1987

Edward Alter v. Hales Sand & Gravel : Brief of Respondent

Utah Court of Appeals

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

EDWARD ALTER, State Treasurer and Custodian of the Uninsured Employers' Fund and the Industrial Commission of Utah,

Plaintiffs/Respondents,

v.

HALES SAND AND GRAVEL and/or WORKERS COMPENSATION FUND of Utah,

Defendants/Appellant.

Case No. 870013-CA

Priority No. 6.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

STATEMENT OF FACTS

Randi Hales died on July 31, 1986, as a result of injuries sustained in a compensable accident while in the employ of defendant/appellant, Hales Sand and Gravel. Randi Hales was not married, had no children and left no persons dependent upon her for support. Hales Sand and Gravel was insured at the time of the accident for all liabilities resulting from claims under the Workers Compensation Act. The company's insurance carrier, the Workers Compensation Fund of Utah, sent a letter to the Industrial Commission on August 19, 1987, accepting liability for the no dependent death benefit as provided for in Section 35-1-68(2)(a), U.C.A. (1953, as amended). (R. p. 1 and 3). Upon receipt of the letter, the Industrial Commission entered an Order for payment of

$30,000.00 into the Uninsured Employers Fund.[1] Hales Sand and Gravel (hereinafter referred to as Hales) filed a Motion for Review which was denied by the Industrial Commission on December 31, 1986. (R. p. 7-8.)

SUMMARY OF ARGUMENT

The no dependent death benefit was originally enacted in 1917 with the first Worker's Compensation Act in Utah. It has been used to provide funding for the second injury fund and the Uninsured Employers' Fund. John Hales, the "owner" of Hales Sand and Gravel, was instrumental in proposing and lobbying the 1987 Utah Legislature for passage of a bill which eliminates the no dependent death benefit but continues other funding sources for both of these funds. The passage of that bill does not evidence that the benefit was unconstitutional.

The creation and funding of the Uninsured Employers' Fund was a proper exercise of the legislature's police power in carrying out the intent and purpose of the Worker's Compensation Act.

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[1]The Order listed Hales Sand and Gravel and/or the Workers Compensation Fund of Utah as defendants. The listing of Hales Sand and Gravel as a defendant in the Order does not mean that it is primarily responsible for the payment of the no dependent death benefit. Hales Sand and Gravel has contingent liability in the event the insurance carrier defaults. See American Fuel Co. v. Industrial Commission, Utah, 187 P. 633 (1920). Since the defendant insurance carrier admitted liability and did not appeal the Order awarding benefits coupled with the fact that there is no evidence that the carrier is likely to default on the Order, it is highly unlikely that Hales Sand will be required to make payment of any portion of the $30,000.00.

ARGUMENT

POINT I

PAYMENT OF A NONDEPENDENT DEATH BENEFIT IS NOT A TAX AS DEFINED BY THE SUPREME COURT OF UTAH

Defendant Hales argues that the nondependent death benefit provided for in Section 35-1-68(2)(A), U.C.A. (1953, as amended) should be categorized as a tax and not as "compensation". In support of its argument, Hales notes that the benefit "is for a public purpose rather than a payment directly to an employee or his dependents as a result of the employee's injury or death." (Appellant's brief p. 4) Even though the benefit is not a payment made directly to one of Hales' employees, the nondependent death benefit has been defined by the Supreme Court of Utah as compensation under the Workers Compensation Act.

As originally enacted in 1917, the compensation system

> ... gave dependents of a workman killed in the course of his employment the option of either suing under the wrongful death statute or accepting the death benefits provided by the compensation act. By necessity the statute was framed in the alternative form, because Article XVI, Section 5, [of the Utah Constitution] precluded a statutory provision making death benefits ... the exclusive remedy.
>
> Star v. Industrial Commission, Utah 615 P.2d 436 (1980) at p. 438.

In 1921, Article XVI, Section 5, was amended by the addition of the concluding clause to read as follows:

> 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. (Emphasis supplied)

The amendment was essential if workers compensation was to be the exclusive remedy in all types of compensable injuries including those resulting in the death of an employee. With the passage of the amendment, nondependent heirs and personal representatives of deceased employees were no longer allowed to sue the employer at common law. That was the holding in the leading case of Henrie v. Rocky Mountain Packing Corporation, 113 Utah 415, 196 P.2d 487 (1948), an action brought by a nondependent father in the state district court for the wrongful death of his minor son. The son had died of injuries sustained in a work related accident while employed by the defendant, Rocky Mountain. In as much as the son was "unmarried, childless and left no dependents", the defendant was ordered to pay $1,000.00 into the state treasury as a no dependent death benefit. The father sought to recover damages and maintained that since the $1,000.00 payment to the state treasury was "not a benefit to him," it was not "compensation" under either the 1921 constitutional amendment or under the workers compensation act. Since it was not compensation, the plaintiff argued, the exclusive remedy provisions of workers compensation law did not operate to prevent the bringing of a wrongful death action under Article XVI, Section 5, of the Utah Constitution.

In reasoning that the no dependent death benefit constitutes "compensation" the Supreme Court stated that:

> Workmen's Compensation Acts were designed to correct what had become a generally recognized

evil. Prior to their enactment, the personal representatives or heirs of a workman killed in the course of his employment could not recover for his death, unless negligence on the part of the employer could be established. Moreover, the defenses of contributory negligence, voluntary assumption of risk, and the fellow servant rule, frequently defeated the cause of action. Even where recoveries were had, they usually came only after months or years of expensive litigation, and were largely reduced by attorney's fees and other costs. On the other hand, where recoveries were allowed, sympathetic juries frequently returned grossly excessive verdicts

The intention of the acts, then, was to secure workmen and their dependents (not heirs or personal representatives) against becoming objects of charity, by making reasonable compensation for calamities incidental to the employment, and to make human wastage in industry part of the cost of production.

Compensation is a concept wholly different from that of damages. Damages are based upon fault, are generally limited only by the findings and conscience of the jury, and in death cases are payable to heirs or personal representatives without regard to dependency. Compensation, on the other hand, generally has no relation to fault, is fixed or limited by statute, and is payable to dependents only.

Plaintiff contends that because the money [no dependent death benefit] paid by defendant or its insurance carrier into the state treasury did not benefit him, it was not compensation within the meaning of Article XVI, Section 5 of the Constitution. Viewed in the light of the history of that section of the Constitution, and of the Workmen's Compensation legislation, the contention is untenable.... "Compensation," as used in the amendment to the Constitution, means the same as it is used and defined in the compensation act, i.e. any payment required by the act to be made to a workman or to his dependents, or for their benefit, or into the state treasury for the special purposes of the compensation act. This includes ... payments into the state treasury as provided by the act.... (Emphasis supplied)

Henrie, supra, at p. 426-428

In the more recent case of Star v. Industrial Commission, supra, the Supreme Court of Utah cited Henrie, supra, with approval in a broader challenge to the no dependent death benefit. In Star, the deceased employee's mother made application for death benefits in the Industrial Commission under Section 35-1-68, even though she was not dependent on the employee. Her claim was denied by the Industrial Commission. The Supreme Court noted:

> On appeal, plaintiff characterizes the death benefits paid under the Workmen's Compensation Act as funds resulting from the wrongful death of an individual, and she claims it constitutes an unjust enrichment to pay such benefits to the special fund of the State of Utah rather than to the estate or family of decedent.
>
> Star, supra, at p. 437

While not specifically addressing the "unjust enrichment" portion of plaintiff's argument, the Supreme Court upheld the Industrial Commission and reiterated its earlier holding that the definition of "compensation" as contained in Section 35-1-44(6), U.C.A. (1953, as amended) includes payment by an employer or his insurance company of the no dependent death benefit to the state treasury for the "special fund".

Hales did not attempt in its brief to distinguish the Henrie or Star cases or the resulting characterization of the no dependent death benefit as "compensation." Admittedly, those two cases deal with a slightly different type of challenge than is being made here by Hales. However, cases involving challenges to the statute made by employers or insurance carriers on constitutional grounds have uniformly held that the no dependent death benefit is a permissible

exercise of a state's police power and does not offend equal protection or due process principles. This result is reached regardless of whether or not the court categorizes the benefit as a tax or as compensation.

POINT II

THE NO DEPENDENT DEATH BENEFIT IS AN APPROPRIATE EXERCISE OF THE STATE'S POLICE POWER AND AS SUCH DOES NOT DEPRIVE DEFENDANT OF PROPERTY WITHOUT EQUAL PROTECTION OR DUE PROCESS OF LAW

The provision for a no dependent death benefit was enacted with the first Utah workers' compensation law in 1917. The funds so collected were used exclusively for the Second Injury Fund until 1984.[2] In the very early case of Salt Lake City v. Industrial Commission, (1921) 58 Utah 314, 199 P. 152, 18 A.L.R. 259, the Supreme Court, citing with approval from Plaintiff's brief said:

> Bearing in mind that "the cost of human wreckage may be taxed against the industry which employs it," this cost of human wreckage ought not to be borne by the state or the taxpayers of the state as such, for the primary obligation rests upon the industry which employs labor. Notwithstanding this fact, the state of Utah in 1917, when the Industrial Act was passed, provided, without expense to employers, a tribunal for the administration of the act ... including salaries of [the commissioners and support staff which] ... might have been imposed solely upon the industries employing labor. As against these contributions of the state for the benefit of industries employing labor, can it be justly contended that the demands of the statute that each industry pay into the state treasury [the no dependent death benefit] ... in the event of the remote contingency of an employe's death

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[2]Originally designated as the "special fund" and later the "combined injury fund" the purpose of that fund has remained substantially the same. The 1984 amendments created what is now known as the Uninsured Employers' Fund.

> by accident without dependents is either discriminatory or unjust? Can it be justly contended that the classification is arbitrary or capricious, or that the statute is a denial of the equal protection of the laws? We think not. We do not understand that a classification, in order to avoid objections as to its constitutionality, should be absolutely uniform and equal in every respect as between the parties composing the class. That equality is not always practicable is recognized in many cases decided by the Supreme Court of the United States, and especially in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, at page 78, 31 Sup. Ct. 337, at page 340 (55 L.Ed. 360, Ann. Cas. 1912C. 160). The court, speaking through Mr. Justice Van Devanter, says:
>
> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these (1) The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time of the law was enacted must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."
>
> Citations omitted, Salt Lake City, supra, at p. 155.

At the time Salt Lake City was decided, the no dependent death benefit was required of any "employer not insured in the State Insurance Fund...." The Utah Court noted that it was within the legislature's power to require that all employers insure with the

State Insurance Fund therefor

> [i]n the absence of some logical reason or authority to the contrary, we feel compelled to hold that the state had the power to name the terms and conditions upon which employers might insure the payment of compensation to their employes even though there was an apparent discrimination in favor of the state.
>
> Salt Lake City, supra, at p. 157

Soon after Salt Lake City was decided, the provision exempting the State Insurance Fund from payment of the no dependent death benefit was changed to require contribution by all employers or their carriers. In analyzing the constitutionality of the no dependent death benefit after the change, the Utah Supreme Court again upheld both the requirement that the benefit be paid and the purpose for which it was to be used in United Air Lines Transport Corporation et al. v. Industrial Commission et al., 151 P.2d 591 (Utah 1944):

> ... The fundamental principles of the law of workmen's compensation were unknown to the people and the times that produced our common law. Workmen's compensation is the natural product of necessity. The numerous hazards which accompanied the growth of industry with the development of power-driven machinery antiquated the common law. Need for a new method and means of giving greater protection and security to the worker and his dependents against injury and death occurring in the course of employment gave birth to legislative law. This creature of the legislature with improvements and refinements is now commonly called workmen's compensation.
>
> Its existence is not due to the needs nor influence of employes alone. It has been promoted and sustained for its benefits to both capital and labor and the general good done society by its usefulness. It bases its right to existence in the police power of the State. Park Utah Consol. Mines Co. et al. v. Industrial

> Comm., 84 Utah 481, 36 P.2d 979. Workmen's compensation is the result of compromise made between master and servant, chaperoned by society, for the benefit of all.
>
> United Air Lines, supra, at p. 594-595

The Court noted that although there still existed some confusion on "extraterritorial jurisdiction" issues,

> ... the right to enact workmen's compensation laws is now well settled. The statutes have repeatedly been held to be constitutional.... Also, such laws providing for creation and maintenance of a special fund as set up by the Utah statute, 42-1-64, U.C.A. 1943, [now section 35-1-68] have, almost universally, been held constitutional. (Emphasis supplied)
>
> United Air Lines, supra, at p. 595

After citing with approval the U. S. Supreme Court decision in the case of Sheehan Co. v Shuler, 265 U.S. 371, 44 S.Ct. 548, 68 L.Ed. 1061, 35 A.L.R. 1056, the Utah Court went on to hold that

> ... the creation of a special fund where the employe dies without dependents is not taking property without due process of law.... The great weight of the decisions of our appellate courts during the last twenty-five years is that an employer or insurance carrier is not deprived of property without due process of law by a workmen's compensation act requiring compensation for death of an employe. This court has held that the workmen's compensation statute is not unconstitutional as a denial of equal protection of laws, nor as taking property without due process. (Emphasis supplied)
>
> United Air Lines, supra, at p. 595

In the leading United States Supreme Court case, Sheehan v Shuler, supra, the Court reviewed a New York statute which created two separate funds for the benefit of employees. One of the funds was in most respects identical to Utah's second injury fund and the

other fund was for the maintenance of "employees undergoing vocational rehabilitation." Payment was required only of employers or their insurance carriers in "certain employments classed as hazardous." Those certain employers were required to pay $500.00 into each fund in the event an employee died with no dependents. The Sheehan Company was "in one of the hazardous occupations" and challenged the payment of the benefit on the grounds that the law was "in conflict with the 14th Amendment, and that the awards made thereunder deprive them of their property without due process and deny them the equal protection of the laws." The U.S. Supreme Court first examined the purpose of the two "special funds" and held that:

> ... The use of such special funds for such purposes is an additional compensation to the employees ... [which] is neither unjust nor unreasonable....
>
> We do not think that the due process clause of the 14th Amendment requires that such additional compensation to injured employees of the specified classes should be paid by their immediate employers, or prevents the legislature from providing for its payment out of general funds so created....
>
> The payments thus required are not unfair and unreasonable in amount. The aggregate for the two funds is $1,000. This is much less than the maximum payment which may be required according to the scales in case the employee leaves survivors entitled to death benefits, and seems not to exceed, if it equals, the average amount of the payments required in such cases.
>
> ... Nor are these provisions in conflict with the equal protection clause. The contention of the companies is that the prescribed awards are in the nature of a tax imposed upon the happening of a contingency, and are of unequal application; that is that they are imposed only upon such employers as happen to have employees who are killed without leaving survivors entitled to

> compensation. However, this is not a discrimination between different employers, but merely a contingency on the happening of which all employers alike become subject to the requirements of the law. All are required to contribute, under identical conditions, to these special funds.
>
> Citations omitted, Sheehan, supra, at p. 1059-1060.

Defendant Hales asserts in his brief that "the only difference between employers who must pay into the Fund and those who are not required to do so is the paying employer who is unfortunate enough to hire an employee who dies without dependents;" and "should the employee die with dependents, the employer is not responsible for the payment of the $30,000.00." Hales argues that this creates an arbitrary classification which deprives him of equal protection of the law because he must pay money which would not be due had his employee left dependents. This is not true. Defendant Hales completely ignores Section 35-1-68(e) which reads as follows:

> If there are wholly or partly dependent persons at the time of death and the total amount of the awards paid by the employer or its insurance carrier to said dependents, prior to the termination of dependency, including any remarriage settlement, does not exceed $30,000, the employer or its insurance carrier shall pay the difference between the amount paid and $30,000 into the Second Injury Fund provided for in Subsection (1).

It is clear from this provision that $30,000.00 is the minimum payment due in the event of a compensable death. And, as in Sheehan, supra, "[t]his is much less than the maximum payment which may be required ... in case the employee leaves [dependants]." An employer or, as in this case, its insurance carrier pays a minimum

of $30,000.00 in every death case regardless of the existence of dependents. Thus the class here is all employers whose employees die from compensable injuries. Employers whose employees have no dependents are not required to pay more money, only the minimum.

Hales next argues that the nondependent death benefit is discriminatory and thus deprives him of equal protection because an uninsured employer "is subject to liability under this statute only if his employee dies with no dependents." (Appellant's brief at p. 14.) This is also untrue. When an employer is uninsured, he becomes liable for all workers compensation benefits including death benefits payable to dependents.

Section 35-1-45, U.C.A. (1953, as amended) states:

> Every employee ... who is injured, ... by accident arising out of or in the course of his employment, ... shall be paid compensation for loss sustained on account of the injury....

Section 35-1-58, U.C.A. (1953, as amended) states:

> Any employee, whose employer [is uninsured] ... may, in lieu of proceeding against his employer by civil action in the courts ... file his application with the commission for compensation ... and the commission shall hear and determine such application for compensation as in other cases; and the amount of compensation which the commission may ascertain and determine to be due to such injured employee ... shall be paid by such employer.... (Emphasis supplied.)

Hales seems to argue that the Uninsured Employers' Fund pays for all compensable injuries suffered by employees of uninsured employers. Defendant states:

> Utah Code Annotated, Section 35-1-57, makes uninsured employers liable in a civil action for any injury received by an employee, as an alternative to reimbursement for the injury by

way of the Uninsured Employers' Fund (Defendant's brief p. 15).

This argument ignores the clear language of Section 35-1-107 subsections (1) and (3), (U.C.A., 1953, as amended) which provides:

> (1) There is created a Uninsured Employers Fund for the purpose of paying and assuring, ... workers' compensation benefits [to employees] when ... [their] employer ... becomes or is insolvent, ... or otherwise does not have sufficient funds ... to cover workers' compensation liabilities under this chapter....
>
> (3) To the extent of the compensation and other benefits paid or payable to ... an employee ... from the Uninsured Employers' Fund, the fund, by subrogation, has all the rights, powers, and benefits of the employee ... against the employer failing to make the compensation payments. (Emphasis supplied.)

These sections make it clear that an uninsured employer is liable for at least the same benefits as an insured employer. The Uninsured Employers' Fund only becomes liable when the uninsured employer is "insolvent." In fact, an uninsured employer may be liable for damages far in excess of the benefits allowable under the workers' compensation laws in the event an employee elected to sue at common law. Section 35-1-57, U.C.A. (1953, as amended) is not "an alternative to reimbursement for the injury by way of the Uninsured Employers' Fund" but an alternative to the limits imposed upon applicants in an action before the Industrial Commission. Section 35-1-58, gives the injured employer the option to file with the Industrial Commission.

> Employers who shall fail to comply with the [mandatory insurance] provisions of Section 35-1-46 shall not be entitled to the benefits of

> this title during the period of noncompliance, but shall be liable in a civil action to their employees for damages suffered by reason of personal injuries arising out of or in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees, and also to the dependents or personal representatives of such employees where death results from such injuries.

Thus nondependent heirs or the personal representative of a deceased employee could sue at common law for wrongful death even if they were not dependent on the employee if the employer were uninsured. Those were the types of suits disallowed by the holdings in Henrie and Star. Had the employers been uninsured in those cases, the nondependent beneficiaries would have prevailed.

Hales cites Yosemite Lumber Co. v. Industrial Acci. Commission, 187 Cal. 774, 204 Pac. 226 (1922), in support of his argument that no dependent death benefits are a tax and as such are unconstitutional. A careful reading of Yosemite reveals that the California Supreme Court found the benefit unconstitutional on the basis of the California state constitution which differs dramatically from Utah's in this respect.

The California Constitution was amended in 1918 to provide for the enactment of a workers' compensation system "to create and enforce a liability on the part of any or all persons, or the dependents of their workmen for injury ... sustained by the said workman in the course of their employment." The California Court held that that constitutional provision did,

> ... [N]ot authorize the creation of a liability on the part of any person to compensate the workmen of other persons, or the dependents of

> workmen of other persons. The phrase "their workmen" necessarily confines the persons to be compensated to workmen who are in the employ of the person who is made liable.
>
> Yosemite, supra, at p. 998.

Thus the Yosemite Court found that the statute was unconstitutional because it went beyond a specific grant of authority in the California Constitution. This specific grant limited the power of the legislature. And notwithstanding the Court's conclusion in the case, the Court recognized the legislature's right to provide a fund for the benefit of those disabled in industry.

> It may be conceded that, under its general powers, the legislature might provide a fund for the benefit of persons disabled in industry in this state, and commit the administration of the fund to the Industrial Accident Commission, and might also levy a tax in some form to raise such fund. (Emphasis supplied)
>
> Yosemite, supra, at p. 1000.

Finally, the court in Yosemite, supra, distinguished

> State Industrial Commission v. Newman, 222 N.Y. 363, 118 N.E. 794, [because] ... [t]he Constitution of New York contains no provision limiting the power of the legislature of that state ... such as are contained in our [constitution]....[3]
>
> Yosemite, supra, at p. 1000

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[3]The California Constitution was amended in 1972 to cure this defect. California now provides for a no dependent death benefit in the amount of $75,000.00. The funds so generated go to that state's equivalent of the second injury fund. California Labor Code, Sections 4701, 4702 and 4706.5.

The Utah Constitution, not unlike New York's, contains no express provision against the legislature's passing a no dependent death benefit further distinguishing the Yosemite case from these facts.

Such was the holding of the Arizona Supreme Court in Hom Acc. Ins. et al. v. Industrial Commission of Arizona et al., 269 P. 501 (1928). There the Court examined a no dependent death benefit for the use of a rehabilitation fund. With a "constitutional mandate somewhat similar to" the California provision analyzed in Yosemite, the Arizona court refused to follow the reasoning of the California Supreme Court. The Arizona Court noted that the California Court

> ... [B]ased its ruling upon the ground that the express grant of power to require employers to compensate their workmen and their dependents implies that the power to compel them to compensate the state for the benefit of the workmen of others is not granted. "The language of neither one of these parts of the section shows or expresses," the court said. "an intent to add another liability to that expressly stated," and it held that the maxim, "The expression of one thing is the exclusion of another," was applicable.
>
> There is no question but that this view is correct, when the power to enact legislation does not exist independently of the Constitution, because a provision in that instrument directing the Legislature to enact particular legislation necessarily carries with it no authority to enact something not included therein. But, when such power does exist, irrespective of the Constitution, ... the Legislatures of the states have all legislative power, except that withheld from them by the state Constitutions, or surrendered to the federal government. In Clark v. Boyce, 20 Ariz, 544, 185 P.136, this court said:
>
> "The Legislature has all power not prohibited to it by the state or federal Constitution."

In Inspiration Consolidated Cooper Co. v. Mendez, 19 Ariz. 151, 166 P.278, it used this language:

> "The legislative power of the state is not controlled nor controllable by simple mandatory directions given by means of constitutional provisions which direct action, but do not restrict action on the part of the Legislature. When the Legislature is not constitutionally restricted, it may act or not as the occasion may seem proper, and in acting may pass any law the Legislature deems for the welfare of the state, unless prohibited by some positive constitutional provision, and all such laws not so prohibited are valid."
>
> That the Legislature could, under its general powers, enact a law requiring employers to pay the state a certain sum for the promotion of the vocational rehabilitation of those disabled in industry, the same as it could a Workmen's Compensation Law, both being within the police power of the state, there is no question....
>
> Hom Acc., supra, at p. 503-504

The petitioners in Home Acc., supra, urged the Arizona Court to adopt a position not unlike Hales is urging here, namely to declare that the no dependent death benefit is a tax and unconstitutional. The Arizona Court reasoned that the benefit is

> [N]ot a tax on property at all, but a part of the compensation the employer, the insurance carrier, or the state compensation fund is compelled to pay, when the employee killed in the course of his employment leaves no dependents. It is just as much a part of the expense the employer must bear or his insurance carrier assume as the amounts to be paid directly to the employee or his dependents, because it is imposed for the same general purpose, the promotion of the welfare of those disabled in industry, and in the exercise of the same power, the police power of the state. The fact that it reaches the injured employee for whom it is intended through a somewhat different channel that is, is paid into the state treasury and held in a special fund, to provide in the manner stated for the promotion of the vocational rehabilitation of persons disabled

> in industry does not give it a tax status different in any degree from that of the compensation that must be paid directly to employees or their dependents. Being imposed for the same purpose, and in the exercise of the same power, it is necessarily the same kind of tax as other compensation, and under all the authorities this is not a tax on property, but a tax on occupation or business.
>
> The third principal objection to the constitutionality of the act is that it violates the provisions of the Constitution designed to secure equal and uniform taxation of property for public purposes. As the charge laid on the persons engaged in the industries named in the act is a pecuniary burden imposed by public authority, it partakes of the nature of a tax, and in the language of a distinguished judge discussing a similar question, "for many purposes might be so spoken of without harm." But it is manifest that it is not a "tax" in the sense the word is used in the sections of the constitution to which reference is here made. The accession to the public revenue, general or local, is authorized or aimed at. The purpose of the exaction is entirely different. It is to be used, not to meet the current expenses of government, but to recompense employees of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employments. It is the consideration which the owners of the industries pay for the privilege of carrying them on. It is therefore in the nature of a license tax, and can be justified on the principle of law that justifies the imposition and collection of license taxes generally.
>
> Under the great weight of authority, a tax on occupation, business, etc., is not, in legal contemplation, a tax on property, which falls within the inhibition imposed by the usual constitutional provision in relation to uniformity of taxation.
>
> Hom Acc., supra, at p. 504-505

The Arizona Court next focused its attention on the due process and equal protection questions:

> ... The argument is that this provision is arbitrary, unreasonable, and discriminatory, in that it provides for a special classification, consisting of only those employers coming under the Workmen's Compensation Act who employ persons without dependents, but with the right to claim compensation, and that it is not required that the beneficiaries of the payments thus made be employees of the persons whose payments create the fund, nor the dependents of such employees, but merely that they be employees disabled in industry. We think it perfectly plain that, though subdivision 9 does provide that only those employers who happen to have an employee without dependents killed shall make the payments in question, and that the beneficiaries of the fund may be employees of employers other than those making the payments, neither of these facts render it arbitrary or discriminatory, because the contingency up on the occurrence of which the employer becomes liable, is just as applicable to one employer as another. And perhaps it was thought that it would tend to place all employees upon a more nearly equal footing in the matter of securing employment, since the Legislature may have entertained the idea that employees without dependents would be given the preference by some employers, in the absence of such provision, inasmuch as the accidental death of a workman without dependents would mean that the employer would pay the funeral expenses and nothing more.
>
> In Salt Lake City v. Industrial Commission, 58 Utah, 314, 199 P. 152, 18 A.L.E. 259, the Supreme Court of that state reached the same conclusion upon a statute identically the same in effect as ... the Workmen's Compensation Act of this state.

Hom Acc., supra, at p. 505-506

POINT III

THE CREATION OF THE UNINSURED EMPLOYERS' FUND IS AN APPROPRIATE EXERCIZE OF THE STATE'S POLICE POWER

Previous cases have dealt with no dependent death benefits payable to a fund similar to Utah's second injury fund or to a fund used for rehabilitation purposes. By amendment in 1984 the Utah

legislature created what is now known as the Uninsured Employers' Fund and diverted the no dependent death benefits to that fund. In 1986 the legislature again amended the statute to provide a one time infusion of additional funding for the Uninsured Employers Fund by way of a premium tax. The premium tax as provided for in the 1986 amendments was to be collected for fiscal year 1986-1987 only. The 1987 legislative amendments abolished the no dependent death benefit as a source of funding but provided for the continuation of the premium tax as a perpetual funding source for the Uninsured Employers Fund. Hales does not make a direct challenge to the legislature's power to create the Uninsured Employers' Fund nor to provide funding through a premium tax for such a purpose. He does state however that the Uninsured Employers' Fund "would not be necessary if the Industrial Commission took the time and effort to enforce the [mandatory insurance] provisions of Title 35." (Appellant's brief at p. 16) On page 17 of his brief, Hales asserts "[t]here would be no need for the fund or at least a lesser need if the Industrial Commission would enforce the provisions provided in Title 35." There is absolutely no evidence in the record of this case to support the accusation. Hales argues that if the criminal laws were enforced there would be no crime. This Court should not engage in the type of speculation needed in reference to that issue. Additionally, the Industrial Commission investigates over 4,000 suspected uninsured employers yearly since the creation of the Uninsured Employers Fund provided the funding necessary to conduct those investigations. Finally, the standards under which the

legislation should be judged have been set out in the cases earlier cited.

The Uninsured Employers Fund was created in 1984 in response to the insolvency of a certified self-insured employer. That insolvency, which occurred in 1983, resulted in the loss of workers' compensation benefits by many injured employees. Their plight brought to focus a problem which had plagued the Industrial Commission since it was established seventy years ago.

An employee is often unable to resume employment after an injury. Outstanding medical bills can result in additional financial pressure. Most private health insurance policies specifically exclude coverage for on-the-job injuries. Health care providers often refuse all but emergency care when a patient is without insurance and unable to pay. An injured employee, unable to work and in need of medical care, is among society's most disadvantaged citizens if there are no workers' compensation benefits available to satisfy his ongoing expenses. Where his employer has no insurance, or inadequate insurance, the employer is ultimately responsible for workers' compensation benefits under the Act. When the employer is unable to pay because of insolvency, the injured employee must shoulder the entire burden of financial and physical loss. If the employee is unable to pay, the responsibility may become that of welfare or charity.

A majority of the states now provide benefits for the employees

of uninsured insolvent employers.[4] In all states except California, the funds are provided by insured employers either through a premium tax or a death benefit.[5] Respondents are unaware of any case where these funds or the source of funding has been successfully challenged. As was noted earlier, the proper test lies with the state's police power as outlined by the U. S. Supreme Court in Lindsley, supra. Hales has failed to show an abuse of discretion on the part of the legislature in creating a fund to pay for those who otherwise might become wards of the state.

CONCLUSION

The provision for a no dependent death benefit is a constitutionally permissible exercise of the legislature's police power and is neither unjust or unfair. To overrule the Industrial Commission and find that the benefit should abate to the Workers' Compensation Fund of Utah at the expense of the Uninsured Employers' Fund will not alleviate the suffering of Hales, the father. The Order of the Industrial Commission should be affirmed.

Respectfully submitted this 5th day of June, 1987.

Suzan Pixton
Attorney for Respondents

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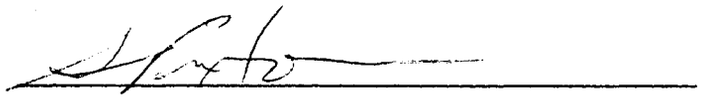
[4] State Workers' Compensation Laws, U.S. Department of Labor, July 1983.

[5] California's Uninsured Employers' Fund receives it's funding from the general fund, Workers' Compensation Benefits, Worrall & Appel, 1985, p. 150-155.

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 5th day of June, 1987, I mailed, postage prepaid, (4) true and correct copies of the foregoing Respondents' Brief to:

David Nuffer
Jacqueline Hatch
SNOW, NUFFER, ENGSTROM & DRAKE
P.O. Box 400
St. George, Utah 84770



ADDENDUM A

35-1-68. Second Injury Fund — Injury causing death — Burial expenses — No dependents, payments to Uninsured Employers' Fund — Payments to dependents.

(1) There is created a Second Injury Fund for the purpose of making payments in accordance with Chapters 1 and 2. This fund shall succeed to all monies heretofore held in that fund designated as the "Special Fund" or the "Combined Injury Fund" and whenever reference is made elsewhere in this code to the "Special Fund" or the "Combined Injury Fund" that reference shall be deemed to be the Second Injury Fund. The state treasurer shall be the custodian of the Second Injury Fund and the commission shall direct its distribution. Reasonable administration assistance may be paid from the proceeds of that fund. The attorney general shall appoint a member of his staff to represent the Second Injury Fund in all proceedings brought to enforce claims against it.

(2) If injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in § 35-1-81, and further benefits in the amounts and to the persons as follows:

(a) If the commission has made a determination that there are no dependents of the deceased, it may, prior to a lapse of one year from the date of death of a deceased employee, issue a temporary order for the employer or insurance carrier to pay into the Uninsured Employers' Fund the sum of $30,000. When the amount in the Uninsured Employers' Fund reaches or exceeds $500,000, the $30,000 shall thereafter be paid into the Second Injury Fund. If the amount in the Uninsured Employers' Fund falls below $500,000 at any time after reaching the initial $500,000, the commission shall direct payments into either the Second Injury Fund or the Uninsured Employers' Fund as may be required so as to maintain the Uninsured Employers' Fund at or near $500,000. Before payment into either fund, the $30,000 shall be reduced by the amount of any weekly compensation payments paid to or due the deceased between the date of the accident and death. If a dependency claim is filed subsequent to the issuance of such an order and, thereafter, a determination of dependency is made by the commission, the award shall first be paid out of the sum deposited for credit to the Uninsured Employers' Fund or the Second Injury Fund by the employer or insurance carrier before any further claim may be asserted against the employer or insurance carrier. If no dependency claim is filed within one year from the date of death, the commission's temporary order shall become permanent and final. If no temporary order has been issued and no claim for dependency has been filed within one year from the date of death, the commission may issue a permanent order at any time requiring the carrier or employer to pay $30,000 into the Second Injury Fund. Any claim for compensation by a dependent must be filed with the commission within one year from the date of death of the deceased.

(b) (i) If there are wholly dependent persons at the time of the death, the payment by the employer or insurance carrier shall be 66⅔% of the decedent's average weekly wage at the time of the

injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent minor child under the age of 18 years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week, to continue during dependency for the remainder of the period between the date of the death and not to exceed six years or 312 weeks after the date of the injury.

(ii) The weekly payment to wholly dependent persons during dependency following the expiration of the first six-year period described in Subsection (2) (b) (i) shall be an amount equal to the weekly benefits paid to those wholly dependent persons during that initial six-year period, reduced by 50% of any weekly federal social security death benefits paid to those wholly dependent persons.

(iii) The issue of dependency shall be subject to review by the commission at the end of the initial six-year period and annually thereafter. If in any such review it is determined that, under the facts and circumstances existing at that time, the applicant is no longer a wholly dependent person, the applicant may be considered a partly dependent or nondependent person and shall be paid such benefits as the commission may determine pursuant to Subsection (2) (c) (ii).

(iv) For purposes of any dependency determination, a surviving spouse of a deceased employee shall be conclusively presumed to be wholly dependent for a six-year period from the date of death of the employee. This presumption shall not apply after the initial six-year period and, in determining the then existing annual income of the surviving spouse, the commission shall exclude 50% of any federal social security death benefits received by that surviving spouse.

(c) (i) If there are partly dependent persons at the time of the death, the payment shall be 66⅔% of the decedent's average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week, to continue during dependency for the remainder of the period between the date of death and not to exceed six years or 312 weeks after the date of injury as the commission in each case may determine and shall not amount to more than a maximum of $30,000. The benefits provided for in this subsection shall be in keeping with the circumstances and conditions of dependency existing at the date of

injury, and any amount awarded by the commission under this subsection must be consistent with the general provisions of this title.

(ii) Benefits to persons determined to be partly dependent pursuant to Subsection (2) (b) (iii) shall be determined by the commission in keeping with the circumstances and conditions of dependency existing at the time of the dependency review and may be paid in a weekly amount not exceeding the maximum weekly rate that partly dependent person would receive if wholly dependent.

(iii) Payments under this section shall be paid to such persons during their dependency by the employer or insurance carrier.

(d) If there are wholly dependent persons and also partly dependent persons at the time of death, the commission may apportion the benefits as it deems just and equitable; provided, that the total benefits awarded to all parties concerned shall not exceed the maximum provided for by law.

(e) If there are wholly or partly dependent persons at the time of death and the total amount of the awards paid by the employer or its insurance carrier to said dependents, prior to the termination of dependency, including any remarriage settlement, does not exceed $30,000, the employer or its insurance carrier shall pay the difference between the amount paid and $30,000 into the Second Injury Fund provided for in Subsection (1).

ADDENDUM B

ability — Funding — Administration — Subrogation — Insolvent employer — Fund's rights with wrongful act or neglect — Adjusting claims — Duty to notify — Penalty — Assessment of self-insured employers.

(1) There is created an Uninsured Employers' Fund for the purpose of paying and assuring, to persons entitled to workers' compensation benefits when every employer of the claimant who is found to be individually, jointly, or severally liable becomes or is insolvent, appoints or has appointed a receiver, or otherwise does not have sufficient funds, insurance, sureties, or other security to cover workers' compensation liabilities under this chapter. This fund succeeds to all monies previously held in the Default Indemnity Fund. If it becomes necessary to pay benefits, the fund is liable for all obligations of the employer as set forth in Chapters 1 and 2, Title 35, with the exception of penalties on those obligations.

(2) Funds for the Uninsured Employers' Fund shall be provided pursuant to Subsections 35-1-68 (2) (a) and 31A-3-201 (2). The state treasurer is the custodian of the Uninsured Employers' Fund and the commission shall direct its distribution. Reasonable costs of administration may be paid from the fund. The commission shall employ counsel to represent the Uninsured Employers' Fund in all proceedings brought to enforce claims against or on behalf of the fund, and upon the request of the commission, the attorney general, city attorney, or county attorney of the locality in which any investigation, hearing, or trial under the provisions of this title is pending, or in which the employee resides or an employer resides or is doing business, shall aid in the representation of the fund.

(3) To the extent of the compensation and other benefits paid or payable to or on behalf of an employee or their dependents from the Uninsured Employers' Fund, the fund, by subrogation, has all the rights, powers, and benefits of the employee or their dependents against the employer failing to make the compensation payments.

(4) The receiver, trustee, liquidator, or statutory successor of an insolvent employer is bound by settlements of covered claims by the fund. The court having jurisdiction shall grant all payments made under this section a priority equal to that to which the claimant would have been entitled in the absence of this section against the assets of the insolvent employer. The expenses of the fund in handling claims shall be accorded the same priority as the liquidator's expenses.

(5) The commission shall periodically file with the receiver, trustee, or liquidator of the insolvent employer or insurance carrier statements of the covered claims paid by the fund and estimates of anticipated claims against the fund which shall preserve the rights of the fund for claims against the assets of the insolvent employer.

(6) When any injury or death for which compensation is payable from the Uninsured Employers' Fund has been caused by the wrongful act or neglect of another person not in the same employment, the fund has the same rights as allowed under § 35-1-62.

(7) The fund, subject to approval of the Workers' Compensation Division of the Industrial Commission, shall discharge its obligations by adjusting its own claims or by contracting with an adjusting company, risk management company, insurance company, or other company that has expertise and capabilities in adjusting and paying workers' compensation claims.

(8) For the purpose of maintaining this fund, the commission, upon rendering a decision with respect to any claim for benefits under this chapter, shall impose a penalty against the uninsured employer of 15% of the value of the total award in connection with the claim, and shall direct that the additional penalty be paid into the Uninsured Employers' Fund. Awards may be docketed as other awards under this chapter.

(9) The liability of the state, the Industrial Commission, and the state treasurer, with respect to payment of any compensation benefits, expenses, fees, or disbursement properly chargeable against the fund, is limited to the assets in the fund, and they are not otherwise in any way liable for the making of any payment.

(10) The commission may make reasonable rules for the processing and payment of claims for compensation from the fund.

(11) In the event it becomes necessary for the Uninsured Employers' Fund to pay benefits pursuant to the provisions of this section to any employee of an insolvent self-insured employer, the Uninsured Employers' Fund may assess all other self-insured employers amounts necessary to pay (a) the obligations of the fund subsequent to an insolvency, (b) the expenses of handling covered claims subsequent to an insolvency, (c) the cost of examinations under Subsection (12), and (d) other expenses authorized by this section. The assessments of each self-insured employer shall be in the proportion that the manual premium of the self-insured employer for the preceding calendar year bears to the manual premium of all self-insured employers for the preceding calendar year. Each self-insured employer shall be notified of his assessment not later than 30 days before it is due. No self-insured employer may be assessed in any year an amount greater than 2% of that self-insured employer's manual premium for the preceding calendar year. If the maximum assessment does not provide in any one year an amount sufficient to make all necessary payments from the fund for one or more insolvent self-insured employers, the unpaid portion shall be paid as soon as funds become available. All self-insured employers are liable under this section for a period not to exceed three years after the self-insured employer's voluntary or involuntary termination of self-insurance privileges within this state. This subsection does not apply to claims made against an insolvent self-insured employer if the insolvency occurred prior to July 1, 1986.

(12) It is the duty of all self-insured employers to notify the Industrial Commission of any information indicating that any self-insured employer may be insolvent or in a financial condition hazardous to its employees or the public. Upon receipt of that notification and with good cause appearing, the Industrial Commission may order an examination of that self-insured employer. The cost of the examination shall be assessed against all self-insured employers as provided in Subsection (11). The results of the examination shall be kept confidential.

ADDENDUM C

Workers Compensation Fund of Utah

Blaine C. Palmer, Director
Rodney C. Smith, Assistant Director
560 South 300 East
Post Office Box 45420
Salt Lake City, Utah 84145-0420

August 19, 1986

Industrial Commission of Utah
P.O. Box 45580
160 South 3rd East
SLC UT. 84145-0580

RE: Claim No: 86-23288-BO
Inj Date: 07-31-86
Claimant: Randi Hale
Employer: Hales Sand & Gravel

Enclosed you will find reports and certificates relating to the untimely death of Randi Hale.

As it appears there are no dependents and claiming benefits. We will await your order regarding payments to the Default Indemnity Fund.

Very truly yours,

WORKERS COMPENSATION FUND

Dean Sanders

Dean Sanders
Claims Supervisor
Phone: 533-7837

DS/tb

ADDENDUM D

024 151

THE INDUSTRIAL COMMISSION OF UTAH

EDWARD ALTER, State Treasurer and Custodian of the UNINSURED EMPLOYERS' FUND and the INDUSTRIAL COMMISSION of UTAH, Applicants, v. HALES SAND AND GRAVEL and/or WORKERS COMPENSATION FUND OF UTAH, Defendants.	DEATH BENEFITS ORDER

WHEREAS, Randi (Marvidikis) Hales was fatally injured as the result of an accident arising out of or in the course of her employment with Hales Sand and Gravel, on July 31, 1986.

WHEREAS, Section 35-1-68 (2) (a), U. C. A., provides that if the Commission has reasonably determined that there are no dependents of a deceased employee, it may issue an Order for the employer or insurance carrier to pay into the Uninsured Employers' Fund the sum of $30,000.00. In the event no dependency claim is filed within one year from the date of death, this Order shall become permanent and final, and

WHEREAS, the Commission has reasonably determined that there are no dependents and desires to have the statutory amount herein above stated paid into the Uninsured Employers' Fund, and further, the Commission is of the opinion that the statutory funeral allowance of $1,800.00 should also be paid,

NOW THEREFORE, IT IS ORDERED that the defendants pay to the Uninsured Employers' Fund, c/o Edward Alter, State Treasurer, the sum of $30,000.00 for the use and benefit of the Uninsured Employers' Fund.

IT IS FURTHER ORDERED that any claim made by undetermined or potential dependents of the deceased must be made within one year from the date of death

or the funds herein ordered paid to the Uninsured Employers' Fund shall become the property of the Uninsured Employers' Fund without further order of the Commission.

IT IS FURTHER ORDERED that the defendants pay the statutory funeral allowance.

Timothy C. Allen
Administrative Law Judge

Passed by the Industrial Commission of Utah, Salt Lake City, Utah this 21st day of August, 1986.

ATTEST:

Linda J. Strasburg
Commission Secretary

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 86000902

EDWARD ALTER, State Treasurer, and Custodian of the UNINSURED EMPLOYERS FUND and INDUSTRIAL COMMISSION OF UTAH	*	
Applicants,	*	DENIAL OF
vs.	*	MOTION FOR REVIEW
HALES SAND AND GRAVEL and/or WORKERS COMPENSATION FUND OF UTAH,	*	
Defendants.	*	

On or about August 21, 1986, an Order was entered by an Administrative Law Judge of the Commission wherein benefits were awarded in the above entitled case.

On or about September 9, 1986, the Commission received a Motion for Review from the Defendant, Hales Sand and Gravel, by and through their attorney.

Thereafter, the matter was referred to the entire Commission for review pursuant to Section 35-1-82.53, Utah Code Annotated. The Commission has reviewed the file in the above entitled case and we are of the opinion that the Motion for Review should be denied and the Order of the Administrative Law Judge affirmed. In affirming, the Commission adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge.

IT IS THEREFORE ORDERED that the Order of the Administrative Law Judge of August 21, 1986, shall be, and the same is hereby, affirmed and the Motion for Review shall be, and the same is hereby, denied.

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 11th day of December, 1986.

ATTEST:

Linda J. Strasburg
Commission Secretary

Stephen M. Hadley
Chairman

Walter T. Axelgard
Commissioner

Lenice L. Nielsen
Commissioner