

2004

# Vivian Jensen (Widow of Henning Sven Jensen) v. Utah Labor Commission; Diamond Express LLC and Truck Insurance Exchange : Reply Brief

Utah Court of Appeals

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VIVIAN JENSEN (WIDOW OF  
HENNING SVEN JENSEN)

**VS.**

### Respondents.

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Agency Case No. 2003489

# Petition for Review of Order and Decision of Utah Labor Commission

Attorney for Utah Labor Commission

Attorney for Petitioner Vivian Jensen

FILED  
UTAH APPELLATE COURTS  
JAN 10 2005

VIVIAN JENSEN (WIDOW OF  
HENNING SVEN JENSEN)

VS.

Respondents.

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Agency Case No. 2003489

# Petition for Review of Order and Decision of Utah Labor Commission

Attorney for Utah Labor Commission

Attorney for Petitioner Vivian Jensen

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## **STATEMENT OF JURISDICTION**

The parties agree that this Court has jurisdiction. See Utah Code Ann. § 34A-2-801, § 63-46(b)-16, § 78-2a-3(2)(a); Union Pacific RR Co. v. Utah State Tax Commission, 2000 UT 40, ¶ 24, 999 P.2d 17.

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

There is no significant disagreement in the statement of issues 1 and 2: In short, was the dismissal of Vivian Jensen's death claim before the Labor Commission improper for nonconstitutional reasons, or alternatively, for constitutional reasons?

The employer Diamond Express and the carrier Truck Insurance Exchange contend, in argument but not as part of their statement of the issues, that the merits of Mrs. Jensen's right to death benefits under workers' compensation, issue 3 presented by Mrs. Jensen, should not be addressed based on their assumption that they are right on issues 1 and 2 and a claim that Mrs. Jensen is "procedurally inappropriate." See Respondents' Brief at 29-30. Accordingly, Mrs. Jensen has also responded to the argument of the employer and carrier in her argument.

## **SIGNIFICANT PROVISIONS OF LAW**

The employer and carrier quote subsections of Utah Code Ann. § 34A-2-407(5)(b) & (6) (Supp. 2004) that were enacted after the version of the statute (2001) that applies to this case. Although the statement of the employer and carrier that the later version of the statute (Utah Code Ann. § 34A-2-407(5)(b) & (6) (Supp. 2004)) is "determinative in this appeal," Respondents' Brief at 2, is inaccurate, the reasons for recognizing rights of Mrs.

Jensen derived through Mr. Jensen under Utah Code Ann. § 34-2-407(5) (2001) apply with equal force under Utah Code Ann. § 34A-2-407(6) (Supp. 2004).

Other provisions quoted by Mrs. Jensen but not quoted by the employer and carrier are important for the reasons presented in her briefs.

### **STATEMENT OF THE CASE**

The employer's and carrier's statement of the case neither disputes Mrs. Jensen's statement of the case nor adds anything of significance to it. The employer and carrier also offer no statement of facts separate from their statement of the case and do not dispute Mrs. Jensen's statement of facts.

The employer and carrier depart slightly from the record in stating that the attorneys, who had undertaken to represent Mrs. Jensen related to her workers' compensation claim and other possible claims, Record at 51 (¶ 8), notified Mrs. Jensen in "[a]n October 31, 2002 . . . that they had decided not to continue representing her with respect to her claims." Respondents' Brief at 4. The record actually reflects Mrs. Jensen's statement that she was notified by an October 31, 2002 letter that the attorneys "had decided not to proceed with my case." Record at 51 (¶ 9). The former attorneys could view the difference between the singular "case" and the plural "claims" as significant if the attorneys, for example, intended statements about the singular "case" not to include her workers' compensation claim. The employer and the carrier depart even further from the record in later statements to the effect that "[u]nfortunately, the petitioner's counsel did not provide her with accurate advice regarding her claim" and "petitioner relied upon her counsel's representation that she had

two years after the industrial incident to file an Application for Hearing.” Respondents’ Brief at 31-32. Nothing in the record establishes the actual advice given to Mrs. Jensen, let alone whether it was inaccurate. The record does not reflect that Mrs. Jensen’s counsel told her anything about her obligations with respect to “the industrial incident” or anything at all about any “Application for Hearing” and in fact suggests the contrary in that “prior to filing her application for benefits, Mrs. Jensen knew nothing about how worker’s compensation worked and was unaware of her related rights and responsibilities and applicable legal standards, including . . . her right or need to file an application for hearing . . . .” Record at 36 (¶ 18); 52 (¶ 12).

### **SUMMARY OF ARGUMENT**

This is a case in which relatively sophisticated parties have been permitted to benefit from a double standard that inordinately penalizes Mrs. Jensen for a small, harmless, and understandable lapse despite the fact that their own misconduct, including violations of workers’ compensation statutes and rules, was essential to her failure to file her claim for benefits within one year. Based on the undisputed facts relating to the accident, including all facts presented by the employer and carrier in connection with their obligations to report and investigate, the employer and carrier were obligated by rule to pay workers’ compensation to Mrs. Jensen without her need for filing a claim. Under established Utah law, this case presents a wrong that should be righted without further delay.

The employer’s and carrier’s attacks on Mrs. Jensen and her former attorneys, who were not representing her at the time of the one-year anniversary of Mr. Jensen’s death,



provide no justification for their violations of Mrs. Jensen's rights or amelioration of the harm that she has suffered because of them. The employer and carrier was required to do far more than send the deficient denial letter that was provided to Mrs. Jensen, and Mrs. Jensen's claim would not have been late without those failures.

Mrs. Jensen's claim should be permitted due to the employer and carrier's failures, particularly in order to avoid the serious constitutional questions raised by the harsh one-year limitation for workers' compensation death claims, inordinately more stringent than required for other workers' compensation claims and wrongful death claims. In the alternative, the governmental interest claimed by the employer and carrier for such a short limitation does not exist.

The response of the employer and carrier does not present any reason for further delay. Workers' compensation benefits should be awarded to Mrs. Jensen due to the death of her husband on the job.

## **ARGUMENT**

### **I**

#### **THE EMPLOYER/CARRIER BREACHED THEIR DUTIES TO VIVIAN JENSEN SUCH THAT THEY SHOULD NOT BE PERMITTED TO RELY ON THE SHORT DELAY IN THE FILING OF HER CLAIM TO BAR IT**

The employer and carrier begin with the end of the story, which is that Mrs. Jensen filed her death claim with the Labor Commission slightly over one year after her husband's death. However, there is nothing "new" or "drastic" or "unprecedented," see Respondents' Brief at 8, 12, about Mrs. Jensen's argument that the employer and carrier should be held

responsible for their own misconduct and failures that led to the short delay in filing of her claim. Utah law has for decades recognized, not only estoppel principles generally, but specifically that “statutes of limitation . . . may be waived or the party may be estopped from relying upon them.” See Hurley v. Town of Bingham, 63 Utah 589, 592, 228 P. 213, 214 (1924), overruled by implication on other grounds, Scott v. School Board, 568 P.2d 746 (Utah 1977) (as noted in Lee v. Gaufin, 867 P.2d 572, 579 (Utah 1993)); see also 51 Am. Jur. 2d Limitation of Actions § 380 (2000) (“Because the statute of limitations is an affirmative defense, it is subject to equitable defenses such as estoppel.”).

Thus, it is important to start at the beginning: Mr. Jensen’s violent accident on January 26, 2002, Record at 5-9, and January 28, 2002 when the employer inexcusably dismissed Mr. Jensen’s death as “a heart attack” and, in violation of Utah Code Ann. § 34A-2-407(4)(a) (now 5(a)), failed to report to the Labor Commission his violent accident, Record at 56 (Occurrence section: “How injury . . . occurred, describe the sequence of events and include objects or substances that directly injured the employee . . .”).

Utah Code Ann. § 34A-2-407(5) (now (6)). In violation of Utah Code Ann. § 34A-2-407(5) (now (6)), the employer failed to provide Mrs. Jensen a copy of the report or a statement regarding workers’ compensation rights and responsibilities. E.g., Record at 34 (¶¶ 10-11). The employer and carrier note that the statutory language<sup>1</sup> refers to “the employee” but do not dispute that Mr. Jensen was an employee and that he died in an accident while driving his employer’s truck. The employer and carrier completely fail to

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<sup>1</sup>As noted above, the employer and carrier refer to the current version of the statute, which was not yet in effect at the times relevant to this case.

address critical statutory language of Utah Code Ann. § 34A-2-407(4) & (5) (2001),<sup>2</sup> particularly its requirement for providing reports of fatality to the employee and its reference to an “employee’s notification of the fatality,” which must be construed to apply to dependents of the dead employee in order to make any sense at all. See Utah Code Ann. § 34A-2-407(4)(b)(iii) & (5)(a) (2001).

The employer and carrier offer no policy reason whatsoever for depriving the employee’s dependent of a copy of the Employer’s First Report of Injury. They also claim no policy reason for refusing an employee’s dependent basic information about workers’ compensation rights and responsibilities. Death cases are especially important claims, and an employee’s dependent, who often will not have the advantage of common business experience that an employee gains through employment, is more likely to be as unsophisticated about workers’ compensation as Mrs. Jensen was. See Record at 36 (¶ 18).

The employer’s and carrier’s excuses for not providing Mrs. Jensen with a statement of rights and responsibilities are based on a circular argument. In essence, they claim the statute should not be applied to them because they would not have done well complying with it anyway. To support this, they argue that the Division’s Employee’s Guide “would be inappropriate and misleading” for Mrs. Jensen and note that it does not refer expressly to the one-year limitation of Utah Code Ann. § 34A-2-417(3).

First, although the Employee’s Guide is prepared by the Workers’ Compensation Division of the Labor Commission, the obligation to comply with Utah Code Ann. § 34A-2-

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<sup>2</sup>The applicability of these requirements to death cases is preserved in Utah Code Ann. § 34A-2-407(5) & (6) (Supp. 2004).

407(5) (now (6)) fell on the employer. As the employer claims to have done nothing to address deficiencies it suggests exist in the exposition of “rights and responsibilities” in the Division’s Employee’s Guide,<sup>3</sup> it should be estopped from relying on the one-year provision of Utah Code Ann. § 34A-2-417(3) because there is no more important responsibility for a workers’ compensation claimant to know than a deadline for taking action and there is no better way to give substance to rights under Utah Code Ann. § 34A-2-407(5)(b). In particular, notice in the Employee’s Guide of the one-year limitation for death claims should be required because the time allowed is so short.

Second, the Employee’s Guide to Workers’ Compensation specifically addresses burial and dependent benefits applicable in case of death claims and provides abundant general information applicable to them. Record at 69, 71 (Q 9 & Q 18); see generally Record at 34-35, 67-75. The assertion that “it would be inappropriate and misleading for the employer/carrier to provide the non-employee petitioner with such a document,” Respondents’ Brief at 10, is not supported by a single reference to anything in the Employee’s Guide, Record at 67-75, that would be inappropriate or misleading for a dependent of an employee to know.<sup>4</sup> On the contrary, even without any express reference to the one-year limitation of Utah Code Ann. § 34A-2-417(3), the Employee’s Guide

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<sup>3</sup>For example, Utah Code Ann. § 63-46a-12(1) provides: “An interested person may petition an agency requesting the making, amendment, or repeal of a rule.”

<sup>4</sup>In fact, dependents of an employee who survived injuries for some time before dying may need to deal with both types of claims. Contrary to the employer’s and carrier’s assertion at pages 13 and 14 of their brief, the Labor Commission did not take “the position . . . that the guide is intended only for employees and not for dependents of a deceased worker.” See Record at 110.

included information that would have led Mrs. Jensen to file her claim within one year and saved her from other costs, inconvenience, delay, and heartache that she is suffering due to the employer's violation of rights she derived from Mr. Jensen's employee status. See, e.g., Petitioner's Brief at 22-24. The record is contrary to the employer's and carrier's weak assertion that "it is quite likely that she would have still retained her attorney and reached the same result" even if Mrs. Jensen had received all of the information in the Employee's Guide. E.g., Record at 36 (¶¶ 19-20).

In addition, reliance is presumed in the case of such a material omission. See Miller v. Celebration Mining Co., 2001 UT 64, ¶¶ 12-15, 29 P.3d 1231 (failure to disclose that entity had been administratively dissolved).<sup>5</sup> One is not permitted to deprive another of important information and then avoid responsibility based on pure speculation, which is wholly unsupported by the record in this case, that the information would not have mattered. Id. at ¶¶ 14-15. The principle of "presumed reliance" was recognized in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972):

Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. . . . This obligation to

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<sup>5</sup>Mrs. Jensen's position is even stronger than in Miller because in Miller the party that presumably would have relied on accurate information (i.e., that a corporation had been administratively dissolved) had it been provided was another corporation represented by its chairman in the relatively sophisticated business transaction at issue. See Miller, 2001 UT 64 at ¶ 1. Such a party might have been expected to utilize readily available public information (available in Utah on the internet) to determine corporate status. In contrast, the Utah Workers' Compensation Act in Utah Code Ann. § 34A-2-407(5)(b) mandates provision of a statement of rights and responsibilities because of the clear expectation that some parties, like Mrs. Jensen was, will be in vital need of it.

disclose and this withholding of a material fact establish the requisite element of causation in fact.

Id. at 153-54. “This presumption recognizes the unique difficulty of proving reliance on a failure to disclose material information of which a plaintiff did not know.” See Grubb v. Federal Deposit Insurance Corp., 868 F.2d 1151, 1163 (10<sup>th</sup> Cir. 1989) (citing Holdsworth v. Strong, 545 F.2d 687, 695 (10<sup>th</sup> Cir. 1976) (en banc), cert. denied, 430 U.S. 955 (1977)). Thus, the Labor Commission erred as a matter of law in concluding that it could not “attribute Mrs. Jensen’s failure to timely file her Application to Truck Insurance Exchange.” Record at 110. In fact, the employer’s and carrier’s unsupported argument that it is “quite likely” Mrs. Jensen would have done the same things implicitly concedes that, consistent with the above-quoted language of Affiliated Ute, “a reasonable [workers’ compensation claimant] might have considered the [information withheld] important in the making of [these] decisions.” The Court need look no further than this to award Mrs. Jensen the minimal consideration a few months grace in the time for filing her claim.

Form 89. The carrier denied Mrs. Jensen’s claim not only without use of Form 89, but without using a form that provided reasonably equivalent information. The employer and carrier do not dispute that Form 89 provided substantial and important information that their denial letter did not. Nevertheless, they argue that Form 89 is not required. It is. See Petitioner’s Brief at 26-29. In the context of the rule, Utah Admin. Code Ann. R612-1-3, “is”<sup>6</sup> and “must” are synonymous and stand in contrast to the permissive “may be used”

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<sup>6</sup>Even judged by the standard used by former President Clinton, who is paraphrased as observing that “it depends on what the meaning of ‘is’ is,” the employer and carrier stretch the definition of “is” beyond its breaking point by arguing in effect

language in subsection R and the equivalent alternative form permitted in subsection F relating to Form 441 but not subsection E relating to Form 89. The style convention in the subsections of the rule generally uses the initial mandatory direction that "this form is used" in the first sentence and then follows with the phrase "must be" in the second sentence if there is an additional requirement relating to how the form is, not "used," but "filed," see Forms 122 (B.), 141 (D.), 142 (G.), 001 (H.), 025 (I.), 130 (J.), or "accompanied," Forms 043 (O.), 044 (N.). Thus, in almost every case that the employer and carrier concede that the form "**must** be used," see Respondents' Brief at 9 (original emphasis), the same "is used" language appears in the rule. For example, subsection A similarly notes that Form 122 (which defendants admit "**must** be used," see Respondents' Brief at 9 (original emphasis)) "is used" and then adds that "[t]his form must be filed within seven days of the occurrence of the alleged industrial accident or the employer's first knowledge or notification of the same." According to R612-1-3(V), carriers have only two options: (1) use the official form, or (2) use an approved version. ("V. The division may approve change of any of the above forms upon public notice.<sup>[7]</sup> Carriers may print these forms or approved versions.") The employer and carrier are wrong in asserting that "[i]t would be inappropriate for this Court to make a determination with respect to which forms created by the Labor Commission must be used," Respondents' Brief at 10, because the Labor Commission itself has specified use of the forms by rule and any unwritten past practice by which "the Industrial Accidents

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that "is" means "is not" if it is the carrier's whim not to use the established form.

<sup>7</sup>The public notice requirement is consistent with rule-making requirements of Utah Code Ann. § 63-46a-5 & -6.

Division has permitted use of other written forms of denial," Record at 110, other than in compliance with R612-1-3(V) is invalid and cannot be used to destroy Mrs. Jensen's rights without a valid change in the rules in compliance with law. See, e.g., Lane v. Board of Review, 727 P.2d 206, 208 (Utah 1996) ("proposed rule cannot be applied" as "rules of an administrative agency are not valid unless the agency complies with the rule-making procedures prescribed in the Rule Making Act"); C.P. v. Utah Office of Crime Victims' Reparations, 966 P.2d 1226, 1229-31 (Utah Ct. App. 1998) (unwritten "policy impermissibly circumvented the Administrative Rulemaking Act's requirements and cannot be used to bar" recovery), cert. denied, 982 P.2d 88 (Utah 1999). Because defendants do not claim approval of their form for denial deleting information required by Form 89, their denial of Mrs. Jensen's claim without providing her the important information contained in it violated her rights under the rules.

Case authority. The distinctions that the employer and carrier seek to draw between this case and only some<sup>8</sup> of the similar cases in which workers' compensation claimants have been permitted to pursue their claims are inconsequential. Fowler v. Titus Manufacturing Co., 734 P.2d 1309 (Okla. App. 1986) and Reynolds v. Workmen's Compensation Appeals Board, 117 Cal. Rptr. 79, 527 P.2d 631, 632-33 (1974) are in point because the rules applied

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<sup>8</sup>In particular, the employer and carrier fail to address these authorities that support Mrs. Jensen: Harris v. District of Columbia Department of Employment Services, 592 A.2d 1014, 1016-19 (D.C. 1991) (later vacated based on stipulation that claim was timely); Denny's Restaurant v. Bell, 659 So. 2d 1374, 1374-75 (Fla. Ct. App. 1995) (claim of untimeliness barred by failure of employer/carrier to provide required disclosure); McGregor v. PIP Johnson Construction Co., 721 S.W.2d 708, 709-710 (Ky. 1987); Gulf Casualty Co. v. Hughes, 230 S.W.2d 293, 296-97 (Tex. Civ. App. 1950). See Petitioner's Brief at 18.



in those cases are no different than the law applicable in Utah under the combined authority of statutory provisions, rules, and established common law principles relating to estoppel. The claim that Fowler, Reynolds, and van der Heyde v. First Colony Insurance Co., 845 P.2d 275, 278-80 (Utah Ct. App. 1993) should not apply because the employer and carrier "complied with the relevant rules and statutes by sending to the petitioner a timely denial of the claim in writing," Respondents' Brief at 13, ignores the many failures of the employer and carrier. The employer and carrier had more obligations than merely sending "a timely denial of the claim in writing." See Petitioner's Brief at 16-30. Because the denial itself was deficient according to the standards of the rules in form (no notice equivalent to Form 89), substance (no valid reason for denial and deficient investigation), and time and procedure (no further-investigation notice, no denial filed with the division), see Petitioner's Brief at 11-13, 26-30, the employer and carrier did not meet preconditions to nonpayment of the claim, see R612-1-7.A ("begin payment of compensation within 21 days . . . or send the claimant and the division written notice . . . that further investigation is needed stating the reason(s) for further investigation"; "commence the payment of benefits or notify the claimant and division in writing that the claim is denied and the reason(s) why the claim is being denied").

The employer and carrier note that in Interstate Electric Co. v. Industrial Commission, 591 P.2d 436, 438 (Utah 1979) "the employee reported the incident within three days of the date of the incident" in contrast to Mrs. Jensen who "failed to file her claim for more than one year and three months." Respondents' Brief at 14. However, comparing report to

report, the Mr. Jensen's employer learned of the incident on the same day Mr. Jensen died. Record at 56. Further, comparing the time periods in proportion to each other, i.e. allowing 50 percent more time (three days instead of two) in Interstate Electric versus allowing 27 percent more time to Mrs. Jensen (one year and 99 days instead of one year), Mrs. Jensen has the stronger case. Finally, in Interstate Electric, the court determined that lateness based on reasonable excuse should be permitted even absent any claim of fault on the part of the employer. Mrs. Jensen has not only presented reasonable excuse, but further shown how the conduct of the employer and carrier led to filing of her claim after one year. See Record at 51-52.

The "intentions" red herring. The employer and carrier, fighting to hold on to money that should have been paid to Mrs. Jensen because of blood shed by her husband as he met his end with his head crushed and pinned to the ground under his truck, indignantly argue that any questioning of their "intentions" is "unfounded," "outrageous," and "offensive." "Intentions" are not the issue. The issue is the unfairness of punishing Mrs. Jensen for slight lateness in the face of more egregious failures of the employer and carrier. As a matter of academics, even in the face of "protestations of blamelessness,"<sup>9</sup> the huge chasm between what the employer and carrier did as established in the record and what one should expect from anyone in their position not wholly indifferent to their responsibilities and how important this matter was and is to Mrs. Jensen is the very sort of discrepancy that creates

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<sup>9</sup>The protestations of the employer and carrier in this matter are pure argument for which they did not provide any support in the record by affidavit of any of their representatives.

issues of fact relating to intention and degree of reprehensibility when such issues are presented by the legal claims involved. See, e.g., Campbell v. State Farm Mutual Automobile Insurance Co., 2004 UT 34, ¶¶ 21-36, 98 P.3d 409, cert. denied, \_\_\_ U.S. \_\_\_, 125 S. Ct. 114 (2004).

The employer and carrier in particular take issue with "petitioner's allegation regarding a motive of the respondents not to preserve evidence" and argue that this should be disregarded because "the cremation occurred before the employer was even required to notify the carrier of the incident," which notice they claim was required "[p]ursuant to Utah Code Ann. § 34A-2-407(5)(b)." Respondents' Brief at 18. However, aside from the fact that the statute relates to a report, not to the carrier, but to the division within seven days (with a copy to the employee that the employer failed to provide), see -407(4)(b) (now (5)(b)) and -407(5)(a) (now (6)(a)), the employer in this case actually prepared the report only two days after Mr. Jensen's death, Record at 56, which was three days before Mr. Jensen's body was cremated, Record at 51. At the time that the employer prepared the First Report of Injury, it had the opportunity to have an autopsy done in order to allow it to provide accurate and reliable information to the Labor Commission as required by law. See Utah Code Ann. § 34A-2-407(4)(b) & -603. Instead, the employer failed to "describe the sequence of events and include objects . . . that directly injured the employee," Record at 56 ("Occurrence"), despite the fact that the police report showed that he had indeed suffered an accident that left his head crushed and pinned under the heavily-loaded vehicle and the highway patrol had said he "was partially ejected and crushed, his death the result of those

injuries and not the heart attack." Record at 4-9. Although the employer and carrier claim that "all of the evidence as contained in the police report and coroner's report demonstrated that Mr. Jensen died of a heart attack," Respondents' Brief at 18, unlike the trauma suffered by Mr. Jensen in being crushed in the accident, which the later-arriving witnesses could observe first hand, the police report and death certificate, Record at 2, reflect no evidentiary foundation whatsoever for the "heart-attack" conclusions, no evidence whatsoever that any "heart attack" occurred before the accident, and, most important, nothing whatsoever to suggest that, "heart attack" or not, Mr. Jensen's death was anything other than a result of the strains of his employment (including navigating bad weather in the course of a long trip) and the accident he suffered. See Workers' Compensation Fund v. Industrial Commission, 761 P.2d 572, 574-75 (Utah Ct. App. 1988). We can never know exactly what was going through the minds of the representatives of the employer and carrier. We do know that they did not take reasonable steps to get it right, that indeed they used the invalid "heart-attack" excuse as the basis for their denial of benefits despite the fact that heart attacks are compensable, and that they now seek to defend their receipt of a windfall arising out of these and other failures.

Whatever the subjective "intentions" of the corporate employer and carrier, their financial interests conflicted with Mrs. Jensen's. Their conduct, viewed objectively in terms of what they did and what they failed to do, all as unambiguously reflected in the record, is decidedly, as Mrs. Jensen argued in her opening brief at 26, "consistent with an intent fueled by self-interest to avoid her right to benefits." In other words, "[i]n terms of their self-

interest, it is better for them to have an answer that they might be able to pass off to the unsophisticated widow as an excuse for not paying than it is to have the answer that is right." Petitioner's Brief at 36. As "any determination of reprehensibility inevitably implicates moral judgments and is therefore susceptible to an arbitrary, inexplicable, and disproportionate outcome," see Campbell, 2004 UT 34 at ¶ 22, there is wisdom in the workers' compensation system battling these problems systemically by placing responsibilities on all employers and carriers to provide protections to claimants. Whether or not the employer or carrier intended to take advantage of Mrs. Jensen, they have nothing to be proud of and are in no position to fault Mrs. Jensen. Mrs. Jensen should be permitted to pursue her claim because she suffered the harm of the employer's and carrier's violations of her rights regardless of whether the violations were due to oversight, neglect, gross incompetence, avarice, or ill will, especially given the difficulty of reliably distinguishing one from the other in the circumstances of a case like this. See Miller v. Celebration Mining Co., 2001 UT 64, ¶ 13, 29 P.3d 1231 (remedy for failure to disclose regardless of intention).

Vigos v. Mountainland Builders, Inc. The employer and carrier are correct in noting that Vigos v. Mountainland Builders, Inc., 2000 UT 2, 993 P.2d 207 involved initial payment of a claim while in this case they did not pay (despite their investigation and denial showing no basis for not paying). However, two important legal principles recognized in Vigos provide further support for Mrs. Jensen's claim. First, Vigos, particularly the concurrence of Justice Russon, points out the important roles demanded of the employer and carrier in the workers' compensation scheme before any claim is necessary by the employee.

Thus, there is far less reason for strict application of time limits in the face of reasonable excuse in workers' compensation cases. See also Interstate Electric Co. v. Industrial Commission, 591 P.2d 436, 438 (Utah 1979). That is especially true in this case in which the employer and carrier failed to fulfill their duties as required by law prior to Mrs. Jensen's filing of her claim. Second, based on the overarching purpose of the workers' compensation scheme, Vigos implied a reasonable exception (prior payment of part of the claim) to the express requirement of the statute, i.e. that an application for hearing had to be filed within a certain time. Based on those legal principles, found not only in Vigos but also in other cases more similar factually to this case, see Petitioner's Brief at 16-19, Mrs. Jensen's claim should be considered on its merits. Vigos itself disproves the assertion, see Respondents' Brief at 20, that the "only exception to the one year statute of limitation is the tolling of the statute during the period of minority of minor dependents of the deceased worker." In addition, the judicial recognition of the "minority exception" only a few months ago in Bonneville Asphalt v. Labor Commission, 2004 UT App 137, 91 P.3d 849 further supports Mrs. Jensen as the court observed:

Our interpretation also comports with the policy of liberally interpreting the Act. "The purpose of the Act is to provide relief from industrial accidents. To that end, we construe the Act liberally and in favor of coverage if the statutes reasonably permit." Vigos v. Mountainland Builders, Inc., 2000 UT 2, ¶ 24, 993 P.2d 207 (citation omitted).

2004 UT App 137 at ¶ 9. Unquestionably, the Workers' Compensation Act permits construction in favor of coverage of Mrs. Jensen's claim. Contrary to the suggestion otherwise in Respondents' Brief at 20, the Labor Commission did not reject the principle

that an employer and carrier may be held responsible for their failures but rather concluded, in error, that it could not "attribute Mrs. Jensen's failure to timely file her Application to Truck Insurance Exchange." Record at 109-10.

Reliance on former counsel. The employer and carrier are inconsistent in their evaluation of Mrs. Jensen's claims. They dismiss any claim against them despite the record showing their failures but in stark contrast assume the validity of a potential claim against her former attorneys, who are not parties to this proceeding and have yet to be heard, despite the absence of a record outlining the conduct of the former attorneys. If Mrs. Jensen is denied justice for the wrongs of the employer and carrier, she may be left with nothing.

The employer and carrier also present a false choice in arguing that Mrs. Jensen's "quick retention of counsel demonstrates that [she] was not prejudiced by any conduct of the respondents." Respondents' Brief at 16. The record shows the opposite is true; whether or not Mrs. Jensen's former attorneys also failed her, Mrs. Jensen in fact was prejudiced by the failures of the employer and carrier. E.g. Record at 52; Petitioner's Brief at 22-27. The employer and carrier are like a driver who recklessly knocks down a stop sign and then just drives off, anxious not to be late for other business. A little while later, someone predictably is injured because of the missing sign. The driver argues that the injured person should blame the city for not replacing the sign quickly enough. Even if hurt by a later failure of the city, the person was still hurt by the failure of the reckless, preoccupied driver. Whatever else happened, Mrs. Jensen was hurt by the failures of the employer and carrier.

The employer and carrier accuse Mrs. Jensen of being "disingenuous and contrary to

her sworn affidavit," Respondents' Brief at 21-22 n.1, because she, like the employer and carrier, id., accurately notes that the record establishes only her understanding and does not establish whether her prior counsel gave incorrect advice regarding the statute of limitations for her workers' compensation claim. See Record at 51-52. The record simply does not reflect, one way or the other, that "the petitioner's prior counsel erroneously told her that she could file her claim within two years of her husband's death." See Respondents' Brief at 24. Even such a statement could be ambiguous or misunderstood because the prior attorneys were considering more than one claim on Mrs. Jensen's behalf. Record at 52. Assuming for argument that "incorrect advice" justifies transferring responsibility for workers' compensation payments from the employer and carrier regardless of their failures to her former attorneys, the Labor Commission reached that conclusion without an adequate record of what the former attorneys told Mrs. Jensen.

In addition to assuming liability on the part of the former attorneys, the employer and carrier assert that "the petitioner's remedy should be sought through a legal malpractice action against her former counsel." Respondents' Brief at 16. If pursuing the former attorneys were such a simple and certain matter, one would expect that Mrs. Jensen's former attorneys already would have taken care of her and she would have no reason to be here. Indeed, if this Court were to pronounce the former attorneys liable and, take appropriate measures to prevent inconsistent results, such as staying a final decision in this appeal to allow a reasonable opportunity for final judgment to be entered against the former attorneys, Mrs. Jensen would be at less risk that the former attorneys, like the employer and carrier



have, would deny liability and fight her claim at every step of the way—this time in the environs of civil court with its far greater expense, which may erode or prevent any claim if a valid one exists.<sup>10</sup> The same illogic employed by the employer and carrier that they did not prejudice Mrs. Jensen because her former attorneys did allows the opposite conclusion that the former attorneys did not prejudice Mrs. Jensen because the employer and carrier did. The reverse argument of the former attorneys would be stronger in the sense that the employer and carrier had the opportunity to have an autopsy and timely investigation done and should have paid the claim long before the attorneys were ever contacted. The employer and carrier also denied Mrs. Jensen the information that she would have used to obtain, for free, better assistance from the Labor Commission. Mrs. Jensen submits that the conduct of the employer and carrier does not merit their receiving, whether at her or her former attorneys' expense, the windfall of avoiding primary liability for compensation that should be paid to Mrs. Jensen. See Petitioner's Brief at 26. Alternatively, if this Court adopts the argument that Mrs. Jensen should recover only against her prior counsel, this Court should impose procedural protections to assure that she does so recover before the employer and carrier are given a final reprieve.

The two non-workers'-compensation, non-Utah cases cited by the employer and carrier stand for the proposition that the "sins" of one party's lawyer should not be visited

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<sup>10</sup>It may be advantageous to determine relative responsibility of the employer, carrier and former attorneys in a workers' compensation administrative proceeding were some basis to exist for the Labor Commission to exercise jurisdiction over the former attorneys. Were that the case, the employer and carrier still should be obligated to pay Mrs. Jensen and left to pursue any claims they may wish to assert against the former attorneys for indemnification or contribution.

upon the other party. However, Mrs. Jensen, who not represented by legal counsel at the time of the one-year anniversary of her husband's death, in contrast seeks to have the employer and carrier in this case held accountable for their own "sins," and the employer and carrier have neither claimed nor shown prejudice from the timing of Mrs. Jensen's claim. In addition, in the context of workers' compensation, courts have held that reasonable excuse for failure to file timely may be forgiven based on reliance on counsel. See State Compensation Insurance Fund v. Foulds, 167 Colo. 123, 445 P.2d 716, 718-19 (1968); Gulf Casualty Co. v. Hughes, 230 S.W.2d 293, 296-97 (Tex. Civ. App. 1950). Similarly, Utah cases have allowed consideration of claims on the merits when a failure to proceed timely was due to a party's reliance on counsel. See Olsen v. Cummings, 565 P.2d 1123, 1123-25 (Utah 1977); Stewart v. Sullivan, 29 Utah 2d 156, 506 P.2d 74, 75-76 (1973).

The charge that Mrs. Jensen was guilty of "neglect or apathy," Respondents' Brief at 31, is not only contrary to the record, see Record at 51-52, but patently unfair. Before any obligation arose on the part of Mrs. Jensen to file her claim, she was entitled to have the employer and carrier perform legal duties that would have led to timely filing of her claim. In the miasma of their failures, Mrs. Jensen acted reasonably and did her best. Record at 51-52. For the employer and carrier to violate their duties to Mrs. Jensen and then seek to profit from having done so is exactly the sort of injustice that principles of estoppel are designed to prevent. See, e.g., van der Heyde v. First Colony Insurance Co., 845 P.2d 275, 278-80 (Utah Ct. App. 1993).

## II

### **IN THE ALTERNATIVE, THE ONE-YEAR LIMITATION OF UTAH CODE ANN. § 34A-2-417(3) IS UNCONSTITUTIONAL**

This case cries out for recognition of Mrs. Jensen's claim as timely under all of the circumstances in order to avoid the serious constitutional issues presented by the radical difference between the one year allowed for death claims (Utah Code Ann. § 34A-2-417(3)), versus the six years allowed for other workers' compensation claims (Utah Code Ann. § 34A-2-417(2)) and two years allowed for other death claims (Utah Code Ann. § 78-12-28). See Bonneville Asphalt v. Labor Commission, 2004 UT App 137, ¶ 9, 91 P.3d 849 (recognition of minor dependent's workers' compensation death claim filed nearly three years after death as timely under Utah Code Ann. § 34A-2-417(3) in order to "protect[] the minor's legitimate interests and avoid[] denial of due process and equal protection") (citations omitted).

The only governmental interest claimed by the employer and carrier for the harsh treatment of workers' compensation death claims is that, supposedly, "a death claim has a definite and certain date of occurrence while other types of occupational disease and repetitive trauma claims may involve some ambiguity as to the date upon which the statutory period begins to run." Respondents' Brief at 27. That reasoning, however, confuses the span of time allowed for bringing a claim with the moment in time when the claim is considered to arise. It also confuses workers' compensation claims governed by the Utah Workers' Compensation Act, Utah Code Ann. § 34A-2-101 et seq., with occupational disease claims governed by the Utah Occupational Disease Act, Utah Code Ann. § 34A-3-

101 et seq. Finally, it does not justify the discrepancy between the limitation for workers' compensation death claims and other death claims.

Further, "legislative means [should] further the legislative objective," see Lee v. Gaufin, 867 P.2d 572, 588 (Utah 1993). Contrary to the argument of the employer and carrier, the legislature clearly does not allow employees six years to bring workers' compensation claims because it determined that much time is needed to know whether an injury has occurred. Rather, workers' compensation claims by definition typically have a "definite and certain date of occurrence" because they require injury or death "by accident arising out of and in the course of the employee's employment," Utah Code Ann. § 34A-2-401. Accordingly, the legislature mandates that employees give notice of the injury promptly, Utah Code Ann. § 34A-2-407(2), and, except in cases of hearing loss, bars claims if notice is not given within "180 days of the day on which the injury occurs," id. - 407(3)(b)(i). The legislature could easily and fairly provide an exception that took into consideration for both injury and death claims the extent of knowledge of workers' compensation claimants,<sup>11</sup> cf. id. -407(3)(b)(ii) & -506 (time for notice begins when employee has hearing loss and knows or should know it is caused by employment), but instead it specified without exception that the six-year period for an application for hearing for non-death claims begins with the accident. See id. -417(2). No rational basis or governmental interest exists for the stringent and divergent treatment of workers'

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<sup>11</sup>Death claims can also be uncertain in timing because the date of occurrence of death will not always be known to the surviving dependents, such as, for example, when the death occurs or is presumed to have occurred some time after a disappearance by the employee in the course of employment.

compensation death claims under Utah law.

### III

#### DEATH BENEFITS SHOULD BE AWARDED

The striking thing about the employer's and carrier's argument that the Court should not consider the merits of Mrs. Jensen's claim is that they do not dispute at all that the reason they gave for denial of Mrs. Jensen's claim, the mere claim that he suffered a heart attack, was not a legal basis for denying her claim. See Workers' Compensation Fund v. Industrial Commission, 761 P.2d 572, 574-75 (Utah Ct. App. 1988). The employer and carrier were required to investigate and give Mrs. Jensen their reasons for denying her claim within 45 days. Because their investigation failed to provide any legitimate basis for the denial of benefits, they should have commenced payment of benefits to Mrs. Jensen years ago. The employer and carrier present no basis for this Court to permit them at this late date to start to try to dig up new reasons for the denial to substitute for their failure to investigate the claim at the time that they were legally required to do so.

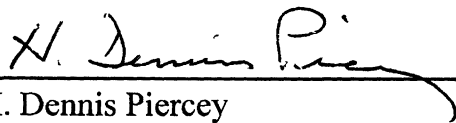
In addition, when the employer prepared the First Report of Injury, it failed to obtain the autopsy needed to reliably answer the questions that the employer was required to address under Utah Code Ann. § 34A-2-407(4)(a)(now 5(a)) and Utah Administrative Code R612-1-3.A. Mrs. Jensen's factual claims are supported fully by the record as cited in her opening brief. The only sources of information (the death certificate and police report) that the employer and carrier claimed to support the denial provide no grounds at all for the failure to pay compensation. Before the Labor Commission, Mrs. Jensen raised the issues

of the employer's and carrier's inadequate investigation, deficient denial, and her right to benefits given the absence of any evidence at all that any heart attack occurred before Mr. Jensen's violent accident. See, e.g., Record at 40-41 & n.11. The employer and carrier did not meet those points, see Record at 80-95, and have wholly failed to present any reason at all for the Court not to order payment of workers' compensation benefits to Mrs. Jensen forthwith.

### CONCLUSION

Given the failures of the employer and carrier, Mrs. Jensen was entitled to have her claim considered on the merits. On the merits, she should have been awarded workers' compensation death benefits. The dismissal of petitioner Vivian Jensen's workers' compensation death claim as untimely should be reversed, and death benefits should be ordered paid to Mrs. Jensen.

Dated: January 10, 2005.

  
\_\_\_\_\_  
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### **CERTIFICATE OF SERVICE**

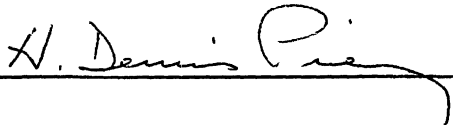
I certify that on January 10, 2005, I mailed two copies of this **REPLY BRIEF OF PETITIONER VIVIAN JENSEN** to:

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A handwritten signature in cursive script, appearing to read "H. Dennis Pien", is written over a horizontal line.