

2004

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

Utah Court of Appeals

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UTAH COURT OF APPEALS

VIVIAN JENSEN (WIDOW OF
HENNING SVEN JENSEN)

Petitioner,

vs.

UTAH LABOR COMMISSION;
DIAMOND EXPRESS LLC and
TRUCK INSURANCE EXCHANGE,

Respondents.

Appeal No. 20040372-CA

Agency Case No. 2003489

BRIEF OF PETITIONER VIVIAN JENSEN

Petition for Review of Order and Decision of Utah Labor Commission

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PARTIES

The caption contains the names of all parties before the Utah Labor Commission.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(a).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the Labor Commission err in dismissing Vivian Jensen's death claim based on the limitation period in Utah Code Ann. § 34A-2-417(3) when she filed her claim only 3 months and 9 days after the one-year anniversary of her husband's death due to the employer's and carrier's violations of her workers' compensation rights prior to expiration of the limitations period?

Standard of review. Correction of error. See, e.g., Utah Code Ann. § 63-46b-16(4); Savage Industries, Inc. v. Utah State Tax Commission, 811 P.2d 664 (Utah 1991); Bevans v. Industrial Commission, 790 P.2d 573 (Utah Ct. App. 1990); see also Miller v. Weaver, 2003 UT 12, 66 P.3d 592; Johnson v. Redevelopment, 2001 UT 67, 913 P.2d 723. This issue was preserved before the Labor Commission. See, e.g., Record at 30-59, 63-75, 99-108.

2. In the alternative, if the Labor Commission did not err in applying Utah workers' compensation law, is Vivian Jensen entitled to consideration of her death claim on the grounds that any requirement that she file the claim within one year is a violation of her rights under the Utah Constitution and the United States Constitution in that Utah workers' compensation law impermissibly and arbitrarily imposes such a short time limitation on death claims while allowing six years for filing even minimal non-death workers' compensation claims.

Standard of review. The Labor Commission left this issue for first consideration by the Court of Appeals based on Avis v. Board of Review, 837 P.2d 584, 586 (Utah Ct. App. 1992), cert. denied, 853 P.2d 897 (Utah 1993). Record at 110. Generally, correction of error applies to constitutional issues when they have been addressed below. See, e.g., Utah Code Ann. § 63-46b-16(4)(a) & (d); Grand County v. Emery County, 2002 UT 57, 57 P.3d 1148; Parks v. Utah Transit Authority, 2002 UT 55, 53 P.3d 473. In addition to the determination of the Labor Commission that this issue could be raised only in this appeal, the issue was preserved. Record at 44-48, 63-64, 106, 110.

3. Should Vivian Jensen be awarded workers' compensation benefits due to her husband's death in a violent work accident under the circumstances established in the record, particularly given the absence of any justification in the denial letter of the carrier for refusing to pay benefits?

Standard of review. Correction of error. See, e.g., Utah Code Ann. § 63-46b-16(4); Savage Industries, Inc. v. Utah State Tax Commission, 811 P.2d 664 (Utah 1991); Bevans v. Industrial Commission, 790 P.2d 573 (Utah Ct. App. 1990); see also Miller v. Weaver, 2003 UT 12, 66 P.3d 592; Johnson v. Redevelopment, 2001 UT 67, 913 P.2d 723. This issue was preserved before the Labor Commission, but the issue was not reached because of the Commission's error in dismissing Mrs. Jensen's claim as untimely. See, e.g., Record at 32, 48, 63, 106. No purpose would be served by remand to the Labor Commission because denial of benefits under the circumstances would be improper as a matter of law. See Workers' Compensation Fund v. Industrial

Commission, 761 P.2d 572 (Utah Ct. App. 1988).

SIGNIFICANT PROVISIONS OF LAW

1. Utah Code Ann. § 34A-2-407(4)-(5) (2001)¹ stated:

(4) (a) In the form prescribed by the division, each employer shall file a report with the division of any:

- (i) work-related fatality; or
- (ii) work-related injury resulting in:
 - (A) medical treatment;
 - (B) loss of consciousness;
 - (C) loss of work;
 - (D) restriction of work; or
 - (E) transfer to another job.

(b) The employer shall file the report required by Subsection (4)(a) within seven days after:

- (i) the occurrence of a fatality or injury;
- (ii) the employer's first knowledge of the fatality or injury; or
- (iii) the employee's notification of the fatality or injury.

(c)

(d)

(5) Each employer shall provide the employee with:

- (a) a copy of the report submitted to the division; and
- (b) a statement, as prepared by the division, of the employee's rights and responsibilities related to the industrial injury.

2. The Division's Employee's Guide to Workers' Compensation (Record at 67-75) states in part that workers' compensation includes burial and dependent benefits in case of death (Q 9 & Q 18) and regarding "RESOLUTION" states:

Q 31. WHAT DO I DO IF MY CLAIM IS DENIED?

A. First talk with the insurance carrier or self-insured employer to find out why

¹Utah Code Ann. § 34A-2-407 was amended in 2003. At the time of the accident in January 2002, the obligations to provide a copy of the employer's report of injury and a statement of employee rights and responsibilities were in subsection (5) rather than, as now, in subsection (6).

your claim has been denied. If they lack information required to accept a claim, you can obtain the missing information and resubmit the claim. If this is unsuccessful, call the Division of Industrial Accidents with the Labor Commission at 530-6800 or toll free (800) 530-5090. The staff may be able to assist you with your claim or possibly file an application for hearing.

CLAIMS RESOLUTION CONFERENCE

The Utah Labor Commission now offers a program to resolve disputes that exist between the parties of a workers' compensation claim. Using Alternative Dispute Resolution (ADR) the parties agree to meet, and with the help of a neutral person, develop solutions, which resolve the issue(s) and mutually benefit both parties. If you are interested in requesting such a conference, please contact the Division of Industrial Accidents with the Labor Commission at 530-6800 or toll free (800) 530-5090.

Q 32.

Q 33. DO I NEED AN ATTORNEY TO HELP WITH MY CLAIM OR FILING FOR A HEARING?

A. An attorney is not required for filing a claim or filing for a hearing. However, if you choose an attorney, they must accept your case on a contingency basis. Your attorney's fees will come out of your compensation if you win. NOTE: The Labor Commission has staff available to explain your rights and responsibilities regarding workers' compensation.

Original emphasis.

3. Utah Admin. Code Ann. R612-1-7.A-B states:

A. Upon receiving a claim for workers' compensation benefits, the insurance carrier or self-insured employer shall promptly investigate the claim and begin payment of compensation within 21 days from the date of notification of a valid claim or the insurance carrier or self-insured employer shall send the claimant and the division written notice on a division form or letter containing similar information, within 21 days of notification, that further investigation is needed stating the reasons(s) for further investigation. Each insurance carrier or self-insured employer shall complete its investigation within 45 days of receipt of the claim and shall 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.

B. The payment of compensation shall be considered overdue if not paid within 21 days of a valid claim or within the 45 days of investigation unless denied.

4. Utah Admin. Code Ann. R612-1-3.E-F states:

E. "Employee Notification of Denial of Claim - Form 089" - This form is used by insurance carriers or self-insured employers to notify the claimant that his or her claim, in whole or part, is denied and the reason(s) why the claim is being denied. An insurance carrier or self-insured employer shall complete its investigation within 45 days of receipt of the claim and shall commence the payment of benefits or notify the claimant and the division in writing that the claim, in whole or part, is denied.

F. "Insurance Carriers/ Self-Insurer's Notice of Further Investigation of a Workers' Compensation Claim - Form 441" - This form is used by insurance carriers or self-insured employers to notify the claimant and the commission that further investigation is needed and the reasons for further investigation. This form or letter containing similar information is to be filed within 21 days of notification of claim that further investigation is needed.

5. Utah Admin. Code Ann. R612-1-3.V states:

V. The division may approve change of any of the above forms upon public notice. Carriers may print these forms or approved versions.

6. Official Form 089, Record at 58 (copied in Addendum), states in part:

NOTICE TO THE CLAIMANT: If you are in disagreement with the denial and cannot resolve your differences by talking with thee carrier and/or your treating physician, you can file for mediation and/or application for hearing. To obtain an application for mediation and/or hearing, contact the Utah Labor Commission, Division of Industrial Accident at (801) 530-6800 or (800) 530-5090.

7. Utah Code Ann. § 34A-2-417(2)-(3) states:

- (2) (a) A claim described in Subsection (2)(b) is barred, unless the employee:
- (i) files an application for hearing with the Division of Adjudication no later than six years from the date of the accident; and

- (ii)
- (b) Subsection (2)(a) applies to a claim for compensation for:
 - (i) temporary total disability benefits;
 - (ii) temporary partial disability benefits;
 - (iii) permanent partial disability benefits; or
 - (iv) permanent total disability benefits.
- (c)
- (3) A claim for death benefits is barred unless an application for hearing is filed within one year of the date of death of the employee.

8. Utah Constitution art. I, § 24 states:

All laws of a general nature shall have uniform operation.

9. Utah Constitution art. XVI, § 5 states:

The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.

10. United States Constitution, 14th Amendment, § 1 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, Vivian Jensen, seeks workers' compensation benefits due to the death of her husband, Henning Sven Jensen, on a Saturday evening, January 26, 2002, after driving his employer's truck from Salt Lake City as far as icy Interstate 90 just outside of Butte, Montana and suffering an accident that left his head crushed and pinned under the heavily-loaded vehicle. Record at 1-2, 4-9. A First Report of Injury was

completed by the employer, Diamond Express, on January 28, 2002 and filed with the Labor Commission but without a copy being provided to Mrs. Jensen. Record at 51, 56. The workers' compensation carrier for the employer, Truck Insurance Exchange prepared a denial letter dated March 8, 2002; this time the document was sent to Mrs. Jensen but without a copy being provided to the Labor Commission. Record Index; Record at 27, 57.

The decisions of the Labor Commission in this matter were based solely on the written submissions in the record; no evidence or argument was presented at any hearing. On May 5, 2003, 3 months and 9 days after the one-year anniversary of Mr. Jensen's death, Mrs. Jensen filed her Claim for Dependent's Benefits and/or Burial Benefits. Record at 1. On July 11, 2003, the employer and carrier moved to dismiss for failure to file the claim within one year under Utah Code Ann. § 34A-2-417(3). Record at 19-25. After Mrs. Jensen's response establishing that she was entitled to benefits and that any lateness was a result of the employer's and carrier's earlier violation of duties owed to her, Record at 30-58, the administrative law judge ruled on October 2, 2003 that "the only exception to this limitation [Utah Code Ann. § 34A-2-417(3)] is the tolling of the statute during the period of minority of minor dependents of the deceased worker," which was not involved in this case. Record at 60-61. Mrs. Jensen's motion for review filed October 27, 2003, Record at 63-65, was denied on April 20, 2004. Record at 109-112 (copied in Addendum). The Commission concluded that it could not "attribute Mrs. Jensen's failure to timely file her Application to Truck Insurance Exchange." Record at

110. Mrs. Jensen filed this appeal. See Record at 113.

STATEMENT OF FACTS

Henning Sven Jensen died in an accident toward the end of a day-long drive from Salt Lake City after sliding off a highway covered by “a layer of ice from shoulder to shoulder,” near Butte, Montana on January 26, 2002. Record at 5-6, 56. The temperature was below freezing, and the ground was covered with two inches of snow. Record at 6. His employer’s truck rolled and crushed his head, leaving him pinned under the truck. Record at 5-9. The truck, weighted down with a load of doors, came down on Mr. Jensen with such force that the truck itself suffered significant structural damage. Record at 4, 6-7.

Blood and tissue stains depicted in photographs of the truck are testament to the violence Mr. Jensen suffered in the accident. Record at 51. The deputy coroner, not a physician, listed the immediate cause of death on the death certificate as myocardial infarction, or heart attack. Record at 2. No underlying basis for the “heart attack” conclusion is stated in the death certificate, Record at 2, or anywhere else in the record. The death certificate also fails to refer at all to the accident and leaves the “injury” boxes blank, including the question of whether or not there was an injury at work. Record at 2. There is no finding in the record that any heart attack was not related to the stress of Mr. Jensen’s work in having to deal with icy, night-time driving conditions, not to mention having his head crushed and trapped under the truck. The only evidence in the record directly addressing whether the injuries in the accident were a factor is the assurance of

the highway patrol reported in the Deseret News that Mr. Jensen, “who was wearing a seat belt, was partially ejected and crushed, his death the result of those injuries and not the heart attack.” Record at 9, 54. Indeed, Mr. Jensen was alone in the vehicle and there is no evidence that Mr. Jensen suffered any heart attack before the truck fell on his head and left him pinned to the ground. Record at 5-7. Rather the officer who prepared the police report arrived at 6:37 p.m. to find Mr. Jensen still pinned under the truck approximately one-half hour after the accident, Record at 5-7, and Mr. Jensen was not pronounced dead by the deputy coroner until 13 minutes after that, Record at 2.

Mrs. Vivian Jensen, Mr. Jensen’s wife of over 36 years, is the dependent entitled to workers’ compensation benefits due to Mr. Jensen’s death. Record at 3. Despite Utah Administrative Code Ann. R612-1-7.A, the employer and carrier failed to reasonably and promptly investigate her claim. First, the employer and carrier failed to obtain the information that would be available through an autopsy performed under Utah Code Ann. § 34A-2-603. Record at 2, 33, 50-51. Instead, two days after the accident, asked by Form 122 “Employer’s First Report of Injury” “HOW INJURY OR ILLNESS/ABNORMAL HEALTH CONDITION OCCURRED. DESCRIBE THE SEQUENCE OF EVENTS AND INCLUDE OBJECTS OR SUBSTANCES THAT DIRECTLY INJURED THE EMPLOYEE OR MADE THE EMPLOYEE ILL,” the employer and carrier completely ignored the violence of the accident in which Mr. Jensen died crushed and trapped under the truck and reported simply that “according to coroners [sic] statement he died of a heart attack.” Record at 56. Despite Utah Code Ann. § 34A-

2-407(5)(a), neither the employer nor carrier provided a copy of the Employer's First Report of Injury to Mrs. Jensen. Having been informed by a police officer that her husband had died in an accident, Record at 50, expecting some sort of compensation because of his death on the job, Record at 51, and deprived of the hint of what was to come reflected in the Employer's First Report of Injury, Ms. Jensen permitted cremation of Mr. Jensen's body on January 31, 2002, Record at 51.

Despite Utah Code Ann. § 34A-2-407(5)(b) (2001), the employer also failed to provide Mrs. Jensen with any statement of "employee's rights and responsibilities related to the industrial injury." Id. The Labor Commission's "Employee's Guide to Workers' Compensation" (Record at 67-75) would have informed Mrs. Jensen that workers' compensation would pay for burial and dependent benefits in case of death (Q 9 & Q 18) and further informed her regarding "RESOLUTION":

Q 31. WHAT DO I DO IF MY CLAIM IS DENIED?

A. First talk with the insurance carrier or self-insured employer to find out why your claim has been denied. If they lack information required to accept a claim, you can obtain the missing information and resubmit the claim. If this is unsuccessful, call the Division of Industrial Accidents with the Labor Commission at 530-6800 or toll free (800) 530-5090. The staff may be able to assist you with your claim or possibly file an application for hearing.

CLAIMS RESOLUTION CONFERENCE

The Utah Labor Commission now offers a program to resolve disputes that exist between the parties of a workers' compensation claim. Using Alternative Dispute Resolution (ADR) the parties agree to meet, and with the help of a neutral person, develop solutions, which resolve the issue(s) and mutually benefit both parties. If you are interested in requesting such a conference, please contact the Division of Industrial Accidents with the Labor Commission at 530-6800 or toll free (800) 530-5090.

Q 32.

Q 33. DO I NEED AN ATTORNEY TO HELP WITH MY CLAIM OR FILING FOR A HEARING?

A. An attorney is not required for filing a claim or filing for a hearing. However, if you choose an attorney, they must accept your case on a contingency basis. Your attorney's fees will come out of your compensation if you win. NOTE: The Labor Commission has staff available to explain your rights and responsibilities regarding workers' compensation.

Record at 67, 69, 71, 73-74 (original emphasis).

Despite Utah Admin. Code Ann. R612-1-7.A, the employer and carrier failed to do other things that they were required to do before they could deny payment, including (1) providing within 21 days of her claim a written "further-investigation" notice to Mrs. Jensen and the workers' compensation division "that further investigation is needed stating the reason(s) for further investigation," see Record Index; and (2) providing within 45 days written notice to Mrs. Jensen and the workers' compensation division "that the claim is denied and the reason(s) why the claim is being denied," see Record Index; Record at 27, 57. All the carrier did was send to Mrs. Jensen alone (nothing was sent to the workers' compensation division) a denial. See Record Index; Record at 27, 57, 109. Nothing in the March 8, 2002 denial improved on the failure of the Employer's First Report of Injury 39 days earlier to address Mr. Jensen's work accident. Although it is crystal clear that, even absent the type of violent accident suffered by Mr. Jensen, death due to heart attack "while . . . driving a truck for his employer," particularly long-

distance driving in difficult weather conditions,² is compensable, Workers' Compensation Fund v. Industrial Commission, 761 P.2d 572, 573 (Utah Ct. App. 1988), the carrier's denial misrepresented to Mrs. Jensen that the carrier "must regretfully deny any benefits of workers [sic] compensation" and noted inconsequentially that "[b]ased upon the death certificate and the police report, he died of a heart attack." Record at 27, 57. The summary denial letter made no reference to the fact noted in the police report that the truck had rolled and landed on Mr. Jensen's head. Record at 5.

The carrier also denied the claim in a way that for yet another time deprived Mrs. Jensen of critical information about the ease with which she could obtain assistance with her claim from the Labor Commission. The Labor Commission's official Form 89 for employers denying a claim in whole or in part, see Utah Admin. Code Ann. R612-1-3.E and Utah Admin. Code Ann. R612-1-3.V, would have provided this notice³ to Mrs.

²In Workers' Compensation Fund, the employee suffering the heart attack was a 56-year-old man, 5'8" and 190 pounds, with a 36-year smoking habit and emphysema. 761 P.2d at 573.

³Mrs. Jensen has learned subsequent to filing this appeal that had the carrier sent a copy of the denial to the Labor Commission as required by rule, the Labor Commission, as a matter of practice not disclosed by any rule, would have sent out a letter to notify Mrs. Jensen of its availability to assist her. Due to the carrier's failure, no such letter was sent.

We were also informed that workers' compensation agencies in other states routinely and actively evaluate workers' compensation denials when they are received to assure that the rights of workers and their dependents are protected, but that the Utah Labor Commission has no such policy and appears for various reasons, possibly including its levels of funding, to place this burden entirely on those who have been wrongly denied benefits.

Jensen:

NOTICE TO THE CLAIMANT: If you are in disagreement with the denial and cannot resolve your differences by talking with the carrier and/or your treating physician, you can file for mediation and/or application for hearing. To obtain an application for mediation and/or hearing, contact the Utah Labor Commission, Division of Industrial Accident at (801) 530-6800 or (800) 530-5090.

Record at 58 (copied in Addendum).

Mrs. Jensen was the quintessential example of a claimant in need of the information that she should have received from the employer and carrier in accordance with Labor Commission rules. In the days following her husband's death, despite her expectation that she would receive benefits because of the accident, Mrs. Jensen knew nothing about the reasons death benefits were available in connection with Mr. Jensen's employment or what plans or laws applied and knew nothing about the Labor Commission or any involvement that any public agency might have with any benefits that could be paid. Even up to the filing of her claim for benefits on May 5, 2003 and notwithstanding intervening legal representation, Record at 35, 51-52, Mrs. Jensen knew nothing about how workers' compensation worked and was unaware of any related rights and responsibilities and applicable legal standards, including without limitation, (1) any one-year provision of Utah Code Ann. § 34A-2-417(3); (2) her right to seek free assistance without the aid of an attorney from the expert staff of the Labor Commission; (3) her right to seek mediation through the Labor Commission; (4) her right or need to file an application for hearing; or (5) that she may be entitled to benefits even if a heart attack was involved or that the heart attack conclusion in the death certificate could be

disputed. Record at 36, 52. Mrs. Jensen considered any benefits due because of her husband's death to be a matter of great importance to her, and believes she did her best to pursue her claim based on the information that she had. Record at 36, 52. She immediately would have sought assistance regarding her claim from the Labor Commission, would have sought mediation, and would have submitted her claim for benefits within one year, had she received notice of her rights and responsibilities related to workers' compensation and the availability of the Labor Commission to assist with her claim. Record at 36, 52.

As a direct result of violations of the employer and carrier of Mrs. Jensen's rights under workers' compensation law, Mrs. Jensen filed her claim for benefits on May 5, 2003, 3 months and 9 days after the one-year anniversary of Mr. Jensen's death.

SUMMARY OF ARGUMENT

Because the workers' compensation process is initiated by the employer and the carrier rather than the claimant and is thus so much within the knowledge and control of the employer and carrier, courts are less strict with workers' compensation time limitations when good cause exists for excusing the sort of minimal untimeliness that is claimed in this case.

The Labor Commission was wrong to give the employer and carrier, not only short shrift, but in effect a huge reward for their violations of Mrs. Jensen's rights. Mrs. Jensen knew nothing about workers' compensation and had a critical need for information to which she was entitled by law. But for the employer's and carrier's

violations of law, Mrs. Jensen would have been informed that she did not need an attorney to file her claim because all she needed to do was call the Labor Commission at 530-6800 and its expert staff would tell her what she needed to know and help her file her claim if necessary, including through ADR. Record at 39-41, 58, 67, 68, 73-75.

Mrs. Jensen's legal representation at one point is the opposite of a reason to punish her with loss of her rights against the employer and carrier. To do so, treats diligent claimants like Mrs. Jensen who persistently pursue their claim, including by consulting legal counsel, less favorably than a less-diligent claimant would be. That is backwards, especially because part of the harm that the employer and carrier caused her was that she went to an attorney and not to the Labor Commission. Her legal representation neither caused nor prevented the harm that the employer and carrier caused Mrs. Jensen. Her rights against the employer and carrier are separate and of the utmost importance especially because other supposed "rights" against her attorneys may prove illusory on the merits or as a practical matter due to associated expenses and risks that she is unable to bear.

Under Utah constitutional law, constitutional issues should only be reached when necessary. There is no need to address constitutional issues here because the employer's and carrier's violations of Mrs. Jensen's rights strongly support this Court's ordering payment of benefits. Alternatively, Mrs. Jensen submits that the extraordinarily short one-year limitation of Utah Code Ann. § 34A-2-417(3) for death claims is in general improper, particularly in view of the contrastingly generous six-year limitation of Utah

Code Ann. § 34A-2-417(2) permitted for other workers' compensation claims, no matter how insubstantial. The huge difference makes no sense especially in light of the fact that the same injury to an employee can give rise to both types of claims.

Given the undisputed facts relating to Mr. Jensen's accident and the absence of any valid reason for denial of benefits asserted in the carrier's denial letter, Mrs. Jensen should have been paid death benefits long ago.

ARGUMENT

I

THE EMPLOYER/CARRIER SHOULD NOT HAVE BEEN REWARDED AT THE EXPENSE OF VIVIAN JENSEN FOR THEIR VIOLATIONS OF HER RIGHTS

Utah law seeks to promote the ideal of an employer/carrier-administered workers' compensation insurance scheme "designed to avoid the costs and difficulties inherent in the common law tort system it supplanted, [in which] injured employees need not undertake the burdensome and expensive task of proving the cause of their injuries." Vigos v. Mountainland Builder's, Inc., 2000 UT 2, ¶ 40, 993 P.2d 207 (Russon, J., concurring) (brackets added) (citation omitted). Two critical ways in which Utah law tries to achieve this goal is by placing on workers' compensation employers and carriers obligations of investigating the claim and informing claimants of their rights and responsibilities, including their right to free assistance with their claim from the Utah Labor Commission. In fact,

[Injured employees] are encouraged not to invest in expensive legal counsel, and they have every incentive to rely on the advice and instructions provided by their

employer, their employer's insurer, and the Commission. If the scheme functions as it should, all these parties work together to provide the benefits to which an injured employee is legitimately entitled, and none of the parties seek to manipulate the system or avoid obligations.

Id. (emphasis added).

This case reflects the tension between the goals of the workers' compensation system and the conflicting self-interest of an employer and carrier. In this case, self-interest won out as the employer and carrier focused their efforts on trying to get rid of the claim rather than on investigating it and proceeded at every turn in the way most likely to leave Mrs. Jensen in the dark about how to obtain fair, efficient and inexpensive consideration of her claim.

In contrast to the procedure in civil actions, workers' compensation procedure even begins, not with the claimant, but rather with the employer and carrier. Because the workers' compensation process is so much within the knowledge and control of the employer and carrier, courts have reason to be less strict with workers' compensation time limitations when good cause (particularly a failure by the employer and carrier) exists for excusing the sort of minimal untimeliness that is claimed in this case. Under analogous circumstances in Fowler v. Titus Manufacturing Co., 734 P.2d 1309 (Okla. App. 1986), the court concluded:

To slam the courthouse doors in the face of this unfortunate woman under the circumstances presented in this record and tell her that she not only cannot get any compensation for her injury but that she must labor long hours to pay the enormous doctor and hospital bills that should have long ago been paid by respondents would not only be repugnant to the intent, purpose and meaning of the Worker's Compensation Act, but to our sense of justice and fairness.

Id. at 1313; see also Vigos v. Mountainland Builder's, Inc., 2000 UT 2, 993 P.2d 207⁴; Interstate Electric Co. v. Industrial Commission, 591 P.2d 436, 438 (Utah 1979) (even absent express language in statute, implied condition permitting reasonable excuse for late notice); Reynolds v. Worker's Compensation Appeals Board, 117 Cal. Rptr. 79, 527 P.2d 631, 632-33 (1974); State Compensation Insurance Fund v. Foulds, 167 Colo. 123, 445 P.2d 716, 718-19 (1968); Harris v. District of Columbia Department of Employment Services, 592 A.2d 1014, 1016-19 (D.C. 1991)⁵; 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). This Court's decision in van der Heyde v. First Colony Insurance Co., 845 P.2d 275, 278-80 (Utah Ct. App. 1993) (violation of life insurance replacement regulations) also stands squarely for the proposition that a defendant may be estopped from relying on a defense when its own conduct or failure has deprived the claimant of protections that would have allowed the claimant to avoid

⁴Although Vigos involved some initial payments of the claim as opposed to the initial denial in this case, its holding was that conduct of the employer and carrier may excuse the claimant from being required to request a hearing within the time provided by statute. See id. ¶¶ 12-24. The Court considered the purposes behind the statute of limitations and workers' compensation generally and determined the claim was consistent with them. Id. ¶¶ 21-24.

⁵The Harris opinion, which concluded that the claim was timely, was later vacated based on a stipulation that the claim indeed was timely. See 648 A.2d 672, 672-74 (D.C. 1994).

the very harm that the defendant seeks to impose on the claimant. See Dahl Investment Co. v. Hughes, 2004 UT App 391, ¶¶ 14-15, ___ P.3d ___ (equitable estoppel).

The Labor Commission implicitly appeared to accept that an employer and its carrier should not be able to take advantage of a claimant's failure to file within a certain time frame if the failure is attributable to them. Record at 110. The Commission also appeared to agree with Mrs. Jensen that the employer and carrier failed in two important ways as it stated that "Mrs. Jensen also points out that Truck Insurance Exchange failed to comply with § 34A-2-407(5) [(2001)] of the Act by providing her with copies of the 'Employer's First Report of Accident' and 'Employees' Guide to Workers' Compensation.'" Record at 110. However, the Commission also noted "[a]s a preliminary matter, . . . that § 34A-2-407(5) requires the referenced documents be provided to 'employees.' Arguably, the statute's directive does not extend to 'dependents' such as Mrs. Jensen." Record at 110. The Commission forgave the violations of the employer and carrier because "apart from this question of semantics, it is undisputed that Mrs. Jensen was aware by March 8, 2002, that Truck Insurance Exchange had denied her claim. She then immediately obtained legal representation to challenge that denial. Her legal counsel later withdrew and, unfortunately, gave her incorrect advice⁶] regarding the filing deadline." Record at 110.

⁶This conclusion of "incorrect advice" deviates from the record, which does not reflect what advice she received but rather establishes only the critical fact that she herself did not understand from it that she was in danger of losing her workers' compensation claim if she did not act in one year. Record at 35-36, 52. Were there no other error in the Labor Commission's analysis, remand to the Labor Commission would

It is unclear whether the so-called "question of semantics" entered into the refusal of the Commission to sanction the employer and carrier for their violations of Mrs. Jensen's rights, but it should not have. Mrs. Jensen had a right to the information mandated by the statute. In addition, the critical harm caused to her by the violation of the statute by the employer and carrier was in no way cured by the denial letter⁷ (which to the contrary exacerbated the harm caused to Mrs. Jensen with more violations of her rights as discussed below) or by the subsequent, and temporary, legal representation.

First, addressing the so-called "question of semantics," although the statute might have been drafted differently, it clearly applies to death cases. Subsection (4) of the statute, Utah Code Ann. § 34A-2-407(4) (2001) (now subsection (5)), unambiguously requires a report to be filed with the workers' compensation division "of any: (i) work-related fatality." The report was filed in this case. See Record at 56. The statute then requires the employer to "provide the employee with: (a) a copy of the report submitted to the division; and (b) a statement, as prepared by the division, of the employee's rights and responsibilities related to the industrial injury." Utah Code Ann. § 34A-2-407(5)

be appropriate to determine how this error affected the decision. However, as discussed in more detail below, Mrs. Jensen contends that the error is inconsequential because, regardless of whether or not there was "incorrect advice," the damage done to her by the failures of the employer and carrier were in no way abated by her temporarily obtaining out-of-state legal representation.

⁷It seems doubtful that the Labor Commission's meant to suggest that Mrs. Jensen's receipt of the deficient denial (discussed further below) alone should excuse the other separate violations of Mrs. Jensen's rights by the employer and carrier. That would be like reasoning that driving within the speed limit excuses running a red light while driving on the wrong side of the road.

(2001) (now subsection (6)). Because the "report submitted to the division" includes reports of fatalities and furthermore because subsection (4)(b)(iii) requires filing of the report within seven days of, among other things, the "employee's notification of the fatality,"⁸ the only reasonable question if these provisions are read together is not whether a deceased employee, or for that matter a comatose or otherwise incompetent employee, is entitled to the report copy and the statement of rights, but how.⁹ In this case, the answer was easy. Just as the employer paid Mr. Jensen through Mrs. Jensen after his death for his work on the day of his death and reported it on his W-2 as part of his wages and other compensation received in 2002, see Record at 56 ("FULL PAY FOR DAY OF INJURY? YES"), and the carrier informed her that it "must regretfully deny any benefits of workers compensation for your late husband," Record at 27, 57 (emphasis added), the employer and carrier were obligated to honor his rights under the statute by providing the required documents to his dependent, Mrs. Jensen. Only a construction

⁸Subsection (4)(b)(iii) in particular reflects the broad scope of the statute. Subsection (4)(b)(iii) reference to "employee's notification of the fatality" has to extend to the employee's dependent's notification of the fatality, because it cannot be referring only to the dead employee. If "[a]rguably, the statute's directive does not extend to 'dependents' such as Mrs. Jensen," see Record at 110, then subsection (4)(b)(iii) is unacceptably robbed of all meaning.

⁹R612-1-7.C.5 contains a similar "ambiguity" in that it provides that a written denial need not occur within 45 days if "[c]laimant is not an employee of the employer" In contrast to their narrow reading of the statute in written arguments before the Commission, the employer and carrier appear to concede the common sense meaning of this rule is that a claimant that is a dependent of an actual deceased employee is not within this exception and is entitled to the same timely payment or denial of the claim to which employees are entitled. See Respondents' Memorandum in Support of Summary Disposition (6/15/04), I.a. (sixth and seventh page).

that consistently applies the statute to all cases, including death cases, promotes justice and effects the purpose of the Workers' Compensation Act. Utah Code Ann. § 68-3-2 ("The statutes . . . , and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice.") Indeed, it would have been an irrational denial of equal protection and uniform operation of laws¹⁰ for the legislature to have done differently and mandated a copy of the report and the statement of rights be provided in nondeath cases involving even minor injuries, but not in the far more serious cases involving a death on the job.

What would have happened if the employer and carrier had provided to Mrs. Jensen the required copy of the report and the statement of rights? At least two things. First, Mrs. Jensen would have been able to see in the report, which the employer signed three days before Mrs. Jensen allowed Mr. Jensen's body to be cremated without an autopsy, the first indication of what evolved into the employer's and carrier's groundless "heart attack" excuse and disregard of the injuries her husband suffered. Record at 33, 51, 56. Unlike the employer and carrier who were taking their position at the same time that they were electing not to preserve evidence directly related to the issue by requesting an autopsy, see Record at 2, 4, 33, 50-51, 56 and Utah Code Ann. § 34A-2-603, Mrs. Jensen had no clue that the employer and carrier were preparing to attempt to deprive her of the benefits to which she was entitled. Record at 50-51.

Second, had Mrs. Jensen received an adequate statement of the rights and

¹⁰The constitutional issues are further discussed below.

responsibilities under workers' compensation as she should have pursuant to Utah Code Ann. § 34A-2-407(5) (2001), she would have been informed directly of 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. But even if Mrs. Jensen had only been provided the Division's Employee's Guide to Workers' Compensation¹¹ (Revised July 2001), Record at 67-75, she would have had concise and important information related to her claim. Again and again, she would have been informed that all she needed to do was call the Labor Commission and they would tell her what she needed to know and help her file her claim if necessary. Record at 39-40, 67, 68, 73, 74, 75. She would have learned that: "An attorney is not required for filing a claim or filing for a hearing. . . . NOTE: The Labor Commission has staff available to explain your rights and responsibilities regarding workers' compensation." Record at 74. She would have learned about the Labor Commission's mediation program:

The Utah Labor Commission now offers a program to resolve disputes that exist between the parties of a workers' compensation claim. Using Alternative Dispute Resolution (ADR) the parties agree to meet, and with the help of a neutral person, develop solutions, which resolve the issue(s) and mutually benefit both parties. If you are interested in requesting such a conference, please contact the Division of Industrial Accidents with the Labor Commission at 530-6800 or toll free (800) 530-5090.

¹¹Oddly, the Employee's Guide refers to several time limitations, including the six-year limitation for temporary total claims, see Utah Code Ann. § 34A-2-417(2) and Record at 74, but in its discussion of death benefits, fails to mention the one-year limitation of Utah Code Ann. § 34A-2-417(2), Record at 69, 71.

Record at 73-74. The "help" telephone number—530-6800—that Mrs. Jensen needed was highlighted repeatedly in Labor Commission documents that she should have received but did not due to repeated violations of law committed by the employer and carrier. Then all she would have needed to do was make that call—one call. And she would have. Record at 36, 52.

Given the principles that the Commission appeared to accept, it arrived at the wrong result. Viewed in light of the employer's and carrier's abysmal performance of their workers' compensation obligations in this case, the extreme sanction of dismissal imposed on Mrs. Jensen was draconian and created a double standard of ready forgiveness of the employer and carrier for multiple violations, including failures to adhere to time limitations, that injured Mrs. Jensen and severe punishment of her for a single, brief, and understandable slip that did nothing to prejudice the employer and carrier.

In looking past the employer and carrier to the fact that Mrs. Jensen at one point obtained legal representation, the Labor Commission did nothing less than punish Mrs. Jensen for her diligence. Nothing that her former attorneys did or did not do caused the violations of Mrs. Jensen's rights by the employer and carrier, which violations preceded the legal representation, and nothing in the legal representation of Mrs. Jensen protected her from the direct harm she suffered from those violations or is inconsistent with her claims against the employer and carrier. Workers' compensation rights are of singular importance. Vigos v. Mountainland Builder's, Inc., 2000 UT 2, ¶ 40, 993 P.2d 207 ,

recognizes that civil actions are far more difficult, complicated, and expensive than administrative workers' compensation proceedings conducted with the aid of the resources, expertise, and simplified procedures of the Labor Commission. Depriving Mrs. Jensen's of her right to an appropriate remedy against the employer and carrier for the harm they caused her because she may also have a separate right, which may prove illusory, against another party is as unprincipled as it would be to refuse a workers' compensation claim because a third party also may be responsible for the injury. The record in this matter does not establish what the former attorneys did or failed to do but rather only Mrs. Jensen's good-faith understanding after her former attorneys withdrew from representing her several weeks prior to the one-year anniversary of Mr. Jensen's death. Record at 35, 52. That is appropriate because the Labor Commission presumably cannot make a determination in favor of Mrs. Jensen that would be binding on her former attorneys and, given the far more substantial expenses, burdens, delays, and risks of a civil lawsuit that she very well may be prove unable to bear, or even undertake,¹² Mrs. Jensen has serious reasons for concern that this action is her only viable opportunity for recovering benefits to which she is entitled for her husband's death.

On the only issue before the Labor Commission, the rights of Mrs. Jensen vis-à-vis the employer and carrier, Mrs. Jensen's diligence in seeking counsel and pursuing her

¹²Justifying the risk and expense of a civil lawsuit is even more difficult because of the relatively small level of benefits that Mrs. Jensen is entitled to given the fact that Mr. Jensen was only earning 18 cents per mile, Record at 56, which had yielded only \$7853.76 over the course of about six months of employment in 2001, Record at 3.

claim should only have been considered in her favor. Indeed, in the context of workers' compensation, a claimant's reliance on counsel has been recognized as an additional basis for consideration of an arguably late claim. 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).

The employer and carrier also suffer in any comparison of their egregious wrongs with any possible mistake by Mrs. Jensen's former attorneys. Only the employer and carrier had a conflict of interest with Mrs. Jensen and their violations of her rights were consistent with an intent fueled by self-interest to avoid her right to benefits. The reward of their misconduct here encourages such disregard for claimants. Further, only the employer and carrier intentionally and fully took on primary responsibility for the risk of paying workers' compensation benefits to obtain corresponding economic benefits associated with Mr. Jensen's work. Finally, only the employer was obligated to protect Mrs. Jensen with insurance by Utah Code Ann. § 34A-2-201, and the carrier assumed that risk.

If there had been no other failures on the part of the employer and carrier, Mrs. Jensen's claim should be considered and paid on its merits for these reasons alone. However, the violations of the employer and carrier, and the error of the Labor Commission's decision, went further than that.

The Labor Commission decision recognized that "[o]ther than the summary information contained in the [March 8, 2002 denial] letter itself, Truck Insurance

Exchange provided no other information to Mrs. Jensen.” Record at 109; see Record at 27, 57. Thus, the Commission recognized that Mrs. Jensen had been deprived of the use of official Form 89, Record at 58, 110, which would have provided her, among other valuable information, this critical warning about the ease with which she could obtain assistance with her claim from the Labor Commission:

NOTICE TO THE CLAIMANT: If you are in disagreement with the denial and cannot resolve your differences by talking with the carrier and/or your treating physician, you can file for mediation and/or application for hearing. To obtain an application for mediation and/or hearing, contact the Utah Labor Commission, Division of Industrial Accident at (801) 530-6800 or (800) 530-5090.

Record at 58 (Addendum 1). The Commission concluded that “it was permissible for Truck Insurance Exchange to use a letter, rather than Form 89, to deny Mrs. Jensen’s claim” based on this reasoning: “The [Rule R612-1-3.E] is not a model of clarity, but it does not mandate use of Form 89. It also allows other written forms of notice of denial. Furthermore, the Industrial Accidents Division has permitted use of other written forms of denial in the past.” Record at 110. On this point, the Labor Commission failed to address the important issue of substance underlying this issue of form. The critical fact is not that the carrier sent a letter; it is that the carrier sent the letter without including in it the conspicuous warning and information required by Form 89.

The language of the R612-1-3.E is mandatory (“This form is used^[13] by insurance

¹³In contrast, R612-1-3, uses the language “may be used,” rather than “is used” in connection with a different form in subpart R (Release to Return to Work - Form 110). A different rule appears to make even Form 110 mandatory. See R612-2-3.D. Other statements in R612-1-3 regarding forms that “must be used” in certain ways do not stand

carriers or self-insured employers to notify the claimant that his or her claim, in whole or in part, is denied and the reason(s) why the claim is being denied”) and additional language in that part of the rule does not “allow[] other written forms of notice of denial,” but rather merely underscores the obligation of the carrier to “complete its investigation within 45 days of receipt of the claim and . . . commence the payments of benefits or notify the claimant and the division in writing that the claim, in whole or in part, is denied.” In stark contrast, R612-1-3.F, which relates to the “further-investigation” notice that the carrier failed to give Mrs. Jensen and the Commission, provides that “this form or letter containing similar information is to be filed within 21 days” Emphasis added. In drafting the rule, the Commission appears to have determined that allowing an exception at the less-important stage of a “further-investigation” notice was not merited at the more-important stage of denial of a claim. But had the Commission also decided to include such an exception in R612-1-3.E, certainly it would have similarly required that any form of denial letter used in place of Form 89 contain similar information as well. See also R612-1-7 (“written notice on a division form or letter containing similar information”). R612-1-3.V underscores that the importance of use of the Labor Commissions forms by providing that “V. The division

in contrast to the requirement for use of Official Form 089, but in support of it, because the style convention used almost exclusively in the rule when a form is required is to state in the first sentence what the form “is used” for and to state in a second sentence how the form “must be used” only if such an additional requirement related to the specific way it is used applies. In the context of the rule, “is used” and “must be used” are synonymous.

may approve change of any of the above forms upon public notice. Carriers may print these forms or approved versions.” Although the Labor Commission may have “permitted use of other written forms of notice of denial in the past,” in circumstances that are not disclosed in the decision or in the record, the Labor Commission did not indicate, the carrier has not claimed, and the record does not support that any public notice and approval of the carrier’s form of denial in this case occurred.

If indeed past unwritten practice of the workers’ compensation division has been to permit employers and carriers to freely circumvent the rule, that is all the more reason now for soundly rejecting the argument, that after promulgating the carefully crafted notice required in Official Form 89 and a related rule for public notice and approval of changes, the Labor Commission, after the fact, may permit the employer and carrier to advantage themselves by depriving the employee’s beneficiaries of the benefit of the rule and the Form it provides for. Allowing not only a different form, but a different form that deprives the claimant of the important notice required through R612-1-3.E¹⁴ unwisely and improperly encourages the employer and carrier unilaterally to render Form 89 a nullity.

In any event, as a simple matter of equity, the sketchy form and content of the carrier’s denial is additional grounds for forgiving Mrs. Jensen’s minor delay in filing her claim. Recognition of the legal failure of the carrier in this regard is not essential to Mrs.

¹⁴Use of the Official Form 089 would also have implicitly warned Mrs. Jensen of need to file the claim "within the statute of limitations." See Record at 58.

Jensen's claim, particularly in view of the Commission's finding that Mrs. Jensen was not provided similar information in violation of Utah Code Ann. § 34A-2-407(5). But the denial letter does reflect another aspect of the employer's and carrier's unbroken pattern of disregard for Mrs. Jensen's rights.

II

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

Mrs. Jensen respectfully submits that questions relating to the constitutionality of the one-year period permitted for workers' compensation death claims, and related questions of constitutionality that would be raised by denying to dependents in death cases similarly appropriate time limitations as afforded to employees, or dependents for benefits that accrued while the employee was still alive, should not be reached¹⁵ because her claim should be considered timely in her circumstances of excusable and minimal delay under the equitable tolling and estoppel exceptions appropriate to the Workers' Compensation Act or other construction of the limitation.¹⁶ In the alternative, Mrs. Jensen contends that application of Utah Code Ann. § 34A-2-417(3) to deny her claim would be unconstitutional. The Labor Commission ruled that it "lacks authority to

¹⁵Even so, it would be appropriate for the legislature to visit the issue to establish a limitation appropriate to the important interest involved.

¹⁶For example, the serious constitutional issues could be avoided or remedied in this case if Utah Code Ann. § 34A-2-417(3) were construed only as requiring an application for hearing to be filed within one year of the death when the death due to an industrial accident does not result until after the six-year period, see Utah Code Ann. § 34A-2-417(2), generally allowed for claims arising out of industrial claims.

consider such constitutional issues.” Record at 110; see Avis v. Board of Review, 837 P.2d 584, 586 (Utah Ct. App. 1992), cert. denied, 853 P.2d 897 (Utah 1993).

No legitimate governmental interest is advanced by the strikingly and inconsistently short one-year provision of Utah Code Ann. § 34A-2-417(3) for death claims, particularly in view of the six-year provision of Utah Code Ann. § 34A-2-417(2) for other workers’ compensation claims.

The Utah Supreme Court has just addressed related principles in Judd v. Drezga, 2004 UT 91, ____ P.3d ____ (November 5, 2004). In a 3-2 decision, the court upheld the medical malpractice noneconomic damages cap and observed:

This court has held, since our decision in Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), that citizens of Utah have a right to a remedy for an injury. Article I, section 11 of the Utah Constitution provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay." Utah Const. art. I, § 11. . . .

Our past jurisprudence has clearly and firmly established the following test for violations of the Open Courts Clause:

[S]ection 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated

. . . [I]f there is no substitute or alternative remedy provided, abrogation of the remedy . . . may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

Berry, 717 P.2d at 680.

. . . .

Judd next argues that section 78-14-7.1 violates the Utah Constitution's uniform operation of laws provision found in article I, section 24. This provision guards against discrimination within the same class and helps ensure that statutes establishing or recognizing rights for certain classes do so reasonably given the statutory objectives. Malan v. Lewis, 693 P.2d 661, 670-71 (Utah 1984). We employ heightened scrutiny under article I, section 24 when reviewing legislation that "implicates" rights under article I, section 11 [the Open Courts Clause]. Lee, 867 P.2d at 581. Sustaining legislation against an article I, section 24 challenge alleging that one's rights under the Open Courts Clause are constitutionally discriminated against requires the court to find that the challenged legislation "(1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal." Id. at 583. Although it causes great hardship for a small, severely injured group of plaintiffs, we find that the damage cap is reasonable, and it substantially furthers and is reasonably necessary to the legislative goal of decreasing health care costs and ensuring the continued availability of health care.

....

Next, Judd challenges the legislatively-imposed cap on quality of life damages on the ground that it violates Athan's right to due process under article I, section 7 of the Utah Constitution. Generally, we apply a rational basis test in substantive due process cases. Wells v. Children's Aid Soc'y of Utah, 681 P.2d 199, 206 (Utah 1984). However, this rational basis test is replaced by a more stringent test in cases where the rights impacted by the legislation are deemed to be "fundamental." Id. Judd argues that we should use such heightened scrutiny in Athan's case. However, because article I, section 11 rights are not properly characterized as "fundamental," we will apply the rational basis test. See Condemarin, 775 P.2d at 359-60 (citing Berry, 717 P.2d at 677).

Id. at ¶¶ 10-11, ¶ 19, ¶ 30. The close vote in Judd underscores the importance of the nature of the claim that Mrs. Jensen asserts in this action. With no countervailing legislative purpose such as the medical malpractice "crisis" addressed in Judd, with the constitutional significance of death claims recognized in art. XVI, § 5 of the Utah Constitution, and the close relationship of death claims and injury claims in worker's compensation (which easily can be intertwined in the case of a single worker), the

remarkably short and disparate time period of Utah Code Ann. § 34A-2-417(3) is improper.¹⁷

Although the employer and carrier has cited Avis, 837 P.2d 584, as having “decided that workers’ compensation statutes of limitation do not violate the open courts provision of the Utah Constitution, or equal protection,” see Respondents’ Memorandum in Support of Summary Disposition (6/15/04), III (thirteenth page), this case is far different than Avis. Avis involved a three-year limitation period and a claim for permanent partial impairment filed over 22 years after the industrial accident. The court also emphasized that the limitation “classifies injured workers in a reasonable manner in that all injured workers are subject to the same limitation period within which to file a claim for compensation.” Id. at 588. In this case, the employer and carrier seek application of the far shorter and more suspect period of only one-year to a vital and important claim of constitutional significance for injuries resulting in death. See Utah Constitution art. XVI, § 5; Halling v. Industrial Commission, 71 Utah 112, 263 P. 78, 81 (1927). The period is also inexplicably only half the amount of time permitted for filing wrongful death claims despite the fact that workers’ compensation matters are resolved in the less-demanding environment of an administrative proceeding and do not involve the issues of fault, often complex, attendant in civil actions. See Utah Code Ann. § 78-12-28.

¹⁷Similarly, no reason exists for considering death workers’ compensation claims to be of a different class than nondeath claims for purposes of information provided to the claimant under Utah Code Ann. § 34A-2-407(5) (2001).

In re Marriage of Gonzalez, 2000 UT 28, 1 P.3d 1074, construed a one-year limitation in a statute narrowly in order to permit a claim—arguably more narrowly than suggested by the statute’s plain language—so as to avoid the constitutional problem presented by the one-year period involved even though the petitioner in that case actually could have pursued the claim, which was for adjudication of marriage, over the course of thirteen years. See id. at ¶¶ 17-30; see also id. at ¶ 52 (Russon, J., dissenting). The court based its holding in part on a Texas decision finding that a similar one-year provision for commencement of actions violated equal protection because the distinction between “ceremoniously” versus “informally” married couples was not sufficiently related to a legitimate governmental interest. Id. at ¶¶ 27-28. The court further noted the decision of the United States Supreme Court in Mills v. Habluetzel, 456 U.S. 91, 99-100 (1982) unanimously holding that a one-year period to file a claim regarding the legitimacy of a child violated equal protection under the 14th Amendment to the United States Constitution because the time period was too short in light of the important rights involved. Id. at ¶ 29.

Applying a one-year provision against Mrs. Jensen is irrational. Had Mr. Jensen survived in a coma for a little over three months after the accident until May 5, 2002, Mrs. Jensen claim for death benefits would unquestionably have been timely. See Utah Code Ann. § 34A-2-417(3). Related claims for other types of workers’ compensation benefits (e.g. temporary total, etc.) would not even be necessary until January 2008. See Utah Code Ann. § 34A-2-417(2). Such an arbitrary distinction does not justify

destroying the sort of critical and constitutionally significant right asserted by Mrs. Jensen. See Currier v. Holden, 862 P.2d 1357, 1364-1365 (Utah App. 1993) (higher scrutiny of limitation of constitutionally significant claims; three-month habeas corpus limitations period without exception for excusable delay held unreasonable and unconstitutional). As in Mills, workers' compensation death claims do not involve evidence that will invariably be lost in only one year or that the passage of 12 months will appreciably increase the likelihood of fraudulent claims. See 456 U.S. at 101.

The substantial issues of constitutionality are ample reason for the Court to apply the principles of In re Marriage of Gonzalez, 2000 UT 28, ¶¶ 23, 30, 1 P.3d 1074 and Vigos, 2000 UT 2, ¶ 8, 993 P.2d 2072, and determine that the constitutional issues need not be reached because Mrs. Jensen should be entitled to benefits due to the employer's and carrier's failures.

III

DEATH BENEFITS SHOULD BE AWARDED

It was about six o'clock on a Saturday evening. Instead of being with his family, with his wife of 36 years, Mr. Jensen is dutifully driving a load of doors for his employer on a desolate stretch of highway outside of Butte, Montana. He loses control and slides across an icy road. Seconds later, the truck has rolled, crushing his head and pinning him to the ground in freezing temperatures. That is how he is left at least for the next half hour, and even after his body is finally removed, his blood and tissue is left on the truck where his head was crushed. It is clear to the highway patrol that Mr. Jensen died of

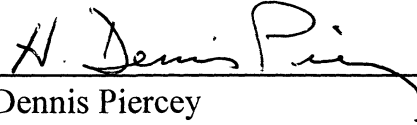
those injuries, but somewhere in the course of all that, the nonphysician deputy coroner surmises without benefit of an autopsy that Mr. Jensen had a heart attack. No evidence in the record of the “investigation” of the employer and carrier supports that conclusion.

The employer and carrier, in turn, decide not to have an autopsy performed or to do anything else to help establish the truth. In 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. Indeed, their proffered “excuse” is no reason at all for not paying the compensation due. Mr. Jensen was near the end of a long day of driving and in the midst of deadly icy conditions that ended up leaving him crushed and pinned under a truck in a remote location, robbed by his employment of his hope for emergency medical assistance and modern medical treatment. “Heart attack” or not, death benefits are long overdue. See Workers’ Compensation Fund v. Industrial Commission, 761 P.2d 572 (Utah Ct. App. 1988).

CONCLUSION

Mr. Jensen died in a violent work accident. Long before any arguable failure by Mrs. Jensen, the employer and carrier violated rights of Mrs. Jensen at every turn. Among other things, the carrier was obligated under Utah Admin. Code Ann. R612-1-7 to “commence the payment of benefits” because, at the end of its investigation, it had found no reason(s) why the claim could be denied. The dismissal of petitioner’s workers’ compensation claim as untimely should be reversed, and death benefits should be ordered paid to Mrs. Jensen.

Dated: November 8, 2004.

A handwritten signature in black ink, appearing to read "H. Dennis Piercey", is written over a horizontal line.

H. Dennis Piercey
938 Greenwood Terrace
Salt Lake City, Utah 84105
Telephone: (801) 582-6495

Attorney for Petitioner Vivian Jensen

CERTIFICATE OF SERVICE

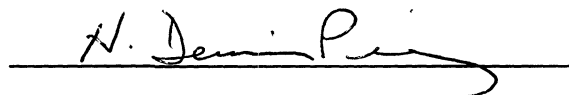
I certify that on November 8, 2004, I mailed two copies of this **BRIEF OF PETITIONER VIVIAN JENSEN** to:

Carrie T. Taylor
David H. Tolk
RICHARDS, BRANDT, MILLER & NELSON
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
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Attorneys for Respondents Diamond Express and Truck
Insurance Exchange

Alan L. Hennebold
Labor Commission of Utah
160 East 300 South, 3rd Floor
P.O. Box 144600
Salt Lake City, Utah 84114-4600

Attorney for the Utah Labor Commission

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

IRM 089 10/00

STATE OF UTAH - LABOR COMMISSION
 Division of Industrial Accidents
 P.O. Box 146610
 160 East 300 South, 3rd Floor
 Salt Lake City, Utah 84114-6610

EMPLOYEE NOTIFICATION OF DENIAL OR PARTIAL DENIAL OF CLAIM

Employee: _____ Date of Alleged Injury: _____
 Address: _____ Phone Number: _____ City: _____
 Date: _____ Social Security: _____ Employer: _____
 Insurance Carrier: _____
 Date Carrier was Notified of Claim: _____
 Claim #: _____ Date of Denial: _____ Adjuster: _____
 Adjuster's Address: _____ Adjuster's Phone Number: _____

NOTICE TO THE CLAIMANT: If you are in disagreement with the denial and cannot resolve your differences by talking with the carrier and/or your treating physician, you can file for mediation and/or application for hearing. To obtain an application for mediation and/or a hearing, contact the Utah Labor Commission, Division of Industrial Accident at (801) 530-6800 or (800) 530-5090.

_____ Please check appropriate reason for denial (if a partial denial is issued, please refer to the section below).

- _____ Failure by an employee claiming benefits to sign releases for medical information.
- _____ Injury/Occupational Disease did not occur within the scope of employment.
- _____ Medical information does not support the claim.
- _____ Claim not filed within the statute of limitations.
- _____ Claimant is not an employee.
- _____ Claimant has failed to cooperate in the investigation of the claim.
- _____ Pre-existing condition (Please be very specific). _____

_____ Other - A specific reason must be given. _____

_____ Please check appropriate reason for partial denial.

- _____ Tested positive to a drug/alcohol chemical test -Medicals only paid.
- _____ Disputed validity - Medicals only paid.
- _____ Disputed validity - Compensation only paid.

_____ Please give a brief explanation of any item checked above): _____

LABOR COMMISSION RULE GOVERNING ACCEPTANCE/DENIAL OF THE CLAIM

12-1-7. Acceptance/Denial of a Claim. (Refer to the Utah Labor Commission Workers' Compensation Rules for complete test)

1. Upon receiving a claim for workers' compensation benefits, the insurance carrier or self-insured employer shall promptly investigate claim and begin payment of compensation within 21 days from the date of notification of a valid claim or the insurance carrier or self-insured employer shall send the claimant and the division written notice on a division form or letter containing similar information, within days of notification, that further investigation is needed stating the reason(s) for further investigation. Each insurance carrier or self-insured employer shall complete its investigation within 45 days of receipt of the claim and shall 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.

2. The payment of compensation shall be considered overdue if not paid within 21 days of a valid claim or within the 45 days of investigation unless denied.

3. Failure to make payment or to deny a claim within the 45 day time period without good cause shall result in a referral of the insurance company to the Insurance Department for appropriate disciplinary action and may be cause for revocation of the self-insurance certification a self-insured employer.

Copies must be sent to: Labor Commission, Employee

Addendum at 9

UTAH LABOR COMMISSION

**VIVIAN JENSEN, widow of
HENNING SVEN JENSEN,**

Applicant,

v.

**DIAMOND EXPRESS LLC and
TRUCK INSURANCE EXCHANGE,**

Defendants.

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**ORDER DENYING
MOTION FOR REVIEW**

Case No. 03-0489

Vivian Jensen asks the Utah Labor Commission to review Administrative Law Judge Hann's dismissal of Mrs. Jensen's claim for death benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUE PRESENTED

Henning Jensen died on January 26, 2002. On May 5, 2003, Mrs. Jensen, his widow, filed an Application For Hearing with the Commission to compel Diamond Express and its insurance carrier, Truck Insurance Exchange, to pay death benefits to Mrs. Jensen for Mr. Jensen's death. On October 2, 2003, Judge Hann dismissed Mrs. Jensen's Application because it was not filed within one year of Mr. Jensen's death, as required by §34A-2-417(3) of the Act.

In requesting Commission review of Judge Hann's dismissal of her claim, Mrs. Jensen contends that, under the facts of this case, the Commission should recognize an exception to the one-year limitation of §34A-2-417(3). Alternatively, Mrs. Jensen contends that application of §34A-2-417(3)'s one-year limitation period would be unconstitutional under the facts of her claim.

FINDINGS OF FACT

Henning Jensen died on January 26, 2002, while employed as a truck driver for Diamond. At the time of his death, Mr. Jensen was married to Vivian Jensen. In a letter dated March 8, 2002, Truck Insurance Exchange notified Mrs. Jensen that it would not pay her any workers' compensation death benefits for her husband's death. Other than the summary information contained in the letter itself, Truck Insurance Exchange provided no other information to Mrs. Jensen.

VIVIAN JENSEN, widow of HENNING JENSEN
ORDER DENYING MOTION FOR REVIEW
PAGE 2

Immediately after receiving Truck Insurance Exchange's letter, Mrs. Jensen engaged the services of attorneys in Missouri to pursue her claim. However, on October 31, 2002, the Missouri attorneys withdrew, leaving Mrs. Jensen with the understanding that she had two years from the date of her husband's death to file an Application For Hearing. Several months later, Mrs. Jensen obtained the services of her current attorney, who filed an Application on her behalf on May 5, 2003.

DISCUSSION AND CONCLUSION OF LAW

Sections 34A-2-401 and 34A-2-414 of the Act provide benefits to the dependants of workers who die from work-related accidental injuries. However, §34A-2-417(3) of the Act bars a claim for death benefits if an application for hearing is not filed within one year of the date of the worker's death.

It is undisputed that Mrs. Jensen did not file her Application for death benefits until more than one year had elapsed from the date of her husband's death. However, she justifies the untimely filing of her Application on the grounds that Truck Insurance Exchange failed to use the proper form (Industrial Accidents Form 89, "Notice of Denial of Claim,") to notify her that her claim was denied. Instead, Truck Insurance Exchange used a simple letter for that purpose. The Commission has carefully reviewed Rule R612-1-3.E, which defines Form 89 and explains its use. The rule is not a model of clarity, but it does not mandate use of Form 89. It also allows other written forms of notice of denial. Furthermore, the Industrial Accidents Division has permitted use of other written forms of denial in the past. The Commission therefore concludes it was permissible for Truck Insurance Exchange to use a letter, rather than Form 89, to deny Mrs. Jensen's claim.

Mrs. Jensen also points out that Truck Insurance Exchange failed to comply with §34A-2-407(5) of the Act by providing her with copies of the "Employer's First Report of Accident" and "Employees' Guide to Workers' Compensation." As a preliminary matter, the Commission notes that §34A-2-407(5) requires the referenced documents be provided to "employees." Arguably, the statute's directive does not extend to "dependents" such as Mrs. Jensen. But apart from this question of semantics, it is undisputed that Mrs. Jensen was aware by March 8, 2002, that Truck Insurance Exchange had denied her claim. She then immediately obtained legal representation to challenge that denial. Her legal counsel later withdrew and, unfortunately, gave her incorrect advice regarding the filing deadline. Under these circumstances, the Commission cannot attribute Mrs. Jensen's failure to timely file her Application to Truck Insurance Exchange.

Mrs. Jensen also contends that §34A-2-417(3)'s one-year limitation is unconstitutional as it applies to this case. The Commission does not agree with that argument, but in any event lacks authority to consider such constitutional issues.

In summary, the Commission is sympathetic to Mrs. Jensen's unfortunate situation, but believes it must apply §34A-2-417(3)'s one-year limitation as a bar to Mrs. Jensen's claim.

VIVIAN JENSEN, widow of HENNING JENSEN
ORDER DENYING MOTION FOR REVIEW
PAGE 3

ORDER

The Commission affirms Judge Hann's dismissal of Mrs. Jensen's Application For Hearing and denies Mrs. Jensen's motion for review. It is so ordered.

Dated this 20th day of April, 2004.


R. Lee Ellertson
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

ORDER DENYING MOTION FOR REVIEW
VIVIAN JENSEN, widow of HENNING JENSEN
PAGE 4

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Vivian Jensen, widow of Henning Jensen, Case No. 03-0489, was mailed first class postage prepaid this 20th day of April, 2004, to the following:


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TRUCK INSURANCE EXCHANGE
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RICHARDS BRANDT MILLER & NELSON
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Sara Danielson
Support Specialist
Utah Labor Commission