

1993

PIPE SPECIALTY, INC. a Utah Corporation,
Petitioner, vs. INDUSTRIAL COMMISSION OF
THE STATE OF UTAH and SALVADOR
MONTOYA, Respondents : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

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PIPE SPECIALTY, INC. a Utah Corporation,	:	
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Petitioner,	:	COURT OF APPEALS
	:	
vs.	:	
	:	
INDUSTRIAL COMMISSION OF THE STATE OF UTAH and SALVADOR MONTOYA,	:	Case No. 930353-CA
	:	Priority No. 07
	:	
Respondents.	:	

REPLY BRIEF OF PETITIONER

APPEAL TAKEN FROM A DECISION OF THE
INDUSTRIAL COMMISSION
STATE OF UTAH

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SUMMARY OF ARGUMENT

This Court and other courts have adopted an anti-default attitude. Pipe Specialty is entitled to relief from the default judgment taken against it because it meets the criteria of Rule 60(b) of the Utah Rules of Civil Procedure authorizing a Court to grant relief upon one or more requisites as set forth in the Rule. Because there was a mistake, excusable neglect, miscommunication there is justifiable reason for Pipe Specialty to be granted relief from its judgment. The Motion for Review filed by Pipe Specialty, through its counsel, was timely when the time computation is taken into consideration because the service of the Order that was by default was made by mail. Neither Pipe Specialty nor its counsel was present when the default was entered. Because Pipe Specialty timely sought relief, this Court as well as the Commission retains jurisdiction in this matter.

POINT I

CONSISTENT WITH THE UTAH RULES OF CIVIL PROCEDURE AND UTAH ADMINISTRATIVE PROCEDURES ACT PIPE SPECIALTY'S MOTION FOR REVIEW TO THE COMMISSION WAS TIMELY AND THE COMMISSION AND THIS COURT HAVE JURISDICTION IN THIS MATTER.

Pursuant to the Utah Administrative Procedures Act ("UAPA") Section 63-46b-1 Utah Code Annotated the parties seeking relief of a default judgment shall be required to comply with the Utah Rules of Civil Procedure ("URCP"). Specifically, a defaulted party may seek to have the agency set aside the default order, and any order in the adjudicated proceeding issued subsequent to the default order, by following the procedures outlined in the Utah Rules of Civil Procedure. Section 63-46b-11(3)(a)

Rule 60(b) of the Utah Rules of Civil Procedure authorizes the Court to relieve a party from a judgment for reasons including but not limited to: "(1) mistake, inadvertence, surprise or excusable neglect; . . . (3) fraud, whether heretofore denominated, intrinsic or extrinsic, misrepresentation or other misconduct of an adverse party; . . . or (7) any other reason justifying relief from the operation of the judgment." Rule 60(b), Utah Rules of Civil Procedure.

In the case at hand, a default judgment has been taken against Pipe Specialty, Inc. Such default was taken by the Industrial Commission against Pipe Specialty in spite of there being three applicable provisions of Rule 60(b) that would justify relief to Pipe Specialty and allow for the default judgment against it to be set aside. First, there was excusable neglect and mistakes made. The Commission itself, sent out a Notice of Cancellation of Hearing to Pipe Specialty on or about April 2, 1992.

Further, pursuant to Rule 60(b)(3) there was misrepresentation by the applicant to Pipe Specialty, wherein Pipe Specialty was told by applicant that he had dropped his claims against it. Based upon that misrepresentation, Pipe Specialty continued to employ the applicant when work was available. On more than one occasion, the applicant indicated to his employer, Pipe Specialty that he no longer wished to pursue his claim for worker's compensation benefits. Therefore, an answer was not filed.

Rule 60(b)(7) provides for relief from a default judgment for any other reason justifying such relief. Based on the foregoing, equity requires that Pipe Specialty be given an opportunity to be heard and have the merits of this case fully presented to the Commission. The

case law from this Court as well as other courts in this state establishes a precedent that it is anti-default. Where any reasonable excuse is offered by a defaulting party, courts generally tend to favor granting relief from a default judgment, unless it appears that to do so would result in substantial injustice to the adverse party. WestingHouse Electric Supply Company v. Paul W. Larsen Contractor 544 P.2d 876 (Utah 1975). See Helgesen v. Inyangumia, 636 P.2d 1079 (Utah, 1981) citing Mayhew v. Standard Gilsonite Company, 376 P.2d 951 (Utah, 1962). In the case at hand, there is no evidence that shows that any injustice, let alone substantial injustice, would adversely affect the other parties.

Respondent is accurate in stating that the Administrative Law Judge adjudicated the claims against Pipe Specialty and entered its order on or about October 19, 1992. Such order contained the following provision: ". . . any motion for review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, . . . and unless so filed, this Order shall be final and not subject to review or appeal." On November 19, 1992, the undersigned as counsel for Pipe Specialty filed its Motion for Review with the Commission which Motion was timely in light of the time computations provided for by UAPA and URCP.

The Order entered by the Administrative Law Judge on October 19, 1992, was in essence by default. Neither Pipe Specialty nor its counsel was present and therefore was not apprised on October 19, 1992, of any judgment or order against it. Both UAPA and the Administrative Rules concerning Workers' Compensation pursuant to the Utah Administrative Code, Rule 568-1-4.(e) provide that the URCP govern concerning the relief from an Order or

Judgment. Applying such URCP it is clear that Pipe Specialties' Motion for Review to the Motion for Review was timely.

Specifically, because the Administrative Law Judge's order and judgment was entered in default, it was served upon Pipe Specialty by mail. Rule 6(e) provides, as far as computation of time, that additional time will provided for by service by mail. Specifically, "whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after a service of notice or other paper upon him and the notice or paper is served upon him by mail, **three (3) days shall be added** to the prescribed period." (emphasis added). Subdivision (e) of Rule 6 is consistent with and clearly applicable to the procedure of the Industrial Commission and therefore supplements the procedure of the Commission. See Griffith v. Industrial Commission, 399 P.2d 204 (1965). Respondent in its Reply Brief has failed to take into consideration this additional computation of time allowed Pipe Specialty because of the notice or service upon it by mail of the Administrative Law Judge's Order.

Pipe Specialty's Motion for Review, in order to consider the issues that have not been adjudicated on the merits by the Administrative Law Judge or the Commission was timely. Because the Motion for Review was timely, the Commission continues to retain jurisdiction in this matter and jurisdiction is therefore vested in this Utah Court of Appeals consistent with UAPA and the URCP.

POINT II

PIPE SPECIALTY HAS PROPERLY SOUGHT RELIEF FROM THE DEFAULT TAKEN AND EQUITY DEMANDS THAT THE COMMISSION GRANT SUCH RELIEF.

The Motion for Review filed by the undersigned, Pipe Specialty's counsel gave the commission Notice of Representation on behalf of Pipe Specialty by the undersigned. However, the Commission upon entering its denial of Pipe Specialty's Motion for Review failed to give notice to the undersigned concerning the Commission's Order which was entered January 6, 1993, denying Pipe Specialty's Motion for Review. Upon communication with Mr. Benjamin Simms, then General Counsel of the Industrial Commission, the undersigned was advised to file a Motion for Reconsideration of the previously filed Motion for Review to the Commission. The Commission took no action on the request which was therefore deemed denied on or about May 3, 1993. Thereafter, Pipe Specialty timely filed for relief from this Court concerning the default taken against it by the applicant.

Respondent claims that in the alternative Pipe Specialty's Motion for Review or its relief sought in order to set aside the default judgment should be made to the presiding officer pursuant to UAPA 63-46(b)-11. However, pursuant to the definition section of UAPA at 63-46(b)-2 (1)(h)(i) presiding officer, "means an agency head or an individual or body of individuals designated by the agency head by the agency rules or by statute to conduct an adjudicative proceeding." The Motion for Review filed on behalf of Pipe Specialty was addressed to the Industrial Commission of the State of Utah. It did not indicate a presiding officer nor chairperson of the Commission, but was directed to the Commission as a whole.

Further, the Commissions response in its Order Denying Pipe's Specialty for Review was signed by three (3) commissioners with Commissioner Hadley (Chairman), Commissioner Carlson and Commissioner Colton. Respondent points out that a presiding officer is endowed with some special knowledge of the case, however, if a chairman or chairperson of the Commission rises to the level of presiding officer such individual has, in the case at hand, no more knowledge or authority than fellow commissioners such as those who also signed with the chairman of the Commission in denying Pipe Specialty's Motion for Review.

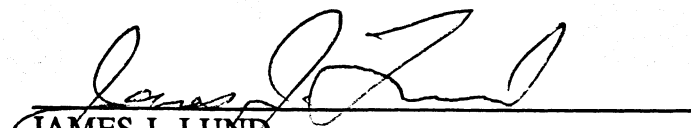
Such nomenclature should not work against Pipe Specialty in order to bring about the draconian result which would prevent it from seeking relief from the default judgment taken against it by the Commission in favor of the applicant.

CONCLUSIONS

Based on the foregoing, Pipe Specialty is entitled to have the default judgment entered against it set aside and be given an opportunity to properly answer and respond at hearing to the allegations set forth by applicant. Further, the foregoing support the fact that this Court as well as the Industrial Commission has jurisdiction over this matter and with such the authority to grant the relief sought by Pipe Specialty.

DATED this 7 day of May, 1994.

TAYLOR, ENNENGA, ADAMS & LOWE

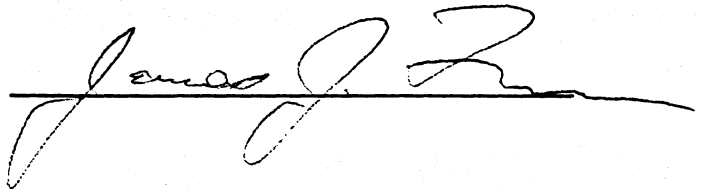

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CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of May, 1994, that two (2) true and correct copies of the foregoing Reply Brief were mailed, by placing the same in the United States mail, postage prepaid, addressed as follows:

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A handwritten signature in black ink, appearing to read "Sharon J. Eblen", is written over a horizontal line. The signature is fluid and cursive.