

2004

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Carrie T. Taylor, David H. Tolk; Richards, Brandt, Miller & Nelson; Alan L. Hennebold; attorneys for respondents.

H. Dennis Piercey; attorney for petitioner.

Recommended Citation

Brief of Appellee, *Jensen v. Labor Commission*, No. 20040372 (Utah Court of Appeals, 2004).
https://digitalcommons.law.byu.edu/byu_ca2/4967

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

VIVIAN JENSEN (WIDOW OF
HENNING SVEN JENSEN),

Petitioners,

vs.

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

Respondents.

Court of Appeals
Case No. 20040372-CA

Labor Commission Case No. 2003489

**BRIEF OF RESPONDENTS DIAMOND EXPRESS LLC AND TRUCK INSURANCE
EXCHANGE**

**PETITION FOR REVIEW FROM ORDERS OF THE LABOR COMMISSION OF
UTAH**

Counsel for Petitioner Vivian Jensen
H. Dennis Piercey (3746)
938 Greenwood Terrace
Salt Lake City, Utah 84105

Counsel for Respondent Labor
Commission of Utah
Alan Hennebold (4740)
P.O. Box 146615
Salt Lake City, Utah 84114-6615

Counsel for Respondents Diamond
Express LLC and Truck Insurance
Exchange
Carrie T. Taylor (6045)
David H. Tolk (7650)
Richards, Brandt, Miller & Nelson
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465

**FILED
UTAH APPELLATE COURTS**

DEC 08 2004

IN THE UTAH COURT OF APPEALS

VIVIAN JENSEN (WIDOW OF
HENNING SVEN JENSEN),

Petitioners,

vs.

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

Respondents.

Court of Appeals
Case No. 20040372-CA

Labor Commission Case No. 2003489

**BRIEF OF RESPONDENTS DIAMOND EXPRESS LLC AND TRUCK INSURANCE
EXCHANGE**

PETITION FOR REVIEW FROM ORDERS OF THE LABOR COMMISSION OF
UTAH

Counsel for Petitioner Vivian Jensen
H. Dennis Piercey (3746)
938 Greenwood Terrace
Salt Lake City, Utah 84105

Counsel for Respondent Labor
Commission of Utah
Alan Hennebold (4740)
P.O. Box 146615
Salt Lake City, Utah 84114-6615

Counsel for Respondents Diamond
Express LLC and Truck Insurance
Exchange
Carrie T. Taylor (6045)
David H. Tolk (7650)
Richards, Brandt, Miller & Nelson
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	1
ISSUES	1-2
CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS	2-3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENTS	6
ARGUMENT	8
POINT I	
The Respondents Did Not Breach Any Duty to the Petitioner and Did Not Engage In Any Conduct Which Would Justify the Requested “Exception to the Statute of Limitations.”.	8
A. Petitioner’s Claim That Respondents Had a Duty to Supply Her With the Additional Form and Pamphlet Fails For Several Reasons.	8
B. Petitioner’s Reliance on <i>Vigos v. Mountainland Builders, Inc.</i> For Support of Her Claims is Unsupported by the Facts of This Case..	18
POINT II	
The Petitioner’s Failure to File Her Claim Pursuant to the One Year Statute of Limitations in This Case Was the Result of the Petitioner’s Neglect or the Result of Erroneous Information Given to Her by Her Prior Legal Counsel.	20
POINT III	
The Petitioner’s Constitutional Arguments Do Not Find Support Under Utah Law	24
POINT IV	
The Petitioner’s Argument Regarding the Merits and Substance of the Underlying Death Benefits Claim Should Be Disregarded Where The Labor Commission Dismissed the Petitioner’s Claim Prior to Any Evidentiary Hearing or Determination on the Merits.	29

CONCLUSION	30
------------------	----

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<u>Avis v. Board of Review of Indus. Com’n</u> , 837 P.2d 584 (Utah App. 1992). . .	2,18,26,27
<u>Bonneville Asphalt v. Labor Commission</u> , 2004 UT App 137, 91 P.3d 849.	20
<u>Fowler v. Titus Manufacturing Co.</u> , 7234 P.2d 1309 (Okla. App. 1986)	12
<u>Grand County v. Emery County</u> , 2002 UT 57, 57 P.3d 1148.	2
<u>Gripe v. City of Enid, Oklahoma</u> , 312 F.3d 1184 (10th Cir. 2002)	22
<u>In re Marriage of Gonzalez</u> , 2000 UT 28, 1 P.3d 1074	28
<u>Interstate Electric Co. V. Industrial Commission</u> , 591 P.2d 436, 438 (Utah 1979) . . .	14
<u>Jeffs v. Stubbs</u> , 970 P.2d 1234 (Utah 1998)	25
<u>Judd v. Drezga</u> , 2004 UT 91 (November 5, 2004)	28
<u>King v. Industrial Com’n of Utah</u> , 850 P.2d 1281, 1291 (Ut. Ct. App. 1993).	1
<u>Lee v. Gaufin</u> , 867 P.2d 572 (Utah 1993)	25
<u>Link v. Wabash R.R. Co.</u> , 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)	23
<u>Reynolds v. Worker’s Compensation Appeals Board</u> , 117 Cal.Rptr. 79, 527 P.2d 631, 632-33 (1974)	13
<u>State v. DeBooy</u> , 2000 UT 32, 996 P.2d 546	25
<u>State v. In</u> , 2000 UT App 358, 18 P.3d 500	25
<u>Union Pacific RR Co. v. Utah State Tax Comm’n</u> , 2000 UT 40, ¶24, 999 P.2d 17.	1

<u>Utah School Boards Ass’n v. Utah State Bd. Of Educ.</u> , 2001 UT 2, 17 P.3d 1125 . . .	25
<u>van der Heyde v. First Colony Insurance Co.</u> , 845 P.2d 275, 278-80 (Utah App. 1993). .15	
<u>Vigos v. Mountainland Builders, Inc.</u> , 993 P.2d 207 (Utah 2000)	18,19

Rules and Statutes

	<u>Pages</u>
Utah Code Ann. § 34A-2-407(5)(b)	2,18
Utah Code Ann. § 34A-2-407(6)	2,10,12
Utah Code Ann. § 34A-2-417(3)	3,4,5,6,7,8,11,24,29,30
Utah Administrative Code R612-1-3(E)	9
Utah Administrative Code R612-1-7	3,9,16
Utah Const. art. I, § 11	25
Utah Const. art. I, § 24	25

JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction in this matter, pursuant to Utah Code Ann. § 63-46(b)-16 (1988) and Utah Code Ann. § 34A-2-801 (1997), to address all the Orders at issue in this case under Union Pacific RR Co. v. Utah State Tax Comm'n, 2000 UT 40, ¶24, 999 P.2d 17.

ISSUES

First Issue: Did the Labor Commission err in dismissing the Petitioner's death claim based upon the one year limitation period set forth in Utah Code Ann. § 34A-2-417(3) when the petitioner failed to file a claim until more than 3 months after the expiration of the one year limitation period?

Standard of Review: The standard of review applicable is the correction of error review. "If . . . the language [of the statute] is unambiguous and we can interpret and apply the statutory language by the traditional methods of statutory construction, utilizing our own expertise to decide the legislative intent, we review the agency action under section 63-46b-16(4)(d) for correction of error." King v. Industrial Com'n of Utah, 850 P.2d 1281, 1291 (Ut. Ct. App. 1993).

Second Issue: Is Utah Code Ann. § 34A-2-417(3) unconstitutional on its face or as applied?

Standard of Review: Because the Utah Labor Commission is not a court of general jurisdiction, it lacks authority to address the constitutionality of a statute. Avis v. Board of Review, 837 P.2d 584, 586 (Utah App. 1992). Generally, correction of error applies to constitutional issues when they have been addressed below. Grand County v. Emery County, 2002 UT 57, 57 P.3d 1148.

**CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES AND REGULATIONS**

The following statutes and rules are determinative in this appeal:

Utah Code Ann. § 34A-2-407(5)(b)

The employer shall file the report required by Subsection (5)(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.

Utah Code Ann. § 34A-2-407(6)

An employer required to file a report under Subsection (5) 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. (emphasis added).

Utah Code Ann. § 34A-2-417(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.

Utah Administrative Code R612-1-7

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 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.

STATEMENT OF THE CASE

This appeal concerns a workers' compensation claim for death benefits. On January 26, 2002, Henning Sven Jensen died while driving a truck for his employer, Diamond Express, LLC on Interstate 90 near Butte, Montana. Record at 1-2, 4-9. On or about March 8, 2002, Truck Insurance Exchange issued a written denial of workers' compensation benefits to Vivian Jensen (the "petitioner"), spouse of Henning Sven

Jensen, based upon the information contained in Mr. Jensen's death certificate and police report which indicated that "heart attack" was the cause of death. Record at 27.

At about the time of the denial on March 8, 2002, the petitioner was offered and accepted legal representation related to her workers' compensation claim and other possible claims. Record at 51. On October 31, 2002, the petitioner was notified by her attorneys that they had decided not to continue representing her with respect to her claims. Record at 51. Based upon statements of her attorneys at that time, the petitioner understood that she had no less than two years, and possibly longer, after the date of her husband's death to proceed with her claim. Record at 52.

The petitioner eventually retained H. Dennis Piercey as legal counsel with respect to her claims and on May 5, 2003, more than one year and three months after the date of Henning Sven Jensen's death, the petitioner filed a Claim for Dependent's Benefits and/or Burial Benefits. Record at 1. On June 6, 2003, the respondents filed an Answer affirmatively alleging that Mr. Jensen died as a result of a non-industrial heart attack and affirmatively alleging that the petitioner failed to timely file a claim for death benefits pursuant to Utah Code Ann. § 34A-2-417(3), based upon the fact that the Claim for Dependent's Benefits and/or Burial Benefits was filed more than one year from the date of death of the deceased. Record at 44-48.

On July 11, 2003, the respondents filed a Motion to Dismiss on the basis that the petitioner's claim for death benefits is barred pursuant to Utah Code Ann. § 34A-2-417(3) for failure to file the claim with the Labor Commission within one year. Record at 19-25. On September 29, 2003, the petitioner filed a Memorandum in Opposition to Motion to Dismiss and conceded that the claim for benefits was not filed until approximately one year and three months after the death of her husband. Record at 30. However, the petitioner argued that such failure to file within the one-year statute of limitations period should be excused based upon the following contentions: (1) the employer/carrier should have provided the petitioner with additional documentation and advice regarding her claims and the statute of limitations; (2) the petitioner's prior counsel failed to prosecute her claims and failed to properly advise her of the statute of limitations; and (3) the one-year statute of limitations is unconstitutional. Record at 30-49.

On October 2, 2003, Judge Debbie L. Hann issued an Order of Dismissal, wherein she concluded that the petitioner's claim must be dismissed because it was not filed within one year of the date of death as required by Utah Code Ann. § 34A-2-417(3). Record at 60-61. On October 27, 2003, the petitioner filed a Motion for Review. Record at 63. On November 13, 2003, Judge Hann signed an Order granting the respondents until and including December 11, 2003 to file a Response to the petitioner's Motion for Review. Record at 78. On December 11, 2003, the respondents filed a Memorandum in Opposition to Motion for Review. Record at 80.

On April 20, 2004, the Utah Labor Commission denied petitioner's Motion for Review stating that the statute of limitation had run, thus barring petitioner's claims. Record at 109.

SUMMARY OF ARGUMENTS

The administrative law judge and the Labor Commission of Utah correctly determined that the petitioner's claim must be dismissed pursuant to her failure to file her claim within the one year statute period required by Utah Code Ann. §34A-2-417(3). It is undisputed that the petitioner failed to comply with the one year statute of limitations. However, the petitioner argues that the statute of limitations should be disregarded based upon her allegations that the respondents failed to properly assist her with her claim and that her prior counsel provided her with erroneous advice regarding the applicable statute of limitation. A careful review of the facts of this case demonstrates that the respondents issued a timely written denial of the petitioner's claims and set forth the factual basis for such denial. Record at 27.

The respondents do not have an affirmative duty to continue to assist the petitioner with her claims or to provide her with legal advice regarding Utah workers' compensation law. The respondents gave the petitioner timely and accurate information in compliance with Utah's Workers' Compensation Rules. The respondents engaged in no conduct which contributed to the petitioner's failure to comply with the statute of limitations.

It is undisputed that after issuance of the denial, the petitioner quickly and reasonably sought and retained counsel to give her advice and with respect to her claims. The petitioner's prior counsel gave her erroneous information regarding the statute of limitations. It was the erroneous advice of counsel that caused the petitioner not to file her claim within the one year statutory period. The petitioner's proper remedy is to pursue her legal malpractice action against her prior counsel.

Finally, petitioner's constitutional arguments against the statute of limitations set forth in Utah Code Ann. §34A-2-417(3) are without merit. The petitioner has presented no decision by any Utah court that sets forth a constitutional prohibition on the Utah legislature's authority and power to create such a statute of limitations. Neither can the petitioner supply any reason for why such a limitation violates any particular provision of the Utah or United States Constitutions. Therefore, the petitioner's constitutional arguments should be disregarded.

ARGUMENT

POINT I

The Respondents Did Not Breach Any Duty to the Petitioner and Did Not Engage In Any Conduct Which Would Justify the Requested “Exception to the Statute of Limitations.”

Utah Code Ann. § 34A-2-417(3) states that “[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.” It is undisputed that the petitioner failed to comply with the one year statute of limitations. Therefore, the administrative law judge and the Labor Commission of Utah correctly determined that the petitioner’s claim must be dismissed.

In her Brief of Petitioner, the petitioner urges this Court to recognize a new exception to the one year statute of limitations based upon the respondents’ failure to adequately inform the petitioner of her potential rights and responsibilities under the statute. Specifically, the petitioner argues that she failed to file her claim within the one year statute of limitations period because the respondents did not provide her with a statement of rights and responsibilities and because the respondents chose to issue their denial of the petitioner’s claim on their letterhead rather than through utilization of the Utah Labor Commission’s Form 89.

A. Petitioner’s Claim That Respondents Had a Duty to Supply Her With the Additional Form and Pamphlet Fails For Several Reasons.

There are several reasons why petitioner’s claim of breach of duty fails. First, there is no requirement in the Labor Commission rules that an employer utilize Form 89

for notification of a denial of the claim. Utah Administrative Code R612-1-3(E) references Form 89 as a form which may be used by an insurance carrier or self-insured employer to notify a claimant that her claim is denied and the reasons why the claim is denied. However, there is no requirement in the rule that such form be used. By way of contrast, R612-1-3 indicates that Forms 122, 221, 141, 142, 001, 025, 130, 102, 043 **must** be used pursuant to the provisions of the rules. The rules do not require the use of Form 89 as the exclusive method of notifying a claimant of the denial of her claim.

Second, Utah Administrative Code R612-1-7 governs the process for acceptance or denial of a claim. Nowhere in that rule, or any other rule, is there a requirement that an insurance carrier utilize Form 89 to notify a claimant of its denial of the claim. Rather, the rule requires either commencement of payment on the claim or denial of the claim “**in writing**” within the 45 day period. It is undisputed that the respondents notified the petitioner in writing of the denial of her claim along with the specific basis therefor within the required 45 day period. Thus, the respondents breached no duty to the petitioner with respect to their denial of the claim.

Third, in denying petitioner’s request for rehearing, Utah Labor Commissioner R. Lee Ellertson stated that Utah Administrative Code R612-1-3 does not require use of Form 89. (See Order Denying Motion for Review, at 2). In fact, “the Industrial Accidents Division has permitted use of other written forms of denial in the past.” *Id.* The Labor Commission has the power to create forms to be used in the workers’

compensation system and has the power and discretion to determine which forms are required and which forms are not. The Labor Commission has determined that use of the Form 89 is not required. For this reason, the Labor Commission dismissed petitioner's argument that failure of the respondents' use of Form 89 was sufficient to create an exception to the one-year statute of limitations. It would be inappropriate for this Court to make a determination with respect to which forms created by the Labor Commission must be used. There is no rule or statute which requires the use of Form 89. Therefore, the petitioner's argument with respect to such form should be disregarded.

Fourth, the petitioner argues that her failure to comply with the statute of limitations was due to the respondents' alleged failure to provide her with a statement of rights and responsibilities and that such statement would have prevented her from missing the statute of limitations deadline. Utah Code Ann. § 34A-2-407(6) requires an employer to provide **the employee** with "a statement, as prepared by the division, of the employee's rights and responsibilities related to the industrial injury." The petitioner was not an employee of Diamond Express, LLC. Rather, the petitioner was the spouse of the deceased employee. Nothing in the language of the statute cited by the petitioner imposes any duty upon the employer/carrier to provide the dependents of an injured or deceased worker with a statement of employee's rights and responsibilities. Indeed, it would be inappropriate and misleading for the employer/carrier to provide the non-employee petitioner with such a document, which was created for injured employee workers.

Fifth, and perhaps most importantly, even if the petitioner had been provided with the document entitled “Employee’s Guide to Workers’ Compensation” and with Form 89, **there is no reference in either one of those documents to a one-year statute of limitations.** Those documents simply state that if the petitioner has any questions, the petitioner could call the Labor Commission for further information. Nothing in Form 89 or the Employee’s Guide would have called her attention to a one-year statute of limitations for filing an application for a hearing as required by Utah Code Ann. §34A-2-417(3). In fact, the petitioner would likely have been led to believe by the Employee’s Guide, which refers to the six-year statute of limitations for temporary total compensation claims, that she had a larger amount of time to file her claim. The petitioner argues speculatively in this appeal that this case would have had a different outcome if she had received a Form 89 and an Employee’s guide. However, because those documents do not contain additional substantive information related to the petitioner’s particular claims, it is quite likely that she would have still retained her attorney and reached the same result despite receipt of the document.

The petitioner concedes on page 23 of Brief of Petitioner that the Employee’s Guide refers to several time limitations, including the six-year limitation for temporary total claims, but fails to mention the one-year limitation for death benefits claims. The fact that the Employee’s Guide makes no reference to the one-year limitation further supports the position of the Labor Commission that the guide is intended only for

employees and not for dependents of a deceased worker. If the Employee's Guide had been created for such dependents, it would have included the reference to the applicable statute of limitations for their claims.

Finally, even if it were determined that the respondents had an obligation to provide the petitioner with a statement of employee's rights and responsibilities, Utah Code Ann. § 34A-2-407 does not contain any provisions which allow for ignoring the applicable statute of limitations when an employer neglects to provide an injured employee with such statement. The drastic and unprecedented remedy requested by the petitioner is not supported by the applicable statutes and should be denied and disregarded.

The petitioner cites to numerous cases, mostly from other jurisdictions, to support the argument that the statute of limitations should be extended in this case. However, the cases cited by the petitioner deal with different statutory systems and none of those cases stand for the proposition that a statute of limitations for a workers' compensation death claim should be extended or tolled after an employer has timely denied a claim in writing in accordance with the rules of the jurisdiction.

The petitioner cites to Fowler v. Titus Manufacturing Co., 7234 P.2d 1309 (Okla. App. 1986) for the proposition that a statute of limitations may be tolled based upon the conduct of an employer in a non-death case. In Fowler, the Oklahoma Court of Appeals tolled the applicable statute of limitations based upon a specific statutory provision which

provides for tolling of the statute of limitations if an employer neglects to advise the employee of his right to file a workers' compensation claim. Id. Oklahoma has a specific statute which provides for the tolling of the statute of limitations. Thus, the Fowler case is useful only in demonstrating that the Oklahoma Court of Appeals adhered to the relevant statutes. The legislature in Utah has created no provisions regarding tolling the statute of limitations for failure of an employer to comply with workers' compensation rules and statutes. Additionally, the facts of the instant case demonstrate that the respondents complied with the relevant rules and statutes by sending to the petitioner a timely denial of the claim in writing. Therefore, the case law cited by the petitioner from other jurisdictions involving other statutory provisions should be disregarded as factually distinguishable from the instant case.

The petitioner also cites to Reynolds v. Worker's Compensation Appeals Board, 117 Cal.Rptr. 79, 527 P.2d 631, 632-33 (1974) in support of her argument. In Reynolds, the court noted the California statute which required an employer to provide an employee with notice that there is a possibility of workers' compensation benefits and to provide the employee with required language that "[i]f you wait too long, you may lose your right to benefits." Id. at 633. The employer in that case failed to provide the employee, as required by the statute, with language specifically referring to the potential for loss of claims through the limitations period. As a result, the court extended the period based upon failure to provide that required language. In the instant case, the respondents

complied with the relevant rules by providing the petitioner a denial in writing. Utah does not require that the employer provide the petitioner with any language or advice with respect to the applicable statutes of limitation. The Reynolds case dealt with an entirely different statutory scheme and should be disregarded in the resolution of the issues presented through the petitioner's appeal.

The petitioner cites to Interstate Electric Co. V. Industrial Commission, 591 P.2d 436, 438 (Utah 1979) for the proposition that late notice may be excused from an employee to an employer in a non-death case. In Interstate Electric Co., the employee failed to give notice to the employer of an industrial accident until three days after the date of the industrial accident because he thought that it was a minor injury from which he would quickly recover. A statute in force in 1979 stated that if an employee failed to notify the employer within 48 hours of the incident, the compensation would be reduced by 15%. The court held that the notice given one day after the expiration of the period did not prejudice the employer and that the 15% reduction should not be enforced.

The facts of the instant case are quite different from the facts of Interstate Electric Co. In that case, the employee reported the incident within three days of the date of the incident. That case did not involve a death. In the instant case, the petitioner failed to file her claim for more than one year and three months subsequent to death of her husband. The petitioner had a large amount of time within which to retain counsel, to assess the merits of her case, and to file an Application for Hearing. The petitioner failed to take

any action until more than three months after the expiration of the limitations period.

Therefore, her claim is barred by the statute.

The petitioner also cites to the Utah case of van der Heyde v. First Colony Insurance Co., 845 P.2d 275, 278-80 (Utah App. 1993) for the proposition that a defendant may be estopped from relying on a defense as a result of its own conduct. However, the van der Heyde case is not a workers' compensation case and does not involve the issue of tolling of a statute of limitations defense. That case involves a defendant's alleged violation of life insurance replacement regulations and has no application to the instant case. Additionally, the Utah Court of Appeals indicated in that case that estoppel requires "a statement, admission, act, or failure to act by one party that is inconsistent with a claim later asserted." Id. at 280. The evidence in the instant case shows that the respondents complied with all relevant statutes and administrative rules in providing the petitioner with a timely denial of her claim. There is no evidence that the respondents made any affirmative act or that any failure to act was inconsistent with the petitioner's claim filed after the expiration of the one year limitations period.

As outlined above, the cases cited by the petitioner from other jurisdictions are inapplicable in the instant case where the courts in those cases are construing statutes which are substantially different from Utah statutes. Additionally, the petitioner has not cited any Utah case which stands for the proposition that a statute of limitations may be tolled even though a defendant has complied with all relevant statutory and administrative

provisions. Therefore, the petitioner's arguments regarding an excusal for failure to comply with the statute of limitations in this case is unsupported and should be denied.

The petitioner was made aware of the respondents' denial of her claim based upon the information contained in the death certificate and police report which indicated that her husband's "heart attack" was the cause of death. As a result, she nearly immediately made the reasonable determination to contact an attorney with respect to such denial. In retaining counsel, the petitioner was entitled to a full explanation from her attorney with respect to her rights and responsibilities under Utah's Workers' Compensation Act. The petitioner's quick retention of counsel demonstrates that the petitioner was not prejudiced by any conduct of the respondents. Rather, as outlined below, the petitioner was prejudiced solely by the conduct of her prior counsel. As such, the petitioner's remedy should be sought through a legal malpractice action against her prior counsel.

As outlined above, there is no support for the petitioner's argument that the respondents breached any duty to the petitioner. Even if it were determined that the respondents breached a duty to the petitioner through failure to utilize the Form 89 and failure to provide the petitioner with a statement of rights and responsibilities, and that the petitioner was prejudiced thereby, there is no legal support for the argument that the petitioner's drastic remedy would be that she has the ability to file her claim at any time without reference to the applicable statute of limitations. R612-1-7, which governs the procedure for acceptance and denial of a claim, sets forth no such remedy. Additionally,

as the petitioner concedes on page 23 of Brief of Petitioner, the Employee's Guide refers to several time limitations, including the six-year limitation for temporary total claims, but makes no mention of the one year statute of limitations for death claims. Neither the Employee's Guide nor Form 89 make any reference to the one year statute of limitations. Therefore, there is no indication that the petitioner's receipt of such documents would have yielded any different result in this case. In fact, it is likely that the referral to longer limitations periods in the Employee's Guide would have caused the petitioner believe that she had a longer period than one year within which to file her claim. The petitioner has provided no legal support for the proposition that the alleged conduct of the respondents justifies ignoring an unambiguous statute of limitation. Accordingly, the petitioner's argument for an exception to the statute of limitations should be disregarded.

In her Brief, the petitioner makes several unfounded and outrageous allegations as to the intentions of the respondents with respect to her claims. Indeed, the petitioner has alleged that 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." Brief of Petitioner at 17. Additionally, the petitioner refers to an "unbroken pattern of disregard for Mrs. Jensen's rights." Brief of Petitioner at 30. The petitioner alleges that the respondents were "electing not to preserve evidence directly related to the issue by requesting an autopsy." Brief of Petitioner at 22. These allegations are offensive, without foundation in the record, and should be disregarded.

The record demonstrates that the respondents complied with all relevant requirements under Utah law. There is no evidence that the respondents engaged in any conduct to deprive the petitioner of her rights.

The record demonstrates that Mr. Jensen died on the evening of January 26, 2002. Record at 1-2. On January 31, 2002, within a few days of the accident, the petitioner had her husband's body cremated. Record at 51. Pursuant to Utah Code Ann. § 34A-2-407(5)(b), an employer must notify the carrier and the division within seven days after the occurrence of a fatality. Thus, the cremation occurred even before the employer was required to report the incident to the insurance carrier. Additionally, all of the evidence as contained in the police report and coroner's report demonstrated that Mr. Jensen died of a heart attack. The petitioner's allegation regarding a motive of the respondents not to preserve evidence and order an autopsy is inappropriate, wholly without support, and should be disregarded especially in light of the fact that a cremation occurred before the employer was even required to notify the carrier of the incident.

B. Petitioner's Reliance on *Vigos v. Mountainland Builders, Inc.* For Support of Her Claims is Unsupported by the Facts of This Case.

The petitioner argues that the case of Vigos v. Mountainland Builders, Inc., 993 P.2d 207 (Utah 2000) contains support for her argument that the statute of limitations should be ignored in this case. In Vigos, the Utah Supreme Court held that a claim for permanent total disability benefits filed more than six years after the industrial incident was not barred by the statute of limitations because the employer/carrier originally

accepted the claim as compensable, paid disability benefits, and paid medical expenses within the six-year period. Id. at 213-214. Based upon those facts, the court determined that the Commission had original jurisdiction over the claim prior to the expiration of the six-year statute of limitation period. Id. at 214.

As Judge Hann concluded in her October 2, 2003 Order, the facts of Vigos are distinguishable from the instant case. In Vigos, the claim was initially accepted as compensable, thus invoking the continuing jurisdiction provisions of the Act. The statute of limitations was not disregarded in that case. Rather, the Utah Supreme Court determined that the Labor Commission had gained jurisdiction over the claim prior to the expiration of the statutory period due to the carrier's acceptance of the claim in that case. "Because there was no dispute over compensation or medical benefits, no Commission hearing was requested or necessary." Id. at 212. In the instant case, the claim was denied and no benefits were ever paid. Therefore, the jurisdiction of the Labor Commission was never invoked in this case prior to the expiration of the statute of limitations period and the petitioner's claim was properly dismissed.

As outlined above, it is undisputed that the respondents provided the petitioner with a denial of her claims within the required 45 day period and that she was made aware that the specific basis for such denial was that the death certificate and police report indicated that "heart attack" was the cause of her husband's death. It is also undisputed that the petitioner quickly retained counsel to assist her with her claims but that her

counsel failed to prosecute her claims and gave her erroneous information regarding the applicable statute of limitations. Further, it is undisputed that the petitioner filed her claim in this case more than one year subsequent to the death of her husband. The petitioner has provided no persuasive legal basis for ignoring the one year statute of limitations in this case. Under Utah law, 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. Bonneville Asphalt v. Labor Commission, 2004 UT App 137, 91 P.3d 849. That exception is certainly not applicable in the instant case. Accordingly, Judge Hann's decision and the decision of Utah Labor Commissioner, R. Lee Ellertson, to dismiss the petitioner's claim was proper and this court should not entertain petitioner's claim for appeal of that decision.

POINT II

The Petitioner's Failure to File Her Claim Pursuant to the One-Year Statute of Limitations in This Case Was the Result of the Petitioner's Neglect or the Result of Erroneous Information Given to Her by Her Prior Legal Counsel.

Although the petitioner argues in her brief that her failure to comply with the statute of limitations was the result of the conduct of the employer/carrier, the facts of this case, demonstrate that the petitioner's failure to file a timely Application for Hearing was not the result of any conduct by the respondents. As outlined above, the respondents complied with all applicable requirements and provided the petitioner with a timely denial under the rules. It is unclear why no action was taken until more than one year and three

months after the industrial incident. The responsibility to file a timely Application for Hearing clearly lies with the petitioner. It is certainly not the responsibility of an employer or insurance carrier to give legal advice to the spouse of a deceased worker—especially where that individual has retained legal counsel. The petitioner’s claim in this appeal is essentially an attempt to shift the responsibility for compliance with the statute of limitations from herself to the respondents. However, it appears that the petitioner’s failure to comply with the one-year statute of limitation was either the result of her own delay or was the result of incorrect legal advice given by her prior counsel.

At about the time of the denial on March 8, 2002, the petitioner was offered and accepted legal representation related to her workers’ compensation claim and other possible claims. (See Affidavit of Vivian Jensen ¶ 8, Record at 52). On October 31, 2002, the petitioner was notified by her attorneys that they had decided not to continue representing her with respect to her claims. (See Affidavit of Vivian Jensen ¶ 9, Record at 52). Based upon statements of her attorneys at that time, the petitioner understood that she had no less than two years, and possibly longer, after the date of her husband’s death to proceed with her claim.¹ (Id. at ¶ 10, Record at 52). As a result of this counsel, the

¹The petitioner now argues on page 19 of the Brief of Petitioner that the record is unclear as to what the petitioner was told from prior counsel. Respondents refer this Court to paragraph 10 of the Affidavit of Vivian Jensen which states, “Based on statements of my attorneys in connection with their decision not to proceed, I understood that I had no less than two years, and possibly longer, after the date of Henning’s death to proceed with my claim.” Record at 52. This assertion of the petitioner unambiguously establishes that she understood from her prior counsel that she had at least two years

petitioner failed to file an Application for Hearing until more than three months after the expiration of the one year limitation period.

The petitioner argues that her claim should be allowed to survive the one year statute of limitations based upon her prior counsel's failure to proceed with her claim for benefits and his failure to correctly advise her of the statute of limitations. However, although this argument is frequently made in cases involving dismissals resulting from missed deadlines and statutes of limitations, courts have consistently held that failure of counsel does not justify reinstating claims for such missed deadlines.

The Tenth Circuit Court of Appeals recently dealt with and resolved the issues presented by the petitioner in her Motion for Review. In Gripe v. City of Enid, Oklahoma, 312 F.3d 1184 (10th Cir. 2002), the Tenth Circuit Court of Appeals was faced with the issue of whether to reinstate a plaintiff's claims, which had been dismissed due to the plaintiff's attorney's failure to comply with deadlines. The Tenth Circuit declined to reverse the judge's dismissal of the claims on that basis stating that "[a] litigant is bound by the actions of its attorney, and the relative innocence in the failure does not constitute grounds for relief." Id. at 1188-89. In support of its holding, the court further stated:

before the statute of limitations would run. The petitioner's new argument that the record is not clear as to whether her prior counsel gave incorrect advice regarding the statute of limitations is disingenuous and contrary to her sworn affidavit contained in the Record at 52.

Plaintiff argues against the harshness of penalizing him for his attorney's conduct. But there is nothing novel here. Those who act through agents are customarily bound by their agents' mistakes. It is no different when the agent is an attorney. (It should be noted, however, that the mistreated client is not totally without a remedy. There may be a meritorious malpractice claim against the attorney.) Id. at 1189.

Thus, the Tenth Circuit has indicated that the appropriate remedy for a litigant whose attorney has missed deadlines is not revival of the dismissed claim, but a legal malpractice claim against the attorney.

The United States Supreme Court has also addressed and resolved the issues raised by the petitioner in this appeal. In Link v. Wabash R.R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), the Court faced the issue of whether to reinstate the plaintiff's claims, which had been dismissed as a result of the plaintiff's attorney's failure to comply with deadlines. In response to this issue, which is identical to the issues raised by the petitioner in this appeal, Justice Harlan indicated:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent. Id. at 633-34.

Justice Harlan further explained:

[A] civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not

be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant. Id. at 634, n.10.

Based upon these considerations, the United States Supreme Court held that a claimant's dismissed claim should not be revived based upon the failures of that claimant's attorney.

The facts of the instant case demonstrate that the petitioner's prior counsel erroneously told her that she could file her claim within two years of her husband's death. It seems clear that it was this erroneous representation to the petitioner by her prior counsel that caused the petitioner not to file her claim within the one year statutory period. However, this issue has been addressed and resolved by the Tenth Circuit Court of Appeals and the United States Supreme Court. Pursuant to the holdings of those courts, a claimant's failure of counsel does not constitute justification for revival of a claim dismissed for failure to prosecute a claim or failure to comply with deadlines. Accordingly, Judge Hann's order and the order from the Utah Labor Commission dismissing the petitioner's claims was consistent with established law and should be upheld.

POINT III

The Petitioner's Constitutional Arguments Do Not Find Support Under Utah Law.

The Petitioner argues that Constitutional issues need not be reached in this case because the Petitioner should be entitled to benefits due to failures of the employer, the carrier, and her prior counsel. However, the Petitioner implies in the Brief of Petitioner that Utah Code Ann. § 34A-2-417(3) violates Utah's Open Courts Clause found in Utah

Const. art. I, § 11 and the uniform operation of laws provision found in Utah Const. art. I, § 24. The Respondents concur with the petitioner that the Constitutional issues need not be reached in this case. Additionally, the petitioner has failed to offer any argument or case law sufficient to overcome the presumption that the one year statute of limitation is constitutionally valid.

Under Utah law, a statute is presumed constitutional and reasonable doubts are resolved in favor of constitutionality. Utah School Boards Ass'n v. Utah State Bd. Of Educ., 2001 UT 2, 17 P.3d 1125; State v. DeBooy, 2000 UT 32, 996 P.2d 546 (stating that legislative enactments are endowed with a strong presumption of validity and will not be declared unconstitutional unless there is no real basis upon which they can be construed as conforming to constitutional requirements); Jeffs v. Stubbs, 970 P.2d 1234 (Utah 1998)(stating that a party mounting a constitutional challenge to a law bears a heavy burden to overcome the presumption that the law is valid, with any reasonable doubts resolved in favor of constitutionality); State v. In, 2000 UT App 358, 18 P.3d 500 (stating that when addressing a constitutional challenge to a statute, the Utah Court of Appeals presumes that the statute is valid and resolves any reasonable doubts in favor of constitutionality).

Additionally, the Utah Supreme Court has stated that the legislature's judgment in fixing length of a limitations period is accorded great latitude under the provisions of the Utah Constitution. Lee v. Gaufin, 867 P.2d 572 (Utah 1993). With respect to statutes of

limitations, the Utah Court of Appeals has stated that state legislatures possess discretion to enact statutes of limitations, and these statutes are presumptively constitutional. Avis v. Board of Review of Indus. Com'n, 837 P.2d 584 (Utah App. 1992).

The respondents emphasize that Utah appellate courts have decided that workers' compensation statutes of limitation do not violate the open courts provision of the Utah Constitution, or equal protection. See Avis v. Board of Review of the Industrial Commission, 837 P.2d 584 (Utah App. 1992). In Avis, the Utah Court of Appeals analyzed a case involving a workers' compensation statute of limitation. See Id. at 587. In that case, this court stated that “a statute of limitations is constitutionally sound if it should allow a reasonable, not unlimited, time in which to bring suit.” Id. (quotation omitted). What is to be considered a reasonable time must be decided by the legislature, and courts will not inquire into the wisdom of such time period unless it is manifestly so insufficient that the statute becomes a denial of justice. See id. Moreover, the court pointed out that courts have long recognized exceptions to alleviate the harsh effects of statutes of limitations, but those exceptions involve cases where “plaintiff[s] had no way of knowing the injury had occurred until after the statute had run and therefore no way of affixing or exploring potential liability within the statutory period.” Id. (quotation omitted). Those exceptions do not apply in this case. Indeed, the petitioner was aware of the occurrence of the death and retained counsel to explore potential liability within the statutory period.

The petitioner argues that there can be no legitimate governmental interest for a one-year statute of limitations for death claims as opposed to longer limitations periods for different types of claims. However, death claims are quite different from other workers' compensation claims. 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. When a worker dies, the interested parties become aware of that fact and can immediately begin to assess the claim and explore the possibility or need to pursue a claim. Additionally, dependents of a deceased worker are an entirely different class of individuals than injured workers.

The one-year period for death claims does not involve the scenario discussed by the Utah Supreme Court wherein plaintiffs have no way of knowing the injury had occurred until after the statute had run and therefore no way of affixing or exploring potential liability within the statutory period. Avis, 837 P.2d at 587. Indeed, the record in this case clearly demonstrates that the petitioner was aware of the death of her husband and immediately retained counsel after receiving notification of the denial of her claim. There is a legitimate governmental interest in prescribing a one-year statute of limitations for death claims where such claims lack any ambiguity as to the date of the death. Additionally, the evidence demonstrates that the petitioner was aware of her husband's death and had ample time within the statutory period to explore potential liability.

Therefore, the petitioner has provided no sufficient argument or case law to demonstrate that the one-year statute of limitations is unconstitutional on its face or as applied.

The petitioner cites to the recent case of Judd v. Drezga, 2004 UT 91 (November 5, 2004) in support of her constitutional argument. In that case, the Utah Supreme Court dealt with the constitutionality of the medical malpractice noneconomic damages cap. That case makes no reference to the constitutionality of any statute of limitations and is inapplicable to the case at hand.

The petitioner also cites to In re Marriage of Gonzalez, 2000 UT 28, 1 P.3d 1074 in support of the argument that a one-year statute of limitations is too short. However, the one-year limitation addressed in that case which required that the determination or establishment of a marriage must occur during the relationship or within one year following the termination of that relationship. Id. At 1077. The Utah Supreme Court in that case declined to address the constitutional issues raised and determined that the statutory section only required the filing of a petition for adjudication of marriage within one year after the termination of the relationship. Id. at 1081. As in In re Marriage of Gonzalez, there is no reason for this Court to address the constitutionality of the one-year statute in this case, which is presumed to be constitutional. Additionally, the holding in that case supports the legitimacy of requiring the filing of a petition or Application for Hearing within a one-year period. Therefore, the petitioner's arguments regarding the

constitutionality of the one-year statute in this case should be disregarded and the decision of the Labor Commission should be affirmed.

The petitioner has not provided any case law or argument sufficient to overcome the presumption of constitutionality with respect to the one year statute of limitations. The constitutionally valid one-year statute of limitations imposed on claims for death benefits pursuant to Utah Code Ann. §34A-2-417(3) provides a bar to Petitioner's Application for Hearing and her claims were, thus, properly dismissed.

Point IV

The Petitioner's Argument Regarding the Merits and Substance of the Underlying Death Benefits Claim Should Be Disregarded Where The Labor Commission Dismissed the Petitioner's Claim Prior to Any Evidentiary Hearing or Determination on the Merits.

In her Brief of Petitioner, the Petitioner argues that the dismissal of her claim should be reversed based upon the fact that her husband's death was a compensable industrial injury. In the Brief, the Petitioner offers highly detailed "facts" related to the truck accident which have never been established before the Utah Labor Commission because the case was dismissed for failure to comply with the statute of limitation. As outlined above, Mr. Jensen's death certificate and the police report from the truck accident indicated that "heart attack" was the cause of Mr. Jensen's death. Based upon that evidence, the petitioner's claim was denied. The petitioner quickly retained counsel and was advised by such counsel that she had two years within which to file her claim.

As a result her prior counsel's lack of familiarity with Utah law, the petitioner failed to file her Application for Hearing within the required period.

Due to the fact that the petitioner failed to comply with the statute of limitation, her case was dismissed prior to a hearing or determination on the merits. It is procedurally inappropriate for the petitioner to now offer "facts" related to the truck accident which never became evidence or part of the record in this case and to argue that benefits are due. Respondents respectfully request that the petitioner's argument with respect to the merits of the underlying case be disregarded. The proper issue before this Court is whether the administrative law judge and the Utah Labor Commission correctly dismissed the petitioner's case where the undisputed facts demonstrated that she did not file her Application for Hearing until more than three months after the expiration of the limitation period. As outlined above, the determinations made below were consistent with clearly established Utah law and should be affirmed.

CONCLUSION

It is undisputed that the petitioner failed to file her Application for Hearing until more than three months subsequent to the expiration of the one year period set forth in Utah Code Ann. § 34A-2-417(3). As a result, the petitioner requests that this Court create a new exception for her failure to comply with a statute of limitations. However, the petitioner has not cited to any cases in Utah or any other jurisdiction to support an exception to a statute of limitations in a workers' compensation death case where the

employer/carrier has complied with all statutory requirements. The petitioner argues that her failure to comply with the statute of limitations was the fault of the employer for issuing the written notice of denial in letter form instead of using a Labor Commission form and for failing to give her the Employee's Guide. The petitioner speculatively argues that she would have somehow become aware of the one year statute of limitations if she had received these forms. However, as outlined above, none of the forms identified by the petitioner contain any reference whatsoever to a one-year statute of limitations for death claims. Additionally, as outlined above, there is no requirement that an employer or carrier use a Labor Commission form to issue a denial of a claim and there is no requirement to give an Employee's Guide to the spouse of a deceased worker. Thus, the respondents did not breach any duty to the petitioner in this case and the petitioner's failure to comply with the statute of limitations should not be excused. There is no evidence that the petitioner was improperly prejudiced in any way by the conduct of the respondents. In fact, the petitioner sought counsel immediately after receiving notice of the denial with the expectation that her retained counsel would provide her with the legal expertise to protect her rights. Unfortunately, the petitioner's counsel did not provide her with accurate advice regarding her claim.

The undisputed facts of this case demonstrate that the petitioner's failure to comply with the statute of limitations was the result of either her own neglect or apathy, or by the erroneous advice given by her prior counsel. The petitioner relied upon her

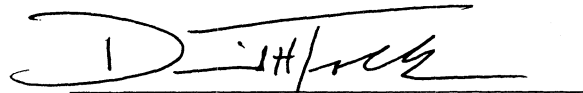
counsel's representation that she had two years after the industrial incident to file an Application for Hearing. As outlined above, courts have consistently held that ineffective assistance of counsel is not a justification for disregarding a failure to comply with a statute of limitations. The petitioner's remedy and proper course of action is to assert a malpractice claim against her prior counsel.

Additionally, the petitioner has not satisfied her burden to establish that the one year statute of limitation violates any particular constitutional provision on its face or as applied to her particular situation. The statute is presumed constitutional under Utah law and the petitioner has provided no legitimate basis to rebut that presumption.

In sum, the issues raised in the Brief of Petitioner have already been decided by two adjudicatory bodies. Those issues do not present any ambiguity as to the application of the law. Therefore the determination of the Labor Commission dismissing the petitioner's claim should be affirmed.

DATED this 8th day of December, 2004.

RICHARDS, BRANDT, MILLER
& NELSON

A handwritten signature in black ink, appearing to read "C. Taylor", written over a horizontal line.

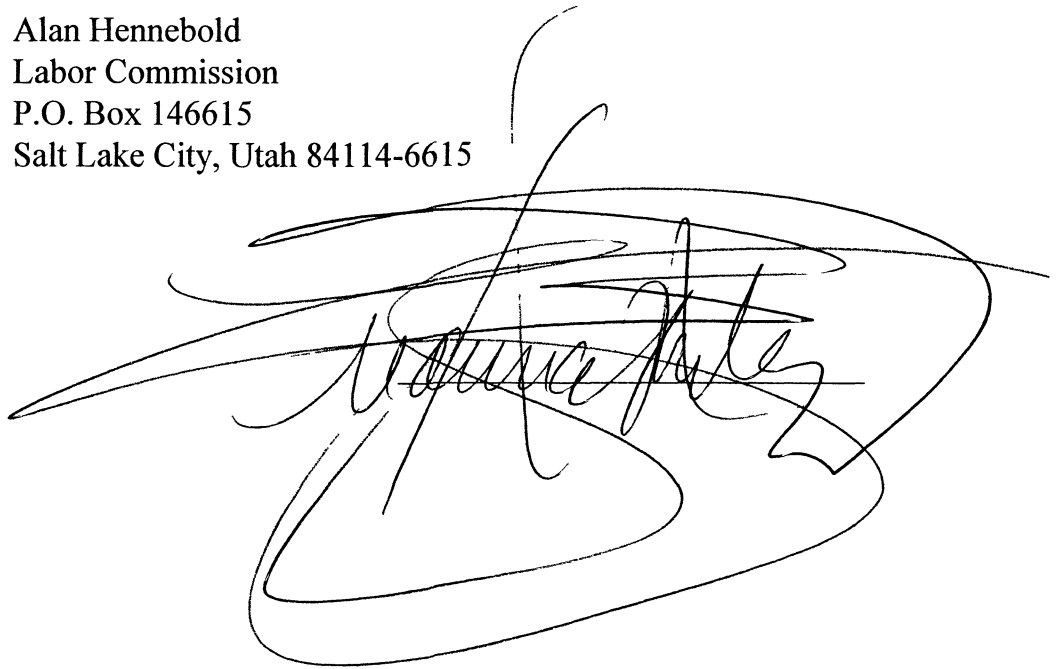
CARRIE T. TAYLOR
DAVID H. TOLK
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 8th day of December, 2004, to the following:

H. Dennis Piercey
938 Greenwood Terrace
Salt Lake City, UT 84105

Alan Hennebold
Labor Commission
P.O. Box 146615
Salt Lake City, Utah 84114-6615

A large, stylized handwritten signature in black ink, likely belonging to Alan Hennebold, is written over the address for the Labor Commission. The signature is highly cursive and loops around the text.