

1996

Verna Caporoz, Roxsanne Clastimodo, Barney Caporoz v. Guillermo Rodriguez, Margeret Rodriquez, Tim Fraga, Handyman Willie, Uninsured Employers' Fund, Industrial Commission of Utah : Brief of Respondent

Utah Court of Appeals

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Recommended Citation

Brief of Respondent, *Verna Caporoz, Roxsanne Clastimodo, Barney Caporoz v. Guillermo Rodriguez, Margeret Rodriquez, Tim Fraga, Handyman Willie, Uninsured Employers' Fund, Industrial Commission of Utah*, No. 960760 (Utah Court of Appeals, 1996).
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IN THE UTAH COURT OF APPEALS

VERNA CAPOROZ (sister) and :
ROXSANNE CLASTIMODO (half-sister) :
of BARNEY CAPOROZ (Deceased) :

Petitioners, Appellants, :

vs. :

GUILLERMO RODRIGUEZ, MARGARET :
RODRIGUEZ, and TIM FRAGA dba :
HANDYMAN WILLIE (Uninsured), :
UNINSURED EMPLOYERS' FUND and :
INDUSTRIAL COMMISSION OF UTAH, :

Respondents, Appellees :

cket Number: 860760-CA

Priority No. 7

ON PETITION FOR REVIEW OF THE ORDER
OF THE INDUSTRIAL COMMISSION OF UTAH

BRIEF OF RESPONDENT UNINSURED EMPLOYERS' FUND

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ROXSANNE CLASTIMODO (half-sister)	:	
of BARNEY CAPOROZ (Deceased)	:	
	:	
Petitioners, Appellants,	:	
	:	
vs.	:	Docket Number: 960760-CA
	:	
GUILLERMO RODRIGUEZ, MARGARET	:	Priority No. 7
RODRIGUEZ, and TIM FRAGA dba	:	
HANDYMAN WILLIE (Uninsured),	:	
UNINSURED EMPLOYERS' FUND and	:	
INDUSTRIAL COMMISSION OF UTAH,	:	
	:	
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JURISDICTION

The Utah Court of Appeals has jurisdiction over this petition for review pursuant to Utah Code Ann. § 35-1-86 and § 63-46b-16.

STATEMENT OF THE ISSUES

1. Whether the Industrial Commission correctly determined that the Petitioners were not dependents of the decedent under Utah Code Ann. § 35-1-71.

Standard of review: The determination of dependency is a question of fact. Rigby v. Industrial Commission, 286 P. 628, 630 (Utah 1930). The Court of Appeals reviews the whole record to determine whether the Industrial Commission's findings of fact are supported by substantial evidence in the record. Virgin v. Board of Review, 803 P.2d 1284 (Utah App. 1990); Utah Code Ann. § 63-46b-16(4)(g).

2. Whether the Industrial Commission correctly determined that the decedent's estate was not entitled to an award of temporary total disability from the date of his injury to the date of his death.

Standard of review: Whether an award of temporary total disability is appropriate in this case is a question of law. The Court of Appeals reviews the Industrial Commission's decision under a correction of error standard. Utah Code Ann. § 63-46b-16(4)(d).

3. Whether the Industrial Commission made adequate findings of fact and conclusions of law is a question of law. The Court of Appeals reviews the record with no deference to the Commission to determine whether the findings of fact and conclusions of law are legally sufficient. Adams v. Board of Review, 821 P.2d 1 (Utah App. 1991); Utah Code Ann. § 63-46b-16(4)(h).

DETERMINATIVE STATUTES AND RULES

Utah Code Annotated § 35-1-71 (1994)

Utah Administrative Code R568-12 (1994)

STATEMENT OF THE CASE

Nature of the Case: *This proceeding arises from a claim for dependents benefits filed by petitioners Verna Caporoz and Roxsanne Clastimodo (“the sisters”) based upon their brother Barney Caporoz’ death from an industrial accident. The Administrative Law Judge (“ALJ”) and the Industrial Commission (“Commission”) denied the claim. The sisters then sought review by the Utah Court of Appeals.*

Proceedings Below: On May 7, 1994, Barney Caporoz was injured in an industrial accident while working for Handyman Willie, an uninsured employer. Barney Caporoz (“the decedent”) passed away on December 17, 1994. The sisters filed a Claim For Dependent’s Benefits and/or Burial Benefits before the Commission. (R.1) The Uninsured Employers’ Fund filed a general denial in answer to the claim. (R. 14) The ALJ denied the sisters’ claim for dependents benefits and an award of temporary total disability to the decedent’s estate. (R. 125-130)

Disposition Below: The sisters filed a motion for review on May 3, 1996 raising the issues of partial dependency and temporary total disability and complaining that the ALJ did not draft his own order. (R. 132) The Commission issued an order denying the applicant’s motion for review on October 30, 1996. (R. 168-173)

RELEVANT FACTS

1. The sisters moved to a three bedroom house in Plain City in 1990 when Verna Caporoz’ employer got a contract with Iomega which is located near Ogden. Prior to their move to Plain

City, the sisters shared a house in Salt Lake City. (R. 231) Two years later, the sisters invited their brother, the decedent, to come live with them in Utah. The decedent moved from Hawaii to Utah in 1992 to live with his sisters. (R. 232)

2. The decedent and his sisters were each employed. The decedent and Ms. Caporoz earned approximately the same income (R. 213, 220-221), while Ms. Clastimodo earned somewhat less (R. 256-257). Each of them contributed to their common living expenses. (R. 209, 220-229, 257-260) The decedent paid \$400 per month, which included his share of the rent and other basic household expenses. (R. 209) His contribution was placed in his sisters' checking account, along with his sisters' earnings. (R. 238-239) Ms. Caporoz then paid rent and other household expenses out of the checking account. (R. 225, 226-227, 238-239) Monthly household expenses included rent and utilities at \$400, automobile insurance at \$106, payments on Ms. Caporoz' charge accounts at \$156, cable television at \$37 and other household needs. (R.221-222, 224-229, 232-233)

3. The sisters and the decedent split the telephone bill according to the long distance calls made by each of them. (R. 227, 257-259) The decedent and his sisters each contributed to food purchases. (R 208, 232-233, 241, 258) He occasionally provided his sisters with money for movies and trips to Wendover, Nevada and day trips to Lagoon Amusement Park. (R. 208, 240-243)

4. At the time the decedent joined his sisters, they already owned some furniture, including a table and chairs, beds, a loveseat, two living room chairs and a television set. (R 212, 235) They also had basic household items such as dishes, utensils and pans. (R. 223) After the decedent arrived, he purchased several items of second hand furniture, including a bed for

himself and a couch. (R. 233-234) The family also purchased some used living room furniture (R. 212, 235) Ms. Caporoz owned two motor vehicles when her brother moved into the house. The decedent repaired one of the vehicles and assisted Ms. Caporoz in obtaining a third vehicle. (R. 221)

5. The decedent was injured in a work related accident on May 7, 1994 and passed away on December 17, 1994. (R. 26, 127) At the time of his death, the decedent was 33 years old, Verna Caporoz was 35 years old and Roxsanne Clastimodo was 30 years old. (R. 1, 246)

6. Immediately after the decedent's injury, Ms. Caporoz quit her job. Ms. Caporoz did not quit her job to provide care for her brother but because she wanted to sit with him while he was hospitalized. (R. 235-236) She remained off work for five months during which time the sisters fell behind on their financial obligations. (R. 243, 246) The sisters were compelled to sell various items of personal property. (R. 215, 218) After Ms. Caporoz returned to work, the sisters have met their payment obligations and are repaying their accumulated debt at the rate of \$250 per month. (R. 237-238, 246) They continue to reside in the Plain City home. (R. 237)

7. On May 5, 1995, the sisters filed a claim for workers' compensation benefits claiming that they were the decedent's dependents. (R. 1)

8. No claim for workers' compensation benefits was filed on behalf of the decedent during his lifetime and no award of temporary total disability benefits was entered in favor of the decedent prior to his death. (R. 169)

SUMMARY OF THE ARGUMENT

1. The determination of dependency is a question of fact. The sisters have failed to marshal all of the evidence in the record to show that the Industrial Commission's findings are not

supported by substantial evidence. Accordingly, their petition for relief should be denied.

The Court of Appeals reviews the whole record to determine whether there is substantial evidence to support the Industrial Commission's denial of benefits. The evidence in the record supports the Commission's conclusion that the sisters were not dependent upon the decedent.

2. The Commission correctly determined that the decedent's estate was not entitled to an award of temporary total disability compensation for the time between his injury and his death.

Utah law is clear that the Commission may not make a posthumous award of temporary total disability unless the award was vested prior to the decedent's death.

3. The Commission's order clearly shows outlines the steps by which the ultimate conclusions on each factual issue were determined. Accordingly, there is no need to remand this matter for further proceedings.

ARGUMENT

Point I. The Industrial Commission Correctly Determined That Petitioners Were Not Dependent or Partially Dependent Upon the Decedent for Support.

A. The Petitioners Failed to Marshal the Evidence.

The sisters claim that the evidence in the record does not support the Commission's determination that they were not partially dependent upon the decedent for support. However, the sisters have failed to "marshal all the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." Grace Drilling v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989).

The sisters' brief also completely ignores one finding that was at the heart of the Commission's determination. The sisters fail to mention that Ms. Caporoz quit her job after her brother was injured and remained off work for the next five months. Ms. Caporoz did not quit her job to provide care to the decedent. He was in a hospital under the care of medical providers for the entire period between his accident and his death. The fact that Ms. Caporoz quit her job deprived the household of her income. This fact was central to the Commission's determination that the sisters' financial problems following the accident were due to the loss of Ms. Caporoz' income rather than the loss of the decedent's support.

The petitioner's failure to marshal the evidence as required should result in the court accepting the Commission's findings of fact as conclusive. Crapo v. Industrial Commission, 297 Utah Adv. Rep. 14, 15 (Utah App. 1996); VanLeeuwen v. Industrial Commission, 901 P.2d 281, 284 (Utah App.) cert. denied, 910 P.2d 426 (Utah 1995).

B. The Commission's Finding of No Dependency Is Supported by Substantial Evidence In the Record.

Utah Code Ann. § 35-1-71 identifies those who qualify to claim dependents benefits under the Utah Workers' Compensation Act:

35-1-71. Dependents-Presumption.

The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

(1) Children under the age of 18 years, or over if physically or mentally incapacitated and dependent upon the parent, with whom they are living at the time of the death of such parent, or who is legally bound for their support.

(2) For purposes of payments to be made under Subsection 35-1-68(2)(a)(i), a surviving husband or wife shall be presumed to be wholly dependent upon a spouse with whom he or she lived at the time of the employee's death.

In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury or death of such employee, except for purposes of dependency

reviews under Subsection 35-1-68(2)(a)(iii). No person shall be considered as a dependent unless he or she is a member of the family of the deceased employee, or bears the relation of husband or wife, lineal descendant, ancestor, or brother or sister. The word “child” as used in this title shall include a posthumous child, and a child legally adopted prior to the injury. Half brothers and half sisters shall be included in the words “brother or sister” as above used.

Although the sisters do not qualify for the presumption of dependency set out above, they may qualify as dependents of the deceased based on the specific facts of this case.

The determination of dependency under the Utah Workers’ Compensation Act is a question of fact based upon the relationship between the sisters and the decedent on the date of the accident. Farnsworth v. Industrial Commission, 534 P.2d 897, 899 (Utah 1975); Rigby v. Industrial Commission, 286 P.2d 628, 630 (Utah 1930). The sisters have the burden to establish their dependency on the decedent by a preponderance of the evidence. Lipman v. Industrial Commission, 592 P.2d 616 (Utah 1979).

The Commission correctly determined that the sisters were not dependent upon the decedent for support and denied their claim for benefits. The Commission applied the Rigby test as set out in Farnsworth:

Ms. Caporoz and Ms. Clastimodo have the burden of proving dependency which is a question of fact that must be made on a case by case basis. They must establish that they relied upon the deceased worker for support, that had the deceased worker not been killed, the applicants would have continued to receive some assistance, and that it was reasonably necessary for the deceased worker to render aid to the applicants to allow them to maintain their accustomed standard of living.

Order Denying Motion For Review, Appendix 1.

The Commission observed that the decedent “carried his share of household expenses” but “did not subsidize his sisters’ expenses.” Although the decedent occasionally treated his

sisters to movies, admission to Lagoon and lodging and meals at Wendover, the Commission concluded that those items were not significant to the support and maintenance of the sisters. The Commission noted that the financial difficulties suffered by the sisters after the decedent's injury were due to the fact that Ms. Caporoz unnecessarily quit her job after the injury, not the loss of support from the decedent.

In other words, the Commission found that the sisters did not rely upon the deceased for support. The Commission determined that the contributions of the deceased to the household expenses were essentially no more than his share. Therefore, the arrangement between the sisters and the decedent was that of three independently supporting adults sharing expenses as roommates. Although the decedent occasionally treated his sisters to movies and other entertainment, those gifts were not necessary to maintain and support his sisters.

The evidence presented at the hearing showed that Ms. Caporoz quit her job after her brother's injury. Although she was not required to care for her brother who remained hospitalized until his death, she remained off work for five months. Accordingly, during the period immediately following the decedent's industrial accident, the household suffered the loss of Ms. Caporoz' earnings. The Commission determined that it was the loss of Ms. Caporoz' earnings that caused the financial reverses the sisters ascribe to the loss of the decedent's support.

There was conflicting evidence regarding the cause of the sisters' decreased standard of living, and the Commission resolved that conflict to the detriment of the sisters. The court should "not substitute its judgment as between two reasonably conflicting views . . . It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the

inferences.” Grace Drilling Company v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989).

The sisters claim that the Commission applied the wrong legal standard to determine dependency because the Commission order found that the decedent “did not subsidize his sisters’ expenses.” “Subsidize” means “to support or assist with a subsidy,”¹ Although the Commission used language that is different from that in Rigby , the result is the same. The Rigby test contemplates that a dependent received some type of actual financial support from the decedent. The use of the term “subsidy” by the Commission does not change the test. The Commission simply found that the decedent did not contribute to the support of his sisters.

The sisters further claim that the Commission applied a higher standard because of the statement that “the Industrial Commission does not consider such items [movies and trips to Lagoon or Wendover] as significant to the support and maintenance of Ms. Caporoz or Ms. Clastimodo.” It is clear that the expenses to which the Commission refers are occasional entertainment expenses or gifts; not contributions to the sisters’ support. “Support” as used in the statute refers to the provision of food, shelter, clothing and other items necessary to maintain the dependent in his accustomed station in life. Farnsworth at 899. In the case of adult siblings, it is not reasonable to find dependency based upon isolated, insubstantial gifts of entertainment.

The Commission’s conclusion that the sisters were not dependents of their deceased brother for workers compensation purposes is supported by substantial evidence in the record. Accordingly, the court should affirm the Industrial Commission’s order denying dependency benefits.

¹ Webster’s II New Riverside University Dictionary (1988).

**Point II. There Was No Award To Mr. Caporoz Prior To His Death,
So No Benefits Can Pass To His Estate.**

A. The Caporoz Estate Cannot Receive Benefits That Were Not Vested In The Decedent Prior To His Death.

The sisters incorrectly assert that the decedent's estate is entitled to a payment of temporary total disability compensation for the period between the decedent's injury and the day of his death. It is well settled in Utah that an award for compensation under the Utah Workers' Compensation Act vests when an award is made and ceases upon the applicant's death. Heiselt Construction Co. v. Industrial Commission, 197 P. 589, 592 (Utah 1921). In Heiselt, David Murphy's fingers were frozen while employed by Heiselt Construction Company. Mr. Murphy later died from causes unrelated to his industrial injury. The Industrial Commission awarded permanent partial disability benefits to Murphy's estate after Murphy's death. The Utah Supreme Court reversed the award holding that an award of compensation does not vest until the award is made during the applicant's lifetime.

A claim for dependent's benefits is separate and independent from any claim the decedent may have had during his lifetime. Halling v. Industrial Commission 263 P. 78, 81 (Utah 1927). In Halling, the claim pursued by Mariner Halling during his lifetime was denied by the Industrial Commission. Upon his death, Rose Halling, his wife, timely filed a claim for dependent's benefits. The Industrial Commission denied the claim concluding that the denial of Mr. Halling's claim precluded the claim of Mrs. Halling and the children "who claim through him." The Utah Supreme Court reversed, reasoning that the claim of Halling's dependents was "separate and independent of any claim Mr. Halling may have had in his lifetime." Id. at 81.

Accordingly, the denial of Mr. Halling's claim was not binding on his dependents and did not bar their claim for benefits after his death.

Parker v. Industrial Commission, 50 P.2d 278 (Utah 1935), cited by the sisters is distinguishable from Heiselt. The decedent in Parker received an award of benefits from the Industrial Commission prior to his death. After Mr. Parker's death, the insurance carrier refused to pay the benefits which had been earlier awarded. The Court held that the award was vested and accrued upon his death. Therefore, the award could be paid to Mr. Parker's estate. In Heiselt, the benefits in question were not vested and accrued. Therefore, those unaccrued, unvested benefits did not pass to the decedent's estate. Id. at 279. The Utah Supreme Court reaffirmed Heiselt and Parker in Pacific States Cast Iron Pipe Co. v. Industrial Commission, 218 P.2d 970, 974 (Utah 1950).

Based upon the Court's reasoning in Halling, the instant claim for dependent's benefits cannot support a claim for temporary total compensation benefits to the decedent's estate. No claim for workers' compensation benefits was filed by Mr. Caporoz or his representative, and no award of any kind was ever made to him while he was living. Therefore, under the analyses contained in the cases cited above, Mr. Caporoz did not have a vested and accrued award which could pass to his estate upon his death.

B. R568-1-12 Does Not Apply To Determine the Date An Award Vests.

The petitioners claim that R568-1-12 provides the date upon which the decedent's award became accrued and vested. The relevant portions of R568-1-12 provide:

R568-1-12. Interest.

A. Interest must be paid on each benefit payment which comprises the award from

the date that payment would have been due and payable at the rate of 8% per annum.

B. For the purpose of interest calculation, benefits shall become “due and payable” (as used in Section 35-1-78, U.C.A.) As follows:

1. Temporary total compensation shall be due and payable within 21 days of the date of the accident.

The sisters fail to note that the plain language of R568-1-12(B) specifically limits the rule’s application to the calculation of interest on workers’ compensation awards. The rule cannot and does not apply to vest an award of benefits when no claim has ever been filed.

The Commission correctly denied the sisters’ claim for temporary total disability benefits because no award of benefits vested and accrued prior to the decedent’s death. For the reasons outlined above, this court should affirm the Commission’s order denying the sisters’ claim for temporary total disability to be paid into the decedent’s estate.

Point III. The Order of the Industrial Commission Contains Adequate Findings of Fact and Conclusions of Law.

The sisters assert that the Order of the ALJ and the Commission are insufficient to permit meaningful review and do not reveal the method by which the Commission reached its determination. This assertion is without merit.

“An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review.” Adams v. Industrial Commission, 821 P.2d 1, 4 (Utah App. 1991). In order for the court to meaningfully review the findings of the Commission, the findings “must be sufficiently detailed to include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.” Adams at 4, quoting Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987).

In this case, the Commission set out a number of factual findings in its order. These facts show that the decedent lived with his adult siblings and that they shared rent and other household expenses in the manner of roommates, each paying their own way. That occasionally, the decedent treated his sisters to movies or other recreational activities. The facts also state that the decedent was injured and later died as the result of a work related accident, and that following the accident, his sister, Verna Caporoz, unnecessarily quit her job to stay with the decedent at the hospital. Subsequent to the accident and Ms. Caporoz quitting her job, the evidence shows that the sisters suffered financial setbacks and were forced to sell some of their personal possessions. The evidence further showed that once Ms. Caporoz returned to work, she has been able to repay the accumulated debts at a rate of \$250.00 per month.

The Commission concluded from these facts that the sisters were not dependent upon the decedent for support. The Commission reasoned that the evidence showed that the siblings each paid their own way during the course of their daily lives, but that occasionally, the decedent would treat his sisters to some form of entertainment. The Commission concluded that the occasional entertainment provided by the decedent was not support. The Commission further concluded that the financial setbacks the sisters suffered after the accident did not show dependency because Ms. Caporoz quit her job on the day her brother got hurt. The Commission attributed the sisters' financial setbacks to Ms. Caporoz quitting her job rather than the loss of the decedent's contribution to the household.

With regard to the Commission's denial of temporary total disability, again the Commission's reasons are clear. According to relevant case law, the right to compensation for injuries is personal to the employee. Unless an award has been made by the Commission during

the decedent's life, the decedent's estate has no claim for unpaid compensation on behalf of the decedent. Pacific States Cast Iron Pipe Co. v. Industrial Commission, 218 P.2d 970, 974 (1950).


No application for benefits was filed on behalf of the decedent and no order was entered awarding benefits to the decedent prior to his death. Any pending claim for compensation or other benefits payable to the decedent expired with his death. Therefore, no temporary total disability payments had vested or accrued to the decedent which could be paid to his estate.

It is the Commission's order that is on review to the Court of Appeals. The respondents assert that the Commission's order clearly sets forth the reasons for its decision and comports with the requirements of the Utah Administrative Procedures Act. Accordingly, the Commission's order should be affirmed.

CONCLUSION

Review of the whole record in this matter clearly shows that the Commission's findings of fact and conclusions of law are supported by substantial evidence. The sisters had the burden to prove that they were dependent upon the decedent for support and they failed to meet that burden. The claim for temporary total compensation to be paid to the decedent's estate fails because no award was entered prior to his death. Therefore, Respondents respectfully request that this court affirm the Industrial Commission's order denying benefits in this matter.

DATED this 16, day of April, 1997.


Sharon J. Eblen, Attorney for Respondent
Uninsured Employers' Fund

CERTIFICATE OF SERVICE

I certify that on the 16 day of April, 1997, I mailed two true and accurate copies of the Respondent's Brief in the matter of Caporoz v. Rodriguez, Case No. 960760CA, first class postage prepaid (except as indicated below), to the following:

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A handwritten signature in cursive script, reading "Sharon J. Eblen", is written over a horizontal line.

Appendix 1

Order of the Industrial Commission

THE INDUSTRIAL COMMISSION OF UTAH

VERNA CAPOROZ and	*	
ROXSANNE CLASTIMODO,	*	
Sisters of BARNEY	*	ORDER DENYING
CAPOROZ, deceased,	*	MOTION FOR REVIEW
	*	
Applicants,	*	
	*	
v	*	
	*	
GUILLERMO RODRIGUEZ, Margaret	*	
RODRIGUEZ and TIM FRAGA, dba	*	Case No. 95-0415
HANDY MAN WILLIE, and THE	*	
UNINSURED EMPLOYERS' FUND,	*	
	*	
Defendants.	*	

Verna Caporoz and Roxsanne Clastimodo ask The Industrial Commission of Utah to review the Administrative Law Judge's decision denying their claim for dependents' benefits and the claim of the estate of Barney Caporoz for temporary total disability compensation under the Utah Workers' Compensation Act. The Industrial Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §35-1-82.53 and Utah Admin. Code R568-1-4.M.

ISSUE PRESENTED

1) Were Ms. Caporoz and Ms. Clastimodo dependents of Mr. Caporoz and therefore entitled to the benefits provided by §35-1-73 of the Utah Workers' Compensation Act ("the Act"). 2) Is Mr. Caporoz' estate entitled to temporary total disability compensation for the period between his accident and death? 3) Did the ALJ fail to properly consider and resolve the factual and legal issues presented by applicants' claim?

FINDINGS OF FACT

On May 17, 1994, while working for Handy Man Willie, Mr. Caporoz was injured by accident arising out of and in the course of his employment. Mr. Caporoz died from his injuries on December 17,

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1994. At the time of his accident, Mr. Caporoz resided with his sisters Ms. Caporoz and Ms. Clastimodo.

Mr. Caporoz was 33 years old at the time of his death. Ms. Caporoz and Ms. Clastimodo were 35 and 30 years old, respectively. Ms. Caporoz and Ms. Clastimodo had come to Utah from Hawaii approximately six years earlier. They had first lived together in Salt Lake City, then moved to Plain City. When Mr. Caporoz came to Utah three years later, he too lived in the Plain City home.

Mr. Caporoz and his sisters were each employed. Mr. Caporoz and Ms. Caporoz earned approximately the same income while Ms. Clastimodo earned somewhat less. He paid \$400 per month as his share of rent and other basic household expenses. His contribution was placed in his sisters' checking account, as were his sisters' earnings. Ms. Caporoz then paid rent and other household expenses out of this checking account. Such expenses included rent at \$400 per month, automobile insurance of \$106 per month, payments on some charge accounts, and other household needs.

In addition to Mr. Caporoz' monthly payment toward household expenses, he purchases food items that were shared with his sisters. He also paid for cable television service and his share of long distance telephone charges. He occasionally provided his sisters with money for movies. On several occasions he paid for travel and lodging in Wendover, Nevada and for day trips to Lagoon Amusement Park.

At the time Mr. Caporoz joined his sisters, they already owned some furniture, including table and chairs, beds, loveseat, two living room chairs and a television set. They also had basic household items such as dishes, utensils and pans necessary for their home. After Mr. Caporoz arrived, he purchased several items of second-hand furniture, including a bed for himself, a couch and other living room furniture. The family acquired two used motor vehicles in addition to the automobile Ms. Caporoz already owned.

Immediately after Mr. Caporoz was injured at work, Ms. Caporoz quit her job in order to be with her brother an the hospital. She

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remained off work for five months, during which time she and her sister fell behind on their financial obligations. They were compelled to sell various items of personal property. Now that Ms. Caporoz has returned to work, she and her sister are meeting their current obligations and are slowly repaying their accumulated debt. They continue to reside in the Plain City home.

On May 5, 1995, Ms. Caporoz filed a claim for dependent's benefits and burial expense with the Industrial Commission. It does not appear that any claim was ever filed on behalf of Mr. Caporoz for temporary total disability compensation for the period between his injury and death.

DISCUSSION AND CONCLUSION OF LAW

I. DEPENDENTS' BENEFITS:

When an accident causes the death of a worker, §35-1-68(5)(b) of the Act provides survivors' benefits to family members¹ who were dependent on the deceased worker for their support. In this case, the parties agree that Mr. Caporoz' death arose out of and in the course of his employment at Handy Man Willies. The only issue in dispute is whether Ms. Caporoz and Ms. Clastimodo were partially dependent upon Mr. Caporoz for their support.

Ms. Caporoz and Ms. Clastimodo bear the burden of proving dependency,² which is a question of fact that must be made on a case by case basis. They must establish that they relied upon the deceased worker for support, that had the deceased worker not been

¹ Those family members eligible for survivors' benefits are identified in §35-1-71 of the Act and include sisters and half sisters.

² Minor children, disabled children and surviving spouses are generally presumed to be dependent, pursuant to §35-1-71 of the Act. However, no presumption of dependency exists with respect to surviving siblings.

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killed, the applicants would have continued to receive some assistance, and that it was reasonable necessary for the deceased worker to render aid to the applicants to allow them to maintain their accustomed standard of living. Farnsworth v. Industrial Commission, 534 P.2d 897, 899 (1975), citing Rigby v. Industrial Commission, 75 Utah 454, 286 P. 628 (1930).

Applying the foregoing test to the facts of this case, the Industrial Commission concludes Ms. Caporoz and Ms. Clastimodo have not established they were dependent upon Mr. Caporoz within the meaning of §35-1-68 of the Act. While Mr. Caporoz carried his share of household expenses, he did not subsidize his sisters' expenses. To the contrary, it appears that Mr. Caporoz and his sisters had developed a system of sharing common expenses, but that each of them paid their own personal expenses. While Mr. Caporoz may have occasionally treated his sisters to movies, admission to Lagoon or lodging and meals at Wendover, the Industrial Commission does not consider such items as significant to the support and maintenance of Ms. Caporoz or Ms. Clastimodo.

The Industrial Commission also concludes that Mr. Caporoz' financial participation was not necessary for Ms. Caporoz and Ms. Clastimodo to maintain their standard of living. It appears that the financial difficulty suffered by Ms. Caporoz and Ms. Clastimodo after their brother's injury resulted from the fact that Ms. Caporoz stopped working, rather than the loss of support from Mr. Caporoz.

In light of the foregoing, the Industrial Commission affirms the determination of the ALJ that Ms. Caporoz and Ms. Clastimodo were not dependent upon Mr. Caporoz and are not entitled to dependents' benefits under the Utah Workers' Compensation Act.

II. TEMPORARY TOTAL DISABILITY COMPENSATION:

Ms. Caporoz and Ms. Clastimodo ask the Industrial Commission to order payment of temporary total disability compensation to Mr. Caporoz' estate for the period between Mr. Caporoz' accident and his death. The Industrial Commission is unaware that any claim for

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temporary total disability compensation was filed prior to Mr. Caporoz' death. It is clear that no award of such compensation was made prior to his death. Under such circumstances, the decision of the Utah Supreme Court in Pacific States Cast Iron Pipe Co. v. Industrial Commission, 218 P.2d 970, 974 (1950), is controlling:

The right to compensation for injuries is a right personal to the employee and unless payments have accrued or a determination has been made by the Commission there is no right to which the personal representative or a dependent can succeed.

Because no temporary total disability compensation accrued to Mr. Caporoz before his death, any claim he might have had to such compensation expired with his death. Therefore, the ALJ correctly declined to order payment of temporary total disability compensation to Mr. Caporoz' estate.

III. ALJ'S CONSIDERATION OF DISPUTES OF FACT AND LAW:

Ms. Caporoz and Ms. Clastimodo contend that the ALJ improperly deferred to the analysis and arguments of the Uninsured Employers' Fund, thereby failing to weigh and resolve factual and legal issues according to his own judgment.

The Industrial Commission finds no merit to this argument. It is the written decision, signed and issued by the ALJ, which must be taken as the ALJ's final judgment in this case. Even if the contents of a decision have been suggested by the evidence and arguments of a party, the ALJ manifested his own judgment by signing the decision. Of course, the decision must properly apply the law and be supported by the evidence. Any party believing the decision to be deficient may obtain review by the Industrial Commission, which has authority to modify the ALJ's findings of fact and application of law. In this case, the Industrial Commission has reviewed the testimony, documentary record and arguments of the parties. Based on that review, the Industrial Commission agrees with the ALJ's determination.


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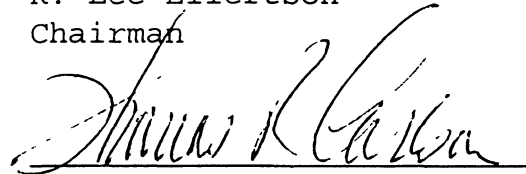
ORDER

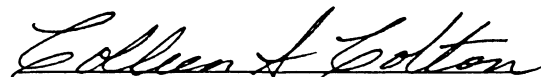
The Industrial Commission affirms the ALJ's decision and denies Ms. Caporoz and Ms. Clastimodo's motion for review. It is so ordered.

Dated this 30th day of October, 1996.




R. Lee Ellertson
Chairman


Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

NOTICE OF APPEAL RIGHTS

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

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CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Barney Caporoz Case No. 95-0415 was mailed first class postage prepaid this 30th day of October, 1996, to the following:

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Support Specialist
Industrial Commission of Utah

Appendix 2

§ 35-1-71, U.C.A.

COLLATERAL REFERENCES

C.J.S. — 99 C.J.S. Workmen's Compensation
§ 296.

35-1-71. Dependents — Presumption.

The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

(1) Children under the age of 18 years, or over if physically or mentally incapacitated and dependent upon the parent, with whom they are living at the time of the death of such parent, or who is legally bound for their support.

(2) For purposes of payments to be made under Subsection 35-1-68(2)(a)(i), a surviving husband or wife shall be presumed to be wholly dependent upon a spouse with whom he or she lived at the time of the employee's death.

In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury or death of such employee, except for purposes of dependency reviews under Subsection 35-1-68(2)(a)(iii). No person shall be considered as a dependent unless he or she is a member of the family of the deceased employee, or bears the relation of husband or wife, lineal descendant, ancestor, or brother or sister. The word "child" as used in this title shall include a posthumous child, and a child legally adopted prior to the injury. Half brothers and half sisters shall be included in the words "brother or sister" as above used.

History: L. 1917, ch. 100, § 79, subsec. 4; C.L. 1917, § 3140, subsec. 5; L. 1921, ch. 67, § 1; R.S. 1933, 42-1-67; L. 1939, ch. 51, § 1; C. 1943, 42-1-67; L. 1977, ch. 151, § 5; 1979, ch. 138, § 4; 1987, ch. 128, § 3.

Compiler's Notes. — The references to Subsections 35-1-68(2)(a)(i) and (2)(a)(iii) should

now be to Subsections (5)(a)(i) and (5)(a)(iii) of that section, following a 1994 amendment adding and redesignating subsections in § 35-1-68.

Cross-References. — Right of action by husband for injuries to wife, § 30-2-4.

Right of action by parent for injury to child, § 78-11-6.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Ability to work.
Children.
Effect of majority after award.
Findings of commission.
General construction.
Irrebuttable presumption.
Necessity for marriage relationship.
Other relatives.
Parents.
Posthumous child.
Presumption and burden of proof.
Question of dependency.
Res adjudicata.
Siblings.
Spouses.
Stepchildren.
Test for determining dependency.

Unmarried companion.
Validity of marriage.
Weight and sufficiency of evidence.
Words and phrases defined.

Constitutionality.

The Equal Protection Clause of the Fourteenth Amendment is not violated by treating nonresident aliens differently than resident aliens and Canadians. *Martinez v. Industrial Comm'n*, 720 P.2d 416 (Utah 1986).

Since the constitutionality of worker's compensation death benefits must be viewed in light of the laws and history of this country, the extension of full death benefits to foreign nationals is not constitutionally required. *Martinez v. Industrial Comm'n*, 720 P.2d 416 (Utah 1986).

Since this section does not conflict with a treaty to which the United States and Mexico

Appendix 3

R586-1-12, U.A.C.

R568-1-12. Interest.

A. Interest must be paid on each benefit payment which comprises the award from the date that payment would have been due and payable at the rate of 8% per annum.

B. For the purpose of interest calculation, benefits shall become "due and payable" (as used in Section 35-1-78, U.C.A.,) as follows:

1. Temporary total compensation shall be due and payable within 21 days of the date of the accident.

2. Permanent partial compensation shall be due and payable on the next day following the termination of a temporary total disability. However, where the condition is not fixed for rating purposes, the interest shall commence from the date the permanent partial impairment can be medically determined.

3. Permanent partial or permanent total disability compensation payable by the Employers' Reinsurance Fund or the Uninsured Employers' Fund shall be due and payable as soon as reasonably practical after an order is issued.