filed his semi-annual report to The Fund which covered the employees of Lindsey Warehouse. The new employees so acquired of S & E were not included on either report (R. 376). Both Miller and his Certified Public Accountant testified as to the reasons for the exclusion of the S & E employees on these reports (R. 174-176). The employees of S & E were, however, included on both reports in the next reporting period ending December 31, 1966 (R. 377 and 453).

On August 5, 1966, claimant's husband was killed in the course of and within the scope of his employment as a truck driver for S & E (R. 163). The sole question in this litigation is whether Miller's policy with The Fund covers the claimant who is entitled to compensation under the Workmen's Compensation Laws of Utah.

The record indicates that there was a policy of insurance with The Fund in existence at the time of the accident, and in the name of Miller, an individual doing business as Lindsey Warehouse (R. 445-450). The employer's payroll and premium report of December 31, 1965, designated the present status of the insured as a "corporation" (R. 142) but the policy remained in the name of Melvin M. Miller, an individual, until September 13, 1966, one month after the accident (R. 450).

In due course, the claimant filed a claim with the Industrial Commission for compensation (R. 3-6). Consequently, a dispute arose as to who was liable for payment of the claim as between Miller, dba S & E Distributing Company, Lindsey Warehouse, Frank E. Martens, or The Fund. A hearing on this matter was held before the Industrial Commission on June 28 and 29, 1967. The Industrial Commission, in its Findings of Fact and Conclusions of Law (R. 513-515) dismissed the action as to the defendants Lindsey Warehouse Company, Inc., Frank E. Martens, and the State Insurance Fund, and assessed individual liability against Miller for payment of claimant's claim.

The Examiner found that Miller, acting as an individual, was the actual employer of the S & E employees, and that no relationship extended to Lindsey Warehouse (R. 514).

The Examiner also found that insurance coverage existed for Lindsey Warehouse, but that neither Miller

nor S & E were covered (R. 514). The Commission therefore concluded that inasmuch as the employees of S & E were those of Miller rather than of Lindsey Warehouse, and because the insurance policy covered only Lindsey Warehouse, that Miller, as an individual, was liable for the claim. An award was consequently entered against Miller individually for \$14,227.20 including statutory funeral expenses of \$525.00, and \$1,400.00 attorney's fees to be deducted from the accrued compensation (R. 515).

On July 23, 1969, Miller filed a Motion for a Writ of Review with the Industrial Commission alleging (R. 521):

1. That The Fund was liable for the claim because its policy covered not only Lindsey Warehouse, the corporation, but also Miller, as the proprietor, on the date of the accident (R. 521).

2. That Lindsey Warehouse, the corporation, was the actual purchaser of S & E, and that coverage existed for the claimant under the corporation's policy with The Fund (R. 524).

3. That if the errors in the award did not require modification of the award, that the records should be reopened so as to admit the newly discovered evidence (R. 527).

On September 12, 1969, the Commission entered its decision on the Motion for the Writ of Review in

which it denied<sup>1</sup> said Motion for the following reasons (R. 561):

1. That even if the S & E operation had in fact been purchased by Lindsey Warehouse Company, coverage of S & E employees was not applied for nor extended to said employees.

2. That the report filed by Lindsey Warehouse on July 16, 1966, did not include the additional payroll of S & E nor did it include the additional job classifications of these employees.

It therefore concluded that the evidence contained in file in the initial award was sufficient to sustain the hearing examiner's decision in that case. It ordered that the Motion for Review filed by Miller should be denied and thereby in so doing, refused to reopen the case for additional consideration (R. 561).

Having exhausted all administrative remedies, the plaintiff now appeals from the decisions of the Industrial Commission.

## ARGUMENT

### POINT I

DISMISSAL OF THE CLAIM AGAINST THE STATE INSURANCE FUND WAS CONTRARY TO THE WORKMEN'S COMPENSATION STATUTES OF UTAH, CONTRARY TO ESTABLISHED AUTHORITY, AND AGAINST PUBLIC POLICY.

The hearing examiner in the award found that the issues before the Commission were limited to (a) who was, in fact, the employer of the deceased at the time of the accident, and (b) who was responsible for the payment of the benefits to the applicant.

Point I will attempt to show that The Fund was indeed the party responsible for payment of compensation to the applicant, and that it was an error of law for the Commission to not so hold. In so doing it will be demonstrated that: (a) the scope and purpose of The Fund indicates that this employee (LeRoy Asay) should have been covered by The Fund's policy; (b) the Utah statutes intend that insurance coverage be of a "full coverage" type, thereby extending coverage to all employees under the Workmen's Compensation Act, and covering the entire liability of an employer who is insured, and; (c) the Industrial Commission acted in an arbitrary and capricious manner in failing to follow its established statutory procedures, and that The Fund was derelict in its duties of investigation and audit of Miller and Lindsey Warehouse in the acquisition of S & E.

*A. The purpose and scope of the State Insurance Fund.*

The purpose of the State Insurance Fund is set forth in 35-3-1, Utah Code Annotated, 1953, which reads in part as follows:

“35-3-1. State Insurance Fund — Purpose. There shall be maintained a fund, to be known as the State Insurance Fund, for the *purpose of insuring employers* against liability for compensation based upon compensable accidental injuries and against liability for compensation on the account of occupational disease, *and of assuring to the persons entitled thereto, the compensation provided by law . . .*” (emphasis added)

It is clearly stated that the purpose of the State Insurance Fund is to protect the employer who insures with this Fund. Of course, not only is the employer protected, but also the employee is assured that he will be compensated for injuries sustained while on the job (simple, adequate, and speedy compensation), and to protect him from an otherwise judgment-proof employer.

Workmen's Compensation Insurance, therefore, is much more than a mere ordinary insurance policy in that it creates a vested right in the employee to compensation, irrespective of the actions of either the insurance carrier or the employer. Arthur Larsen, in his treatise on Workmen's Compensation entitled *Workman's Compensation Law*, Section 92.00, makes the following comment:

“Compensation insurance creates a sort of insured status in the employee. If it did no more than protect the employer from any liability incurred by him under compensation law, there would be no occasion for discussion of such insurance in connection with compensation law at

all. The employer's rights would be fixed by substantive compensation law, and all questions of the insurer's relation to the liability would be a simple application of general insurance law, just as an automobile liability insurer's position is worked out by a direct interpretation of the insurance contract. Compensation insurance, however, has come to be an integral part of the compensation system which unlike tort litigation, which is an adversary contest to right or wrong between contestants, *Workmen's Compensation is a system, not a contest, to supply security to the injured worker and to distribute the costs to the consumer of the product.*" (emphasis added)

It is clear, then, that this type of insurance has in mind the very ultimate of protection to the injured employee. Simply stated, the purpose of such insurance stands in two relations: First, to the employer, to protect him from the burden of compensation liability; and secondly, and more important, to the employee, to insure that he gets the benefits called for by statute.

As between the insurance carrier and the employee, defenses by the carrier based upon the misconduct or omissions of the employer are of no relevance in determining liability. In *Workmen's Compensation Law*, Supra, Section 92.20, pg. 446, Larsen states that this is a rule of general application and that several states have incorporated it in their statutes, these states being Georgia, North Carolina, Pennsylvania, South Carolina, Virginia, and Wisconsin. The Utah Supreme Court has indicated that this is the case in Utah. In *Continental Casualty Company vs. Industrial Commis-*



sion of *Utah*, 61 Ut. 16, 210 P.127, (1922), the Supreme Court indicated that fraudulent statements which induced the issuance of an insurance policy are no defense against the employee. While the actual decision in this case annulled an Industrial Commission award for compensation, it did hold:

“ . . . The Industrial Commission was without authority to determine or hold that his terms were not in force and binding upon the casualty company at the time of the accident. If the policy was obtained by fraud or if a mistake was made in fixing the date when the same should become effective, the Industrial Commission is not the tribunal to grant the plaintiff relief . . . The Commission has no power to do otherwise than to enforce and apply his terms as the same appear in the policy.”

In *Empey vs. the Industrial Commission of Utah*, 91 Ut. 234, 63 P.2d 630, (1937), this Court held at page 636 of 63 P.2d:

“To deny the injured employees compensation merely because those who drew the policy with knowledge of the facts misconceived the legal relations of the parties flowing from such facts would work a grave injustice to the injured employees without any fault on their part.”

It has also been held that even non-payment of premiums does not entitle the carrier to deny liability to the employee. In *Home Life and Accident Company vs. Orchard*, 227 S.W. 705 (Tex. Civ. App. 1921), it was held that if an employer was protected by the policy

issued by his employees' workmen's compensation insurer, such protection was not lost because the employer failed to pay the proper premium to the insurer. If the employer owed the premium and does not pay it, he still owes it, and it is subject to audit and payment. See also, *Traders and General Insurance Co. v. Henderson*, 235 Ark. 896, 362 S.W.2d 671 (1962).

It can be seen then that Workmen's Compensation Insurance occupies a very different and distinct posture than does ordinary liability insurance. It is the policy of Workmen's Compensation Insurance to have the rights and interests of the employee foremost in mind. When a dispute arises between an employer and his insurance carrier, the policy behind Workmen's Compensation should be the point upon which liability turns. Mere technicalities and formalities which are points of dispute between the parties should not deny the employee his right of speedy compensation when a policy of insurance exists.

In the case at hand, there is no question that a policy of insurance with The Fund was in force upon which liability could turn. It is therefore submitted that the foregoing clearly illustrates that the policy of Workmen's Compensation Insurance requires that the employee's right to compensation not turn on relatively insignificant points as compared with the intended purpose of Workmen's Compensation Insurance and the rights of the employee.

B. *The Utah statute is in the nature of a "full coverage" statute.*

In Larsen's *Workmen's Compensation Law*, Section 93.10, pg. 459, he discusses the various types of Workmen's Compensation statutes. He classifies these statutes as follows:

- (1) Full coverage statutes.
- (2) Modified coverage statutes.
- (3) Statutes which provide for no express coverage.

In discussing these statutes, Mr. Larsen says:

"Under most compensation acts, either by express provision or by court interpretation, the law has undertaken to compel a certain minimum coverage in insurance contracts, regardless of any narrower agreement between the insurer and the employer . . . The principal reason is probably the convenience of being able to assume that so far as the employee is concerned, the liability of the insured is completely co-extensive with that of the employer, so that one proceeding can settle the liability of both."

Larsen describes the *full coverage* statute as the type of statute which states that policies of insurance must cover the employer's entire liability. In Section 93.20, Mr. Larsen says:

"The usual language is something like this:  
'Every policy of insurance covering the liability of an employer for compensation shall cover the

*entire liability of the employer to his employees under the act.* At first glance, it might seem that there could be only one interpretation of this sweeping language — *coverage of all the employees of the assured in all occupations and all businesses. This is, indeed, the meaning accepted by the majority of courts.*” (emphasis added)

Larsen goes on to state that many courts have been disturbed with this broad sweeping language and have attempted to impose certain restrictions and qualifications into such statutes. He concludes:

“This judicial tampering with the unqualified language of the statute seems unjustified.”

It is submitted that the Utah statute relating to Workmen’s Compensation Insurance is indeed a “full coverage” type statute. Utah Code Annotated, 1953, Section 31-19-15, states in part:

*“Every policy of insurance covering the liability of an employer for compensation shall cover the entire liability of the employer to his employees on account of compensable and accidental injuries and occupational diseases covered by the policy or contract. . . .”* (emphasis added)

Applying Larsen’s analysis and the literal meaning and interpretation of the Utah statute, one can reach only a single conclusion: That under the Utah Workmen’s Compensation laws, the insurance is to cover the *entire liability of the employer to all of his employees*. Accordingly, any policy of insurance issued to an employer should cover the entire liability of that employer to his employees.

The Utah courts adhere to the position of the majority of the courts which have interpreted full-coverage statutes, and the Utah courts, as well as the courts of the neighboring states, uphold the full-coverage interpretation of the applicable statute. As indicated by the following cases, Utah courts have ignored payment of premiums, proper classification of employees, and the name in which the policy was issued, in determining whether a given policy provided compensation for an injured employee.

In *Empey vs. Industrial Commission of Utah*, Supra, the court was called upon to determine whether certain employees were entitled to the benefits of a policy of insurance which was issued in the name of the Escalante Company. In this case, the Escalante Company owned certain property and contracted with the Arrowhead Company to do certain drilling on it. There was common ownership of stock and common management between the companies. The companies also maintained joint offices, and one set of books was kept for the companies in regard to this operation. In this case, there was much confusion as to the name in which the policy should be issued. After several changes, the policy was issued in the name of the Escalante Company. In the course of the drilling, employees were injured. The Commission found that the injured persons were employees of Arrowhead and disallowed the claim. The Court reversed the decision of the Commission and, in effect, held that the name of the insured

in the policy is not controlling. The Court in so doing stated as follows:

“ . . . the evidence shows without conflict that the policy here relied upon by plaintiffs was issued as a coverage for the workmen engaged in the operations incident to the development of the Escalante well where the explosion occurred.”

The Court further stated as follows:

“To deny the injured employees compensation merely because those who drew the policy with knowledge of the facts misconceived the legal relations of the parties flowing from such facts, would work a grave injustice to the injured employees without any fault on their part.”

“ . . . Neither of the defendants can escape liability because the Escalante Company rather than the Arrowhead Company was named as the insured in the policy involved in this controversy.”

This case clearly indicates that the Courts will go to great lengths to find an employee to be covered under an existing policy of insurance. The case also indicates that the Utah public policy, as expressed by its Supreme Court, is in favor of finding coverage to exist. In the *Empey* case, the Court used the test of intent in order to determine whether coverage should be extended to the employees in question. The Court looked to the intent of the employer in taking out the policy to determine whether the injured employee should be able to claim benefits from the insurer.

From a consideration of the above holding of the Utah Supreme Court, it is clear that the extension of coverage should not turn upon the name of the insured and the party actually shown as the owner of the policy. The *Empey* case indicates that a decision to the effect that the name of the insured and the party shown to be the owner of the policy were the controlling factors in finding no coverage existed, would be contrary to public policy and to the purpose of the Workmen's Compensation Acts, and also contrary to the announced intention and policy of the courts which have held that the statutes and insurance contracts will be liberally construed to cover the employees engaged in an operation or activity which could reasonably be construed to be intended to be covered by a policy of insurance which has been issued.

The Utah courts have followed the almost universal rule of extending coverage in cases similar to the one now before this Court. This was done as early as 1924 in the Utah case of *Anderson vs. Last Chance Ranch Company, et al.*, 63 Ut. 551, 228 P. 184 (1924). In this case, the Last Chance Ranch Company, a Utah corporation, was engaged in the general business of agriculture. It hired from three to fifteen men. It decided to construct a house upon its ranch properties to be occupied by its general manager, and to accomplish this it engaged two carpenters and a carpenter's helper, Anderson, to work with its regular farm hands to construct the house. During the course of the construction

of the house, Anderson was instructed by someone in authority to assist in unloading and storing grocery provisions to be consumed by the farm hands in the basement of the house. In so doing, he was injured and out of this injury a claim was asserted against the corporation under the workmen's compensation statutes. The defense of the corporation was that Anderson was engaged in a farming activity which was excluded under the compensation statutes. The claimant contended that the corporation, as far as his employment was concerned, was engaged in the construction business and, therefore, he had a right to make a claim against the corporation under the workmen's compensation statutes.

The Court refused to decide the case on a narrow finding that even though Anderson was hired as a carpenter's helper to work on the construction of the house he was, in fact, during the time of the temporary diversion, engaged in an agricultural pursuit in that he was handling provisions for the agricultural business. Rather, the Court found that the construction of the house in question was merely incidental to the corporation's farming business and so much so as to be rightly considered a part of it. The Court stated that Anderson was "regularly employed in the same business, or in and about the same establishment" as a part of the agricultural business of the corporation. In so doing, the Court construed what is meant by the Utah statutory language concerning "regularly employed in the same business" and in doing so stated:



“It means all employments in the usual course of the trade, business, profession or occupation of an employer.”

The Utah Court concluded its opinion criticizing “the narrow ledge upon which some of the decisions stand” in making a determination that a particular activity is not within the scope of the regular business of an employer. It is true that in this Utah case the finding that Anderson was regularly employed in the agricultural business of the corporation resulted in excluding him from the Workmen’s Compensation Act. However, in doing so the Court made a determination that the construction of the house on the ranch property by the corporation was a part of and incident to the agricultural business of the corporation. It is evident that at this early date the Utah Court recognized that an employer could engage in various types of activities which would complement and be considered a reasonable extension of the general business of the employer.

The holding in *Harding vs. Industrial Commission of Utah, et al.*, 83 Ut. 326, 28 P.2d 182 (1934) is similar.

In the *Harding* case, Harding was regularly engaged in loading and unloading the brick kilns. However, at the time of his injury, he was temporarily working in hauling hay off the fields owned by his employer. This hay was used to feed the horses owned and used by the brick company for drayage purposes.

The Fund policy contained no classification for employees engaged in agricultural activities. The Fund,

in defense, contended that under the contract of insurance, it undertook the coverage only of employees of the company engaged in work specified in the contract. The Fund further contended that it could not be held liable merely because Harding was generally engaged in work covered by the policy.

The Court in finding that the Fund policy should be held to extend coverage to Harding stated that:

“An employee injured while performing an act which is fairly incident to the prosecution of the business, trade or occupation of the employer and appropriate in carrying it forward and providing for its needs is not to be barred from the benefits of compensation because the act is not wholly embraced in the precise and characterization process or operation made the basis of the group in which employment is claimed.”

Decisions from other states have interpreted statutes similar to the Utah full coverage statutes. In *Maryland Casualty Company vs. Marion J. Sullivan, et. al.*, 160 Tex. 515, 334 S.W.2d 783 (1960), the court stated:

“Where an employer procures coverage for part of his employees under the Workmen’s Compensation Act, this coverage will extend to all other of his employees who work in the same general class of business.”

In this case, insurance coverage covered a corporation in the business of selling fertilizers and chemicals. The owner of this company also was the major stockholder

and manager of a crop dusting company. The pilot for the crop dusting company was killed in an airplane accident and the court held that he was covered by the Workmen's Compensation policy that had been issued to the fertilizer and chemical company, although it contained no designation or classification for an airplane pilot and no premium had been paid for such a classification.

In a recent Idaho Supreme Court decision, *Clawson vs. General Insurance Company of America*, 90 Ida. 424, 412 P.2d 597 (1966), the court held that the name in which a compensation policy is issued is not controlling, but that it will consider the operation intended to be covered in determining whether the issued policy should cover the employees involved. In this case, two separate building contractors had entered into a joint venture for the construction of a school. For a time, the joint venture obtained and kept in force a compensation policy for the joint venture. The policy was cancelled prior to the accident which gave rise to the compensation claim. The individual venturers continued to maintain separate policies on their own individual contracting businesses. The court held that the policies issued to the individual joint venturers should be extended to cover the claim arising out of the joint venture operation. The Idaho Supreme Court quoted Mr. Larsen and his treatise on Workmen's Compensation in stating:

“The omission by an employer to list or pay a premium upon an employee does not effect the right of the employee to receive compensation from the carrier.” See 2 Larsen, *Workmen's Compensation*, 92.20. *Clawson vs. General Insurance Company of America*, *Supra*, at 602.

Again, as in the *Empey* case, *supra*, the court is looking to the employer's intent when providing compensation insurance to determine whether the particular employee injured, was covered by the employer's compensation insurance. It is submitted by the plaintiff that on the date that LeRoy M. Asay, husband of the applicant, was killed, he was an employee within the meaning of the statute of Lindsey Warehouse and Melvin M. Miller.

The Utah statute in defining when an employer shall be considered subject to the Workmen's Compensation Act does not necessarily limit the consideration to a certain type of business activity in determining whether an employer is an employer subject to the Act. Section 35-1-42, Utah Code Annotated, 1953, provides in part as follows:

“The following shall constitute employers subject to the provisions of this title:

\* \* \*

(2) Every person, firm and private corporation, including every public utility, having in service one or more workmen or operatives regularly employed in the same business, *or in or about the same establishment*, under any contract of hire, . . .

“The term ‘regularly’ as herein used shall include *all employments* in the usual course of the trade, business, profession or occupation of the employer, whether continuous throughout the year or for only a portion of the year.”

The above language indicates that a person is regularly employed by an employer if he is engaged in an employment *which is in the usual course of the trade or business of the employer*.

The Utah Supreme Court extended this statutory coverage by its decision in the *Empey* case, *supra*. In that case the Court decided that an injured employee was entitled to the benefits of a workmen’s compensation policy where the workman was employed by a company not covered by insurance, but was injured while performing work incident to the expansion and development of the business of another employer, who was covered by compensation insurance.

As is evident from the undisputed evidence of the hearing held on the 28th and 29th days of July, 1967, LeRoy Asay was killed while driving a truck in the course of his employment. There would also seem to be no dispute that at the time of his death, Mr. Asay was employed by a company which was being operated by Melvin Miller, either in his capacity as an individual or through the Lindsey Warehouse as a corporation. (R. 163 and 271)

It therefore follows from the decisions and statutes previously cited herein, that any claim which Asay

would have against his employer would be covered by the existing policy of workmen's compensation insurance regardless of the name in which the policy was issued, the employee classifications shown on the policy, or the payment or lack of payment of insurance premiums with respect to LeRoy Asay.

It is this plaintiff's contention that the decedent at the time of his death was engaged in an activity which was an integral and long-standing type of activity necessarily incident to the type of warehousing business in which the plaintiff had been engaged for many years (R. 238-239; 329-330) and which had been covered by the insurance policy in question.

The clear meaning of the language of the State Insurance Fund policy indicates that a broad coverage is intended. In this regard, reference is made to the first paragraph of the State Insurance Fund policy which reads as follows:

“(Hereinafter called the ‘Fund’) does hereby agree with the Employer named and described as such in the declarations hereinafter set forth and hereby made a part hereof, *to insure the Employer against liability for compensation under the Workmen's Compensation Act and the Utah Occupational Disease Disability Law*, as provided in Chapters 1, 2 and 3 of Title 35, Utah Code Annotated 1953, and all amendments thereto, including liability to pay for medical and other treatment and care of injured employees as required by said Acts;”

Further, the first paragraph under the heading "Employers Liability Coverage" in the policy reads in part as follows:

"The Fund will *indemnify this Employer* against loss by reason of the liability imposed upon him by law for damages on account of personal injuries to *such of his employees as are legally employed*, wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada."

This broad coverage language is consistent with the full-coverage statute (31-19-15 U.C.A.) referred to previously. It is also evident from this language that the only condition precedent to payment of a claim is that the employee be legally employed. It is undisputed that Asay was legally employed by Melvin Miller or Lindsey Warehouse (R. 159).

It may be that The Fund relies on the following language contained under the declarations in its policy as a basis for limiting the coverage of the policy: "No other operation of any nature will be conducted by the employer, except as follows: No exceptions." (R. 449)

In regard to construing policy coverage, the following statement is found in *Workmen's Compensation Law*, supra, Section 94.30 page 468:

"Finally, when a question of construing policy coverage arises exclusively between insurer and insured, it might be thought that the terms of their contract should be allowed to control. How-

ever, if the statute expressly says that an insurer's entire liability must be covered, the unqualified language of the statute is broad enough to include issues arising between the insurer and the insured."

On page 533 of Volume 3 of the same treatise Mr. Larson states:

"However, the routine statement of classification on the policy which is relevant to the assigning of rates as between insurer and employer should not necessarily outweigh the unqualified language of a full-coverage statute specifically designed to deal with the problems caused by incomplete coverage." (R. 474)

The record indicates that The Fund went to great lengths to show that the classifications of S & E employees and those of Lindsey Warehouse were different, (R. 176-178) and such evidence was apparently given much credence by the examiner in holding that the policy did not cover the employees of S & E (R. 561). Mr. Larson is making it clear that where a state has a full coverage statute the classification numbers or lack of such numbers on an insurance policy are to be given very little weight in determining whether the insurer is liable for the payment of the claim.

The plaintiff strongly urges the Utah Statute is indeed of the "full coverage type" and that it extends coverage to the entire liability of the employer to all of his employees. The foregoing has amply demonstrated through statutory interpretation and case law that the



mere technicalities of coverage such as employee designation, payment of premiums, and even the name of the employer so insured are not controlling in establishing coverage in corresponding liability of the insurance carrier or the employer.

The Hearing Examiner chose to disregard all of the foregoing argument as set forth by learned counsel during the initial hearing. Plaintiff concedes that it is the function of the commission to weigh the evidence, and it may at times even refuse to follow uncontradicted evidence in the record, but when it does so, we submit, that its reasons for rejecting should appear inasmuch as the Hearing Examiner gives us no indication as to why this argument was not taken into consideration. Plaintiff argues that this Court should find that such action was arbitrary, and capricious, that it was an error at law for the Commission to disregard the clear purpose and intent of the Workmen's Compensation Statutes, and that public policy demands that administrative judicial bodies carry out the legislative intent of these statutes. The award should be set aside on these grounds.

*C. The Industrial Commission acted in an arbitrary and capricious manner in failing to follow its established statutory procedures, and The Fund was derelict in its duties of investigation and audit of Miller and Lindsey Warehouse.*

The Plaintiff, in the preceding argument, has attempted to show that such technicalities as the name in which the policy was issued, the employee's classification shown on the policy, or the payment or lack of payment of insurance premiums, are not in themselves enough to defeat the liability of the authorized insurance carrier.

Although this Plaintiff feels that the prior arguments negate the necessity of proceeding along the following line of reasoning, he will attempt to show that The Fund should be estopped from denying liability, and that the Commissions' Award be set aside. The basis for such an argument is the Plaintiff's contention that the Commission failed to follow its statutorily imposed procedures, and that the Plaintiff was denied certain rights of notice as a result of the arbitrary actions of both The Fund and the Industrial Commission.

Section 35-1-47, Utah Code Annotated, 1953, makes it the duty of every employer to file with the Commission a notice of his insurance.

The employer shall forthwith file with the commission in a form prescribed by it a notice of his insurance, together with a copy of the contract or policy of insurance.

It is undisputed that both Lindsey Warehouse and S & E were at some time covered by insurance. and presumably each policy was filed with the Commission prior to the acquisition of S & E by Miller.

Martens, doing business as S & E, testified that he was covered by a policy of insurance which coverage extended up through June 30, 1966 (R. 416).

The record indicates that S & E had been covered by a policy of insurance with the State Insurance Fund when it was under the proprietorship of one Carl Burdett, though Burdett had cancelled his policy when Martens acquired the business in 1965 (R. 175-176). Martens' testimony would seem to indicate then that his insurance was with a private carrier, and pursuant to law a copy of the policy should have been filed with the Industrial Commission. If Martens insurance expired as of June 30, 1966, or if indeed, he had no insurance, the Commission is chargeable with notice that no insurance was in effect for the employees of S & E from June 30, 1966 to the time of the accident. These facts establish quite conclusively that the Commission did indeed have notice, or was chargeable with such notice, that no insurance was in existence for these employees, and pursuant to statute, the Commission should have brought action to compel coverage of the employees of S & E.

The Statutes make it clear that it is the Commission's responsibility to make sure all employers have insurance. In Section 35-1-46 this responsibility and duty is affirmatively set forth,

"If the Commission has reason to believe that an employer of one or more employees is conducting a business without securing the payment

of compensation in one of the three ways provided in this section, the Commission may give such employer five days written notice by registered mail of such noncompliance, and if the employer within said period does not remedy such default, the Commission may file suit as in the section above provided and the Court is empowered, ex parte, to issue without bond a temporary injunction restraining the further operation of the employer's business."

There is no evidence that the Commission ever gave either Martins or Miller any notice regarding the non-coverage of the employees of S & E Distributing Company.

In his treatise, *Workmen's Compensation Law*, supra, Mr. Larsen states, in Section 93.42 on pg. 465:

"It may be observed in passing that little weight is given in any of these to the question of whether premiums were in fact paid on the employee in question. The company's payrolls are open to the insurer's inspection, and it is up to the insurer that if there is any controversy about coverage, to bring an action for any premiums the employer refuses to pay."

In this excerpt, Mr. Larsen makes it clear that the burden is on the insurer to collect any additional premiums due by virtue of a company's acquiring new employees, and the fact that a premium has not been paid on the particular employee in question does not absolve the insurance fund from liability arising by virtue of a compensable injury to an employee. The Utah courts have also made it clear that it is the duty

of an insurance carrier to make inquiries and investigations regarding coverage or noncoverage of employees. In the previously cited case *Empey vs. the Industrial Commission of Utah*, Supra, the Court stated:

"If the management of the fund desire to be more fully advised as to the nature of such interests, a request should have been made thereof. Notice of the fact that the Arrowhead Company was interested in the drilling of the Escalante well was notice to all that would have been discovered upon further inquiry.

Here the Court estopped the State Insurance Fund from denying liability on the grounds of failure to make proper investigations as to the nature of the entities involved. The Court went on to say

"Neither of the defendants can escape liability because the Escalante Company rather than the Arrowhead Company was named as the insurer in the policy involved in this controversy."

The language of the policy with the State Insurance Fund itself is interesting:

"Any increase of such estimated payroll, or the actual payroll, based upon later information furnished by the insured employer or *by audit by the fund*. The insured employer shall permit such audit and give such information when requested by the fund."

It is significant there is an affirmative duty or burden put upon The Fund to "investigate" and "audit" in order to insure that there is an adjustment

of premiums paid commensurate with the type of risk and the amount of payroll involved.

It would seem that The Fund has been derelict in its obligations and responsibilities to audit and investigate existing policies of insurance. There is no question that a policy of insurance with The Fund was outstanding, and The Fund has the policy-given right of continual investigation and audit in order to adjust the coverage of premiums. If Miller is to be penalized for failure to file a report, should not The Fund be estopped from denying liability for this claim for failure to follow its established procedures?

Likewise, the Commission has been guilty of some looseness in its procedures, and arbitrary in its action toward this plaintiff. There is no question but that the rights as provided by the Workmen's Compensation Statutes of Utah regarding notice, have been denied him. Again, if this plaintiff is to be subjected to such a harsh penalty for the mere failure to file a report and include newly acquired employees thereby, it is submitted that the Commission cannot point the finger of guilt toward this plaintiff when it itself was in part responsible for his failure to file. The foregoing, we believe, amply justifies this Court in setting aside the award for the reason that the Commission's actions were arbitrary and capricious and not in accordance with law.

## POINT II

THE INDUSTRIAL COMMISSION ABUSED ITS DISCRETION AND ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER WHEN IT REFUSED TO REOPEN THE CASE UPON MOTION FOR REVIEW, AND FAILED TO TAKE OFFICIAL NOTICE OF A DISTRICT COURT PROCEEDING.

The Commission in its Findings of Fact and Conclusions of Law and Award, states "There is no probative evidence to make a finding that Lindsay Warehouse Company, Inc., was the employer" (R. 515). While we do not concur with the blanket statement of the commission, we submit that even if such had been the case at the time of the initial hearing, it was not so at the date of the petition for a Motion of Review. Evidence was then available in the form of a proceeding in the District Court of Salt Lake County, Judge Bryant H. Croft, presiding, which clarified the established entities and indicated who, in fact, was the purchaser of S & E.

The complaint and supporting documents of this District Court proceeding were attached as exhibits to the Motion For Writ of Review (R. 530-556). Although the facts are adequately set out in the Motion for Writ of Review, we feel that a brief recapitulation would be in order to better appraise the Court of the situation.

Frank E. Martens, a party to these proceedings and who participated in the hearing, sued Miller and Lindsay Warehouse Company, Inc., by his complaint filed as Civil No. 176150 in the District Court for Salt Lake County, State of Utah, on November 21, 1967, some six months after the Commission entered its Conclusions of Law and Findings of Fact, and Award. Martens prayed for judgment of \$47,076.87 and for \$4,800 attorneys fees, based upon the alleged unpaid balance of the purchase price due and owing for the sale by him and the purchase of S & E by Miller and Lindsay Warehouse (R. 530). Both Miller and Lindsay Warehouse filed answers and Lindsay Warehouse filed a counterclaim (R. 532 and 534). Attached to the counterclaim of Lindsay Warehouse was the final agreement between the parties dated June 13, 1966 (R. 540). The parties were indicated as F. E. Martens as seller, and Lindsay Warehouse Company, Inc., as the buyer. Thereafter Miller filed a motion for summary judgment asking to dismiss him from the litigation inasmuch as the preliminary agreement, also dated June 13, 1966, was superseded and terminated by the final agreement of the same date (R. 546). Thereafter, the Third District Court, the Honorable Bryant H. Croft, on February 7, 1969 granted an order granting Miller's motion for a summary judgment and dismissing Martens' complaint against Miller. It also ordered that Miller's name be stricken from the caption of the case (R. 547).



The sum and substance of the preceding facts are that the final agreement between the parties was made as stated between Martens and Lindsay Warehouse, although Martens in his law suit sued both Miller individually, and Lindsay Warehouse. The District Court on February 7, 1969, found and ordered that Miller, individually, had no liability to Martens for the unpaid balance for the purchase of S & E, and dismissed Martens complaint against Miller.

The Commission clearly recognizes that this evidence was indeed probative as to who was the actual purchaser of S & E as set forth on page 1 of the Commission's denial for the Motion for Review, but side-steps it in favor of another issue (R. 561).

We submit that the Commission should have allowed re-opening of the record to allow in the new evidence, but instead it ignored the offered evidence in favor of its initial award, which now stands in clear contradiction to the facts as to who was the actual purchaser.

Granted, the Commission has discretion as whether or not to reopen the case, but such discretion must be used so as not to be arbitrarily applied as we believe it was in this case. This Court has specifically forbidden such arbitrary use of discretion in *Murphy vs. Grand City*, 1 Ut.2d 412, 268 P.2d 677 (1954).

The plaintiff argues that this new evidence, if considered by the Commission, would have compelled

a different result, and we submit that it was an abuse of discretion to not consider it. As set forth in *Min. vs. Industrial Commission*, 113 Ut.88, 202 P.2d 67 (1949), the Court indicated that where additional evidence would not compel a contrary finding, there is no abuse of discretion not to reopen. By a parity of reasoning then, we submit that where the additional evidence would compel a contrary finding, it would be an abuse of discretion not to reopen.

This Court has specifically authorized administrative bodies to reopen a case for consideration, "When new evidence is available, or new issues have arisen, power of the commission to reconsider the case is not curtailed." *United Air Lines Transport Corporation vs. Industrial Commission of Utah*, 110 Ut. 590, 175 P.2d 752 (1946), at 754. It is to be strongly argued, therefore, that a contrary result would indeed have been the result had the record been reopened. It is the plaintiff's contention that Commission acted in excess of its powers when it refused to reopen the case and denied the petition for rehearing.

As stated previously, the Commission acknowledges that this newly adduced information could materially affect the basic issue in this case when it stated:

"However, it is the commission's opinion that even if the S & E operation was in fact purchased by Lindsay Warehouse Company (as evidenced by the agreement attached to the motion for review), coverage of S & E Distributing Company

was not applied for nor extended to said employees." (R. 561).

It can thus be seen that the Commission came as close as possible to an outright admission that the District Court proceeding was conclusive as to who was the purchaser of the business, but unfortunately negates this proposition for an issue which we believe has been adequately met and answered in Point I, and could have been so resolved at a rehearing.

There is little doubt that the Industrial Commission could have taken "judicial notice" of the District Court proceeding. In 2 Am Jur 2d, Administrative Law, Section 385, it states:

"Just as Courts take judicial notice of certain matters in proceedings before them, administrative agencies may take judicial or 'official' notice. Ordinarily, an administrative agency may appropriately act in a proceeding of an adjudicatory nature upon the record presented, *and such matters as may properly receive its attention through official notice.*"

The United States Supreme Court in *United States vs. Pierce Auto Freight Lines*, 327 U.S. 515, 90 L.Ed. 821, 66 S.Ct. 687 (1945), held that administrative agencies are not pinned to the record any more than are the Courts.

Utah cases indicate that judicial notice can be taken by administrative bodies. In the case of *Spencer vs. the Industrial Commission*, 81 Ut. 511, 20 P.2d 618

(1933), the Court indicated that the Industrial Commission may take judicial notice of other cases, so long as it gives the other party an opportunity to meet it and it is made part of the record. In *Putnam vs. The Industrial Commission*, 80 Ut. 187, 14 P.2d 973 (1932) it was held that the Commission's notice of actions in a different cause and between different parties was improper and would be excluded on review because it could not be put into evidence without consent as primary facts testified to in the different case. Both of these cases indicate that if properly put into the record with notice to the other party such such notice is being taken of the prior proceeding, then judicial notice will indeed be proper.

The District Court proceeding not only was probative of the identity of corporate entites and parties, but was between persons who were parties to the applicant's claim before the Commission. Reason and equity demanded that the case should have been reopened and that the Commission take notice of the District Court's proceedings to better achieve the ends of justice. Had the case been reopened, each party would have had an opportunity to submit proofs and to otherwise contest the introduction of the District Court proceeding as evidenced before the Commission.

### POINT III

THE INDUSTRIAL COMMISSION'S FINDING OF NON-COVERAGE AS TO MELVIN M. MILLER, AS AN INDIVIDUAL, WAS CONTRARY TO THE FACTS AND INSUFFICIENT TO SUPPORT THE AWARD.

The plaintiff has attempted to show thus far in his Brief, that the Industrial Commission was in error when it assessed liability against Melvin Miller as a result of alleged non-coverage by the State Insurance Fund. He has attempted to illustrate that the policy and scope of the State Insurance Fund and Workmen's Compensation laws favor a very liberal construction of said laws so as to afford coverage to every employee and to cover the employer's entire liability to all of his employees. It has also been argued that the Industrial Commission was in error when it denied a motion for review and refused to reopen the case for further consideration to allow additional evidence. If, as the case may be, this Honorable Court finds the prior arguments unpersuasive we believe, in the alternative, that the following argument justifies setting aside the Industrial Commission's award.

Much of the arguments and evidence at the hearing was presented by Miller to show that Lindsey Warehouse was indeed the purchaser of the business, and not Miller as an individual. The Hearing Examiner, however, felt the evidence that Miller purchased the

business as an individual outweighed the evidence to the contrary. In fact, the examiner put the issue rather strongly:

“The conclusion is rather clear that Miller, acting as an individual, became the employer and no relationship extended to the corporation . . . there is no probative evidence to make a finding that Lindsey Warehouse Company was the employer. There is substantial evidence to find that Melvin M. Miller, an individual, doing business as S & E Distributing Company was the employer.” (R. 514).

If this is so, and the Hearing Examiner unequivocally states that it is, we find a major inconsistency between the facts and the Award.

The evidence is undisputed that policy #3L-372 with the State Insurance Fund was in effect covering Miller as an individual doing business as Lindsay Warehouse at the time of the fatal accident. The record clearly indicates that the policy was an “individual” policy designation, and remained such until September 13, 1966, approximately one month after the fatal accident (R. 450).

The Examiner found that

“The Defendant State Insurance Fund had a compensation policy covering Lindsey Warehouse Company, Inc. on this same date (Aug. 5, 1966). *The endorsement covering the corporation name (Lindsey Warehouse) was received after the accident but the State Insurance Fund*

*has not raised that issue.*" (R. 514) (emphasis added)

Of course The Fund has not raised the issue because this issue is dispositive of the whole matter and fatal to its case. So what if The Fund has not raised this issue? The Fund is not acting for Miller and the Corporation, but the Fund, unfortunately, is the chief adversary of Miller in these proceedings. It is not for The Fund to decide which is or is not probative and important evidence but this is a job for the investigatory powers of the Commission. Such a summary disposition of an important issue cannot be counseled in the most liberal interpretation of administrative processes: "The Commission must not single out some portion of the evidence and give it undue weight to the exclusion of other evidence of equal importance." *Diaz vs. Industrial Commission*, 80 Ut. 77, 13 P.2d 307 (1932).

In January of 1966 the State Insurance Fund received the employers payroll and premium report for the preceding six months, which indicated that the policy was now covering an employer whose status was designated as a corporation (R. 142). The policy, however, remained in the name of Mel Miller as an individual until September of 1966 as previously mentioned. The Fund may argue that inasmuch as Miller gave notice that the policy should be designated as covering a corporation, that he should be estopped from asserting that there was coverage to him as an individual at the time of the accident. It is a general rule of law that

insurance contracts should be construed most strongly against the insurer rather than the insured. As stated in 43 Am Jur 2d, Insurance, Section 271

“The general rule applicable to contracts generally, that a written agreement should, in the case of doubt as to the meaning thereof, be interpreted as against the party who has drawn it, it is very frequently applied to policies of insurance and constitutes an important rule of construction in such respect, in view of the fact that ordinarily, and in practically all cases, it is the insurer who furnishes or prepares the policies used to embody the insurance contracts.”

Because of the special status of the State Insurance Fund, and the unique position of the employee beneficiary under such a policy of insurance, it is submitted that the State Insurance Fund should indeed be liable for this claim and estopped from denying such liability by reason of the fact that policy remained in the name of Miller as an individual. This Court has held that the State Insurance Fund does not occupy a more favorable position than does an insurance company or a self-insuring employee. See *Woldberg vs. The Industrial Commission*, 74 Ut. 309, 279 P 609 (1929). It seems quite clear, then, that the policy coverage should be construed most favorably to the insured, and afford coverage to any business that Miller engaged in as an individual proprietor.

The question then becomes, if on the date of the accident The Fund's policy provided coverage to Miller,



an individual, as an insured, it is entirely inconsistent for the award to contain a finding of non-coverage as to the claim of the claimant. If, as the Examiner finds, Miller acquired S & E as an individual, in his own right, and if the policy was in the name of Miller as an individual, affording coverage to any business activity in which he was engaged at the time as an individual proprietor, it is unmistakably clear that S & E employees would then be covered under Miller's existing policy with the State Insurance Fund. Any other conclusion from the established and undisputed facts would be contrary to logic and reasoning. However, the Commission has seen fit to disregard these clear and undisputed facts and has assessed personal liability against Miller because it found that there was no insurance in existence for the employees of S & E.

The Commission's Findings of Fact, Conclusions of Law and Award are in clear contradiction of the facts. In view of the foregoing it is clear that there is no "substantial evidence" upon which the Commission could find that Miller was not covered by insurance, and its award to that effect must be set aside.

## CONCLUSION

The implications of this proceeding are, by any measure, more far-reaching than the mere correcting of an erroneous award against an innocent party. They give this Honorable Court a unique opportunity to

clearly define the nature and extent of the responsibility of the State Insurance Fund to the working people of Utah.

As demonstrated by the foregoing arguments, the State Insurance Fund is much more than an ordinary insurance carrier, and as such has a unique and specific duty to the beneficiary of its coverage. The employee as beneficiary stands in the position of having a vested right, and should not be denied speedy and adequate compensation when a policy of insurance exists with the State Insurance Fund from which compensation could be had.

As has been demonstrated, the Utah Courts have traditionally looked upon this type of problem with great liberality, going to great lengths to find that an employee was indeed covered by the policy of insurance. There is no justification for releasing the State Insurance Fund from its intended purposes. The weight of legislative intent requires it, and public policy demands it. The Industrial Commission and The Fund should be compelled to act in accordance with the spirit and purpose of the Workmens Compensation Act.

The foregoing arguments should also amply illustrate that the Industrial Commission has acted in disregard of undisputed facts. The evidence clearly indicated that at the time of the initial award that the plaintiff, Melvin M. Miller, was covered by an insurance policy with the State Insurance Fund. No search-

ing investigation was necessary, the facts were there—readily available, easily discernable.

The Commission was also given an opportunity to correct its erroneous award when the defendant filed his Motion for Review. Denial of this motion constituted an abuse of discretion on the part of the Commission, which discretion was exercised in an arbitrary and capricious manner.

This plaintiff recognizes that the claimant is legitimately entitled to compensation, not by any wrong perpetrated by the plaintiff himself, but by reason of the Workmens Compensation Act. Hardship has been imposed upon both parties long enough. The award of the Commission should be set aside and remanded with directions to award claimant compensation by reason of coverage through the State Insurance Fund.

Respectfully submitted,

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Attorney for Plaintiffs

I hereby certify that I mailed a true and correct copy of the foregoing this ..... day of December, 1900, to Robert D. Moore, Attorney at Law, Judge Building, Salt Lake City, Utah; to Jack L. Schoenhals, Attorney at Law, Kearns Building, Salt Lake City, Utah; to F. E. Martens, 3635 Millcreek Road, Salt Lake City, Utah; and to the Industrial Commission of Utah, State Capitol Building, Salt Lake City, Utah.

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WAYNE C. DURHAM