

1948

Silver King Coalition Mines Company and Continental Casualty Company v. Industrial Commission of Utah and Susan J. Mitchell : Brief of Plaintiffs

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Shirley P. Jones; Attorney for Plaintiffs;

Recommended Citation

Brief of Appellant, *Silver King v. Industrial Commission of Utah and Mitchell*, No. 7171 (Utah Supreme Court, 1948).
https://digitalcommons.law.byu.edu/uofu_sc1/850

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

171
Case No. 7171

In the Supreme Court of the State of Utah

SILVER KING COALITION MINES
COMPANY, a corporation, and CONTI-
NENTAL CASUALTY COMPANY, a
corporation,

Plaintiffs,

vs.

INDUSTRIAL COMMISSION OF UTAH
and SUSAN J. MITCHELL, mother of
Lester A. Mitchell, deceased,

Defendants.

PLAINTIFFS' BRIEF

FILED

AUG 20 1943 SHIRLEY P. JONES,

CLERK, SUPREME COURT, UTAH

Attorney for Plaintiffs

I N D E X

	Page
STATEMENT OF FACTS	2
STATEMENT OF ERRORS	11
APPLICABLE STATUTORY PROVISIONS	11
Silicosis—Defined	11
Autopsy in Death Claims	12
Compensation for Silicosis — Schedule of Amounts — Increase of Payments—Death Benefits to Dependents.....	12
Benefits—To Whom Paid—Manner—Termination.....	13
OCCUPATIONAL DISEASE	14
Procedure—Extent of Review	14
Rules of Procedure	14
WORKMEN'S COMPENSATION	14
Rules of Evidence Before Commission	14
ARGUMENT	14
I. Is there substantial competent evidence having probative value to support the findings of the Commission?.....	16
II. Did the Commission abuse its discretion in refusing an autopsy in this case?	23

AUTHORITIES

Appalachian Electric Power Co. v. National Labor Relations Board, 93 Fed. (2) 985	18, 23
Arthaud v. Griffin, 217 N.W. 809	31
Clay v. Aetna Life Insurance Company, 53 Fed. (2) 689 (Minn. D. Court)	29
18 C. J. p. 1135, Sec. 3	31
Howard v. Hartford Accident and Indemnity Co. (1934), 32 Pac. (2) 231	27
Howes v. United States Fidelity and Guarantee Co., 73 Fed. (2) 611	28
Lee v. Baltimore Hotel Company, 136 S.W. (2) 695.....	31
Meyers v. Travelers' Insurance Company (Pa. 1946), 46 A. (2) 224	27
National Labor Relations Board v. Union Pacific Stages, 99 Fed. (2) 153	17
Salt Lake City v. Anderson, 106 Utah 350, 361, 148 Pac. (2) 346.....	30
Standard Accident Insurance Company v. Rossi, 3 Fed. (2) 667.....	28
Strzebinska v. Jary, 193 A. 745	31
U.C.A. 1943, 42-1-78	14
U.C.A. 1943, 42-1-82	14
U.C.A. 1943, 42-1a-25	12, 32
U.C.A. 1943, 42-1a-29	11, 19
U.C.A. 1943, 42-1a-33	13
U.C.A. 1943, 42-1a-39	14, 19
U.C.A. 1943, 42-1a-43	14, 19
U.C.A. 1943, 42-1a-47	12

In the Supreme Court of the State of Utah

SILVER KING COALITION MINES
COMPANY, a corporation, and CONTI-
NENTAL CASUALTY COMPANY, a
corporation,

Plaintiffs

vs.

INDUSTRIAL COMMISSION OF UTAH
and SUSAN J. MITCHELL, mother of
Lester A. Mitchell, deceased,

Defendants.

Case No.

7171

PLAINTIFFS' BRIEF

This case and case No. 7172 in this court involve the same plaintiffs and very similar facts. Both cases demonstrate the arbitrary and capricious action of the Industrial Commission in making an award after refusing an autopsy. In both cases the employee was dead and buried before we ever heard of the case, in both cases the medical evidence fails to measure up to the requirements of our statute, and in both cases the record demonstrates the high-handed manner in which the Industrial Commission proceeded in order to find against

us. We believe the court will find it helpful to consider the two cases together. The unfairness and arbitrariness of the Commission is apparent in each case, but when they are considered together it is more than apparent that the Industrial Commission has adopted a course of procedure which forecloses employers from having fair and impartial hearings.

Both cases are here on Certiorari from the Industrial Commission to review awards of the Commission granting compensation on account of death claimed from an occupational disease, to-wit: silicosis. While the circumstances, facts and applicable law are in many respects similar, we have felt that it would be more helpful to the court to consider each case in a brief devoted to that case rather than to attempt to consolidate the two cases in one brief.

STATEMENT OF FACTS

Lester A. Mitchell was an employee of the plaintiff Silver King Coalition Mines Company at its mine in Park City, and the plaintiff Continental Casualty Company carries the Workman's Compensation insurance for the mining company. Mr. Mitchell left his employment with the mining company on December 10 or 12, 1946 because he was not physically able to perform his work. (R. 22, 38) He died June 6, 1947. (R. 3, 38) It is not clear how long he worked for the plaintiff mining company. The application for compensation, (R. 3), states that he worked for the mining company from

July 28, 1937, to December 13, 1946. His associate, A. J. Frantz, stated that he was off for one year during 1938 and then worked until December 13, 1946. (R. 37, 38) A period of eight years and five months. Although Dr. Wherritt said that the deceased had mentioned that he worked for the mining company or in the area around Park City for twenty-two years, that was only the doctor's impression, and he is not sure of it. (R. 28, 29) The definite evidence shows that he worked a maximum of eight years and five months which was not continuous. His continuous employment prior to his death was eight years.

Up until the last few months he appeared normal and active. (R. 22) On December 9, however, he was examined by Dr. Wherritt, and his condition was such that he discontinued work because he was physically unable to work. (R. 23) The immediate cause of his death was congestive heart failure. (R. 24) At the hearing Dr. Wherritt said the heart failure was due to silicosis, although the Commission was advised before the hearing that Dr. Wherritt's death certificate did not give silicosis as a cause of death. (R. 65) The doctor, however, did not take any x-rays but had them taken by Dr. Viko. He does not do that work. (R. 24) Five or six months before his death Mr. Mitchell developed dropsy which was directly due to his heart trouble, which heart trouble gradually grew worse as time went on. (R. 25) Dr. Wherritt came to the conclusion that the man had silicosis because he couldn't

expand his lungs and was short of breath. He conceded that silicosis must be very pronounced or extensive to affect the heart. (R. 26, 27) He also stated that any disease of the heart would cause shortness of breath and lack of expansion in the lungs. Dr. Wherritt said you couldn't tell from physical examination alone that the heart trouble is due to silicosis, and he conceded that all he did was make a physical examination. (R. 28) Dr. Wherritt first examined the man December 9, 1946, (R. 23), although he states that he had known him as a neighbor for many years but had not examined him for ten years. (R. 21) He also stated that he was not in a position to state what degree of silicosis Mr. Mitchell had. (R. 25)

No claim was ever made for compensation until September 29, 1947. (R. 3) The doctor's report was not filed until July 12, 1947, and the first that plaintiffs ever heard of Mr. Mitchell at all was a week or so after his death, (R. 46), by means of a letter from the Secretary of the local union dated June 12, 1947, and received June 13, 1947. (R. 60) Mr. Peterson, the representative of the plaintiff insurance company, saw Mr. Payne, the signer of the letter, exhibit 60, after he had received the letter and asked why we were not notified of these occupational disease cases until after the man had died, and Mr. Payne said that he had informed claimants generally in that area in connection with occupational disease not to report the case until after the man had died, and then in case an autopsy was requested to deny the autopsy. (R. 46, 47)

Dr. Wherritt sent the man to Dr. Viko, (R. 24), who examined the deceased only once on December 17, 1946, and the result of his examination lead the doctor to the opinion that the man had silicosis and cor pulmonale due to chronic lung disease. (R. 30) Cor pulmonale is enlarged heart displaced to the right due to chronic lung disease. (R. 32, 34, 35) (Commonly called right sided heart failure.) He was of the opinion that the silicosis was not severe enough in itself to cause disablement, "but with the heart disease he was totally disabled." The doctor stated that there could be one other factor in the distortion of the chest, an old empyema, due to pneumonia which the man had many years ago. (R. 30, 31)

The Inter-Mountain Clinic, Dr. Viko's clinic, took x-rays of Mr. Mitchell December 17, 1946, No. 28863, and they are now here in this court as Exhibits in that case. (R. 31) The most striking thing about the x-rays is the heart. It is generally enlarged, and the doctor was of the opinion that he had cor pulmonale and that he had diffused nodular silicosis. (R. 31) The doctor was of the opinion that silicosis produced cor pulmonale (enlargement of the heart), (R. 33), but there was also emphysema, or air in the chest cavity, present and that also contributed to the enlargement of the heart, and the emphysema and the silicosis combined caused the cor pulmonale, and which one is predominate would be hard to say. (R. 33, 34) From the x-rays alone it would be difficult to say that there is sufficient evidence of

silicosis to cause heart trouble. (R. 34) The silicosis shown by his x-rays is not as severe as third degree silicosis, and there is no area of conglomeration. By themselves the pictures leave some doubt as to whether silicosis was of sufficient severity to cause cor pulmonale. (R. 35) Dr. Viko conceded that an autopsy would show the cause of death and positively confirm the degree of silicosis, determine the type of heart disease and would rule out the possibility of any other heart disease. Without an autopsy the degree of silicosis is uncertain. (R. 36)

Dr. Viko apparently was of the school of thought that believes that cor pulmonale can be caused by silicosis even when the silicosis is not of sufficient severity to be disabling and the x-rays show no area of conglomeration. Dr. Viko did not produce x-rays which disclose nor did he testify his x-rays disclose discrete nodules of fibrous tissue similarly disseminated throughout both lungs. He also conceded that the greater the silicosis the greater the probability of cor pulmonale. (R. 35)

Dr. Richards testified, and as will appear, he is of the school of thought that holds that heart trouble does not come from silicosis, and that if it could the silicosis would have to be of the greatest severity, would have to be disabling and would be clearly disclosed by x-ray. There are two schools of thought, one of which is recognized by Dr. Viko and not recognized by our statute,

and the other recognized by Dr. Richards and by our statute.

Dr. Richards is one of the outstanding specialists on silicosis in the inter-mountain country. He is a practitioner of twenty-five years, experienced with this disease and in taking x-rays of it and interpreting the x-rays. (R. 40) In case No. 7172 the applicant's attorney conceded (R. 131 in that case) that in the Western states there is no one who has had as much practice and experience with silicosis as Dr. Richards, and that he is a medical expert of great and unusual talent. Dr. Richards examined the x-rays taken by Dr. Viko's clinic, and those x-rays did not disclose to him any evidence of pulmonary heart disease. There is an enlargement of the heart, and there is some silicosis present. There is diffused nodulation throughout, especially in the right chest, but only a moderate amount of nodulation in the left chest. (R. 41) There is no nodulation similarly disseminated throughout both lungs. From an x-ray standpoint you cannot say that this is silicosis, but from the man's history you could interpret these films as silicosis. There is enough suggestion of silicosis in the films to require a further and positive diagnosis, and if the man is dead, the only way to make that determination would be by autopsy. If an autopsy were denied, "I would say you would be in a precarious state to make a diagnosis of silicosis." (R. 41, 42) Even if this should be silicosis it is not the type of silicosis that would cause death. Whether or not silicosis can cause heart disease is an

extremely controversial question. Those who are most acquainted with silicosis do not feel that the amount of silicosis shown here, if it is silicosis, is the type that causes heart failure. The only positive way to determine it is by autopsy, and in the absence of autopsy it is purely speculative and controversial. (R. 43) In answer to leading questions from the Commissioner Dr. Richards repeated that in his experience and in the contacts he had had, "I would say provided this is silicosis, it is not the type of silicosis that we see as a causative factor of cor pulmonale," and he has never seen a case of cor pulmonale with that amount of silicosis. The x-rays show only a minimum of silicosis, if it is silicosis at all. (R. 44, 45) The Commissioner argued with and lead the doctor through several pages of the record, but the doctor concluded: "It is too easy to make a diagnosis of a situation and then reason back to some findings to cause that situation. The trouble with this silicosis is these controversial things, that anyone who is thoroughly acquainted with silicosis could not accept that as a diagnosis of silicosis and say it is an ideological factor in cor pulmonale." (R. 45) We shall later in the brief refer to our statute defining silicosis and show that the pattern of silicosis is always the same; that it is uniform in everybody; that in fact Dr. Viko himself stated: "The only question that could arise is whether the silicosis was of sufficient degree to produce cor pulmonale. Perhaps it is not by itself; but with a considerable degree of emphysema sufficient to cause cor pulmonale there might be a question whether the old

distortion of the chest from empyema might be a factor I could not say." (R. 32) Dr. Richards' statement that the nodulation is not similarly disseminated throughout both lungs is not disputed, and from the record it is undisputed that Dr. Viko conceded that it was questionable whether the silicosis present was of sufficient severity to cause cor pulmonale. Dr. Richards was positive that it was not of sufficient severity, and both doctors agreed that the positive way of determining the question was by autopsy.

After we learned of the existence of Mr. Mitchell, which as a matter of fact was not until he had passed out of existence and was buried, and after we had exhausted means of learning the cause of death, our representative wrote to Mrs. Mitchell, the applicant, Exhibit 2, (R. 47, 61) calling her attention to the fact that the cause of death was doubtful; that he had exhausted his efforts to determine the cause of death, and that the only way it could be determined was by autopsy. He requested her to allow an autopsy and stated that if the autopsy showed silicosis, payments would be made immediately. To this letter Mrs. Mitchell replied, Exhibit 3, (R. 47, 62) refusing an autopsy erroneously secure in her belief and for the reason that the doctor said it was too late because Mr. Mitchell had been dead six months. Mr. Peterson wrote her again, Exhibit 4, (R. 48, 63), requesting autopsy and advising her that Dr. Carlquist of the L.D.S. Hospital and Dr. Ogilvie of the St. Marks Hospital advised that the autopsy could be

successfully performed. Mrs. Mitchell for no reason again refused the autopsy, Exhibit 5, (R. 48, 64), and we then applied to the Industrial Commission for an autopsy setting forth the facts very fully. In the letter to the Commission we called attention to the fact that Dr. Wherritt's death certificate said the death was due to congestive heart failure but did not say anything at all about silicosis. We called attention of the Commission to the fact that there was doubt that the man had died from silicosis; that it was possible for a successful autopsy, but the Commission refused to allow it. (Exhibits 6 and 7, R. 48, 49, 65, 66)

As soon as we learned of the death we began making investigations. We interviewed Dr. Viko who said that there was an indication of silicosis, that sputum tests would have to be taken to make the case more conclusive and gave his permission to have the x-rays examined by Dr. Richards. Dr. Viko told Mr. Peterson that autopsy was the only thing that would definitely confirm the cause of death. (R. 49, 50) The x-rays were submitted to Dr. Richards with the result as shown.

The applicant testified as to the degree of her dependency on the deceased, and about all that one can glean from the record is that he paid for the food they both ate and the taxes on her home, and that at one time he had the house fixed up, and that he paid for the fuel. She owned the home. She paid the light bill, bought her own clothes, and has an income from social security. There is not a word of evidence as to how much he con-

tributed to her, nor that she was dependent upon him. In this state of the record the Commission made an award in the same objectionable manner it did in case No. 7172 in a total sum and made absolutely no finding at all of dependency. Petition for rehearing was duly made, (R. 14), denied, (R. 16) The case is here by certiorari.

STATEMENT OF ERRORS

1. The decision of the Commission is not supported by substantial competent evidence having probative value.

2. The Commission acted without or in excess of its powers.

3. The Commission abused its discretion in refusing an autopsy in this case.

4. The award even if properly supported is not in conformance with the Occupational Disease Law of the State of Utah.

APPLICABLE STATUTORY PROVISIONS

U.C.A. 1943

42-1a-29. SILICOSIS—DEFINED.

“For the purpose of this act ‘silicosis’ is defined as a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide dust (SiO_2) characterized by small discrete nodules of fibrous tissue similarly disseminated through-

out both lungs, causing a characteristic X-ray pattern, and by variable clinical manifestations.”

42-1a-47. AUTOPSY IN DEATH CLAIMS.

“On the filing of a claim for compensation for death from an occupational disease where in the opinion of the commission it is necessary to accurately and scientifically ascertain the cause of death, an autopsy may be ordered by any member of the commission and shall be made by a person designated by such member of the commission. The person requesting any such autopsy shall pay the charge of the physician making the same. Any person interested may designate a duly licensed physician to attend such autopsy, and the findings of the physician performing the autopsy shall be filed with the commission and shall be a public record. All proceedings for compensation shall be suspended upon refusal of a claimant or claimants to permit such autopsy when so ordered. Where an autopsy has been performed pursuant to an order of any member of the commission no cause of action shall lie against any person, firm or corporation for participating in or requesting such autopsy.”

42-1a-25, as amended by Laws of 1945. COMPENSATION FOR SILICOSIS—SCHEDULE OF AMOUNTS—INCREASE OF PAYMENTS—DEATH BENEFITS TO DEPENDENTS.

* * *

“(b) In case of death from silicosis the dependents of the deceased employee shall receive the difference between the amount paid prior to death, if any, for the total disability as in paragraph (a) of this section set forth, and a maxi-

mum sum to be determined as follows: A maximum of not to exceed \$3,000 if such disability or death, whichever first occurs, results in the calendar month of July, 1945, and if such disability or death, whichever first occurs, results in August, 1945, a maximum of not to exceed \$3,050 and after August, 1945, the maximum amount shall increase at the rate of \$50 per calendar month and the maximum amount shall be determined in all cases by the month in which the disability or death, whichever first occurs, results, provided, however, that in no case of death from silicosis shall the employer be required to pay compensation in excess of the difference between the sum of \$5,000 and the amount paid, if any, for total disability prior to the occurrence of death. The compensation for death shall be paid to such dependents at four week intervals at the rate of \$16 per week plus 5% for each dependent minor child under the age of 18 years, up to and including 5 dependent minor children.”

42-1a-33. BENEFITS—TO WHOM PAID—MANNER—TERMINATION.

“* * * Should any dependent of a deceased employee die during the period covered by such weekly payments, the right of such dependent to compensation under this act shall cease; *provided*, that should a widow who is the sole dependent of the deceased employee, and who is receiving the benefits of this act, remarry during the period covered by such weekly payments, she shall be entitled to receive in a lump sum payment one-third of the benefits remaining unpaid at the time of such remarriage.

“In all cases where the weekly payment is increased 5% or 10% for each dependent minor child such increase shall cease at the death, marriage, attainment of the age of eighteen years, or termination of dependency of each such child.”

The rules of evidence and the provisions for review are quite different in the Occupational Disease Law than they are in the Workman's Compensation Act as follows:

OCCUPATIONAL DISEASE
42-1a-39. Id. PROCEDURE
—EXTENT OF REVIEW.

“* * * The review shall not be extended further than to determine:

(a) Whether or not the Commission acted without or in excess of its powers.

(b) Whether or not findings of fact are supported by substantial competent evidence having probative value.”

42-1a-43. RULES OF PROCEDURE.

“* * * Hearsay evidence shall not be admissible. No party to any proceeding shall be prejudiced by his or its failure to make objections or to take exceptions at any hearing.”

WORKMEN'S COMPENSATION

42-1-78. Id.

“* * * The review shall not be extended further than to determine:

(1) Whether or not the Commission acted without or in excess of its powers.

(2) If findings of fact are made, whether or not such findings of fact support the award under review.”

42-1-82. RULES OF EVIDENCE BEFORE COMMISSION.

Contains no such provisions as those opposite and permits Commission to make investigations according to its judgment.

ARGUMENT

The facts in the other case No. 7172 in this court differ from this case in detail, but the two cases essentially give rise to the same principles of law. A con-

sideration of the cases involve two main subjects: (1) Is there substantial competent evidence having probative value to support the findings of the Commission and (2) Did the Commission abuse its discretion in refusing an autopsy in this case?

In this case as in the other case there is no evidence whatever that in the plaintiff mine deceased was exposed for five years in the last ten to silicon dioxide dust. However, the foregoing two questions are also relied upon in this case as in the other case to annul the award of the Commission because they demonstrate not only arbitrary and capricious action on the part of the Commission, but a complete lack of understanding by the Commission of the Occupational Disease Law and the elements essential to a finding of death or disability under its provisions.

Under the first heading naturally come the questions does the evidence comply with our statutory definition of silicosis and what actually is the substance of the evidence as disclosed by the testimony of *all* the witnesses. Under heading II arises the question of whether our autopsy statute has any value whatever and whether parties have any rights whatever under it in view of the attitude of the present Commission. In passing may we remark at this point that never before have autopsies been refused by the Commission. The Commission heretofore always has taken the position that it sought for and required all the evidence it could secure in order to protect the rights of both parties and make certain

as far as possible that actual justice was done by the Commission. Never until now under the Occupational Disease Law has the Commission considered itself to be the guardian of the sentiments or whims of one party against the substantial rights of the opponent. Never until now has the Commission taken the position that its function is to guard one party from possible adverse evidence in order to make an award against the other party. Also under heading II comes the point of the wording of the Commission's award.

I.

IS THERE SUBSTANTIAL COMPETENT EVIDENCE HAVING PROBATIVE VALUE TO SUPPORT THE FINDINGS OF THE COMMISSION?

At the outset it may be well to bear in mind that tuberculosis itself is not an occupational disease; also that in case of disability or death from silicosis when complicated with any disease other than pulmonary tuberculosis, compensation shall be reduced as provided in Section 51. (42-1a-30). Heart disease caused the death here. Silicosis as defined by our statute is not even present, and even the evidence of silicosis fails to establish it as the cause of death.

The words "substantial competent evidence having probative value" have clear and well defined meanings. The Federal Courts in construing the National Labor Relations Act have many times had occasion to define "substantial evidence." It has frequently been contended that the court must accept the findings of the Board on

matters of fact. The courts uniformly hold that they are not required to accept the board's findings unless supported by "substantial evidence." In *National Labor Relations Board vs. Union Pacific Stages*, 99 Fed. (2) 153 at 177 the Ninth Circuit Court of Appeals had this to say, particularly appropriate in view of the state of the record here, with reference to what constitutes substantial evidence.

"It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack * * *. But the courts have not construed this language as compelling the acceptance of findings *arrived at by accepting part of the evidence and totally disregarding other convincing evidence.*

* * *

" 'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration *all* the facts presented to him and *all* reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.

"*The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality,*

errors will result and great injustices be wrought.” (Italics added)

And in the case of *Appalachian Electric Power Co. vs. National Labor Relations Board*, 93 Fed. (2) 985, the Fourth Circuit Court of Appeals at page 989 says concerning the test of substantial evidence “and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla *or which gives equal support to inconsistent inferences.*” (Italics added)

Of course, in order for evidence to be competent it must be given by one qualified to speak. When a doctor admits, as did Dr. Viko, that the silicosis shown by his x-rays is not third degree silicosis and there is no area of conglomeration, that it is hard to say which disease is predominate in causing heart trouble; that the only question that can arise in this case is to whether the silicosis was of sufficient degree to produce heart trouble, and that without autopsy the degree of silicosis present is uncertain, (R. 30-36), such evidence is neither substantial or competent to prove that death was due to silicosis. This was particularly true when the doctor saw the patient only once and that one time was six months before his death. It is particularly questionable whether such evidence is competent when it appears from the record that there are two schools of thought as to whether silicosis can cause heart trouble at all, and it is undisputed that in order to cause heart trouble it must be in the most advanced stage which is not present here. Also it is questionable

whether the doctor's testimony is competent when he belongs to a school of thought that is not recognized by our statutory definition of silicosis. And certainly, evidence has no probative value where it is given either by an incompetent person or where the evidence itself discloses that it does not prove the fact for which it was offered.

Our statute as we have seen is much more explicit in Occupational Disease cases than it is in Workmen's Compensation cases. Not only is the commission expressly prohibited from accepting hearsay testimony in Occupational Disease cases, (41-1a-43, *supra*), but the findings of the Commission must be supported by substantial competent evidence having probative value. (42-1a-39b) Also the Commission is not left free under our statute to accept the opinion of either one of two schools of thought with reference to silicosis. The Legislature has already declared that in this state silicosis must be established by proof of "small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing a characteristic X-ray pattern, * * *" (42-1a-29) The statute also defines silicosis as a chronic disease of the lungs caused by a prolonged inhalation of silicon dioxide dust. Aside from the fact that there is no evidence whatever in this case that the deceased suffered a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide dust in the Silver King Mine, it is our contention that there likewise is no X-ray evidence showing a characteristic X-ray pattern

as a result of small discrete nodules of fibrous tissue similarly disseminated throughout both lungs. It will be noted that the statutory definition agrees with Dr. Richards, that the pattern must be the same in all individuals; that the nodulation must be equally distributed in both lungs; that there must be present existing nodulation disclosed by x-ray, and that in the absence of these elements there can be no finding of silicosis.

The testimony discloses in this case as it did in Case No. 7172 that there are two schools of thought, one holding that cor pulmonale is never caused by silicosis, and the other school of thought holding that it can be caused by silicosis. Both schools of thought, however, agree that in order for silicosis to be a cause of cor pulmonale the silicosis must be very severe. Our Legislature undoubtedly had before it the views of these two schools. It adopted the view of the school of thought that holds that there can be no silicosis unless there are "small discrete nodules of fibrous tissue similarly disseminated throughout both lungs causing a characteristic X-ray pattern." That is, the Legislature adopted the school of thought represented by Dr. Richards, if there is a characteristic X-ray pattern it must be the same in all individuals. The pattern is uniform. If there must be small discrete nodules *similarly* disseminated *throughout both* lungs, then each lung must be the same and show the same pattern in order for there to be a diagnosis of silicosis under our statute. The characteristic X-ray pattern is not present here. Dr. Viko did not testify that

it is, and Dr. Richards positively testified that there was no characteristic X-ray pattern here. Dr. Viko conceded that his X-rays showed an enlarged heart, but he saw only a few scattered rales; he said that from the pictures it would be difficult to find that the silicosis is of sufficient severity to cause heart trouble; that by themselves the pictures might leave some doubt. (R. 30, 32, 34, 35) Dr. Viko did not testify that his pictures disclosed small discrete nodules similarly disseminated throughout both lungs, and Dr. Richards' testimony is undisputed that the diffused nodulation throughout was especially in the right lung and only a moderate amount in the left lung; that even if this is called silicosis, of which he is doubtful, the amount is not sufficient to be a cause of death. (R. 41, 43) Silicosis must be a chronic disease of the lungs. Dr. Wherritt stated that up until the last few months Mr. Mitchell appeared to be normal and active. (R. 22) He had not examined him for ten years, and he died within six months after he first went to see Dr. Wherritt. (R. 3, 21, 23) During all the time that Mr. Frantz had worked with him he was never ill or had to lay off work. (R. 40) The pictures are here and need only to be looked at to see that they have no resemblance whatever to a characteristic X-ray pattern of silicosis, and that there is no nodulation showing the same appearance in both lungs.

The testimony of Dr. Richards as we have already shown is positive, conclusive and largely undisputed. It is unnecessary to repeat it. The Commission completely disregarded Dr. Richards' testimony and accepted the

inconclusive testimony of Dr. Viko, which at the best insufficient severity from the X-rays to cause death shows only the possible existence of silicosis and that of even according to his school of thought which is not recognized by our statute. Mr. Peterson of the insurance company is not disputed in his statement that the death certificate which he actually saw contained no reference to silicosis but gave the cause of death as congestive heart failure. (R. 65, Exhibit 6)

We respectfully submit that there is no substantial competent evidence having probative value to support the findings of the Commission, that the X-rays themselves disclose that there is no silicosis present that conforms to our statute. Undoubtedly, the Industrial Commission has closed its mind to the fact that the Legislature considered this controversial question and adopted the definition of silicosis advocated by those best informed on the subject. The Legislature excluded the school of thought represented by Dr. Viko that permits a finding of probable silicosis where there is not present the elements required by our statute. The Commission should be required to conform to the statutory definition of silicosis and not substitute its judgment as to the presence or absence of silicosis in place of the judgment of the Legislature.

The evidence is not substantial and does not even give "equal support to inconsistent inferences." Evidence is not substantial even though it gives equal sup-

port to inconsistent inferences. *Appalachian Electric Power Co. vs. National Labor Relations Board*, supra.

II.

DID THE COMMISSION ABUSE ITS DISCRETION IN REFUSING AN AUTOPSY IN THIS CASE?

In this case as in Case No. 7172 the Commission refused an autopsy although in both cases we knew nothing about the employee and never even heard of him until after he was dead and buried. In case No. 7172 the Commission announced that its refusal was in deference to the wishes of the applicant, but in the present case it did not even give that as a reason. The Commission's action in this case was arbitrariness without any semblance of pretense otherwise. In this case appears the reason why we are never notified in these cases until after the man is dead and buried, from the testimony of Mr. Peterson that the Secretary of the union advised claimants generally in the Park City area not to report occupational disease until after the man has died and then to refuse an autopsy. (R. 46, 47) In both cases after refusing an autopsy, which the record in both cases discloses would have been conclusive, the Commission disregarded the positive, uncontradicted evidence of the outstanding authority on the subject and made an award against us upon such fragments and conclusions as it could draw from the record from witnesses whose testimony is obviously inferential at the best.

On point two our brief is largely the same in each case because the principle involved in each case is identical, and the comments and authorities on one case apply with equal force to the other.

We have discussed the evidence in this case before considering the question of the Commission's refusal of an autopsy because it seems to us that the Commission's arbitrariness appears clearly and irrefutably from the decision it made in the face of the record. The Commission as at present constituted apparently is of the opinion that it is omnipotent and that it has absolute power to take any action it sees fit to take regardless of the circumstances. The Commission did not seek to evaluate the facts judicially, but it ferreted out isolated phrases upon the assumption we suppose that if there were uttered any word or sentence, no matter upon what flimsy or unstable foundation it rested, that word or sentence might be the basis of a decision in this case.

The arbitrariness of the Commission is made so much more manifest by its action in refusing an autopsy in both this case and in No. 7172 that we cannot let the matters pass. If we did, then not only is the autopsy statute meaningless but substantial rights of parties before the Industrial Commission might cease to exist.

It is true that the statute with reference to autopsy is not couched in mandatory language. Neither, however, is the Commission authorized to deny an autopsy merely upon its own whim or caprice or upon the whim or caprice of any one else. The statute says that in death

cases from an occupational disease "where in the opinion of the Commission it is necessary to accurately and scientifically ascertain the cause of death an autopsy may be ordered by any member of the Commission." In the present case the applicant seeks to exact money from us upon the premise that her son died from an occupational disease. Surely she should not be allowed to ask us for money upon the plea that her son died from an occupational disease and at the same time deny us access to the facts that would enable us to determine whether or not he did die from such a disease. She was not too sensitive to ask us for money, but when it came to allowing us to determine whether he did or not die from silicosis she became too sensitive to allow us to investigate or discover that question. The very fact that the Commission denied our right to an autopsy under the facts present here itself discloses an arbitrary and capricious act on the part of the Industrial Commission. It discloses that the opinion of the Commission was not honestly and fairly exercised. The Commissioner had absolutely no basis for refusing an autopsy. If Mrs. Mitchell didn't want an autopsy and refused one, the Legislature has said that a hearing should be suspended and she should not be permitted to profit by her own act in withholding evidence. The Industrial Commission allowed Mrs. Mitchell to profit at our expense by denying us a right which we earnestly insist every fairminded man would consider we are entitled to have granted.

There is nothing wrong with autopsies. Courts have approved them in numerous cases as necessary and

essential instrumentalities for securing the truth. Every rule of evidence and every rule of law pertaining to trials has been promulgated, announced and enforced throughout the centuries for the sole purpose of disclosing the truth. In this case the legal machinery was used by the Commission to conceal the truth. We never even knew the man was sick until he was dead and buried. We obtained all the evidence we could, and consulted all the doctors who knew anything about the case to try and determine the cause of the man's death. It could not be determined. We were absolutely within our rights in asking for an autopsy, and the Commission was completely arbitrary and capricious and not governed by sound judicial discretion in denying us an autopsy. It is apparent from the record that an autopsy no doubt would have disclosed positively that Mr. Mitchell did not die from silicosis. But instead of requiring the applicant to prove her case and placing the burden of proof upon her, the Commission joined with her in denying us a positive test that would establish without doubt her right or her lack of right to recover. The Commission also accepted conjecture and surmise, against the positive evidence of the only qualified person who testified, in its struggle to aid this applicant—not to aid her to secure her rights, but to aid her by depriving us of our rights.

Many cases have considered the question of the propriety of an autopsy. There are none that we have been able to find that come under a statute similar to ours, and most of them arise under provisions of in-

insurance policies giving the insurer the right to an autopsy. However, the right to a physical examination in cases where the physical condition of the plaintiff is an issue is sustained by the great majority of American courts upon the principle to which we referred above—that the purpose of a trial is to determine the truth, and when the plaintiff's physical condition or that of the plaintiff's decedent, is in issue, the right of the defendant to a physical examination arises as a matter of right even in the absence of statutory provision therefor. Both the Workmen's Compensation Act and the Occupational Disease statute give this right beyond question, (42-1-85, 42-1a-46).

The Kansas court in *Howard vs. Hartford Accident and Indemnity Company* (1934) 32 Pac. (2) 231, held that the lower court did not abuse its discretion in appointing at the request of the insurer a commission of physicians for the purpose of examining the insured's injured eye where the insured objected to the testimony of a private physician who had previously examined his eye, on the ground that the examination was privileged. In *Meyers vs. Travelers' Insurance Company* (Pa. 1946) 46 A. (2) 224, the court held that independently of any provision in the policy of insurance the court may order a physical examination of the insured, and it is not an unlawful invasion of his rights to require such an examination aided by stethoscope, X-ray, etc. The remedy if the examination is refused by the plaintiff is to dismiss his case. It would seem to require no extended argument

to conclude that when a person seeks to recover because of the physical condition of himself or another he should not be allowed to block and prevent any reasonable examination that will disclose that person's true condition.

The courts have sustained the right of autopsy and find nothing repugnant in it, particularly when the autopsy will disclose the truth of the matter under inquiry. For instance in *Standard Accident Insurance Company vs. Rossi*, 35 Fed. (2) 667, the Eighth Circuit Court of Appeals reversed because an autopsy was refused. Of course the policy provided for an autopsy, but the principle announced by the case is applicable here. The court said: (672)

“From the foregoing it appears that there was substantial evidence to the effect that an autopsy might very probably have disclosed the cause of death, and that the condition of the body at the time the demand was made would not necessarily, nor even probably, have prevented such disclosure.

* * * The refusal to grant it was such a breach of the insurance contract as would preclude recovery by appellee.”

In *Howes vs. United States Fidelity & Guarantee Company*, 73 Fed. (2) 611, the Ninth Circuit Court at page 612 said:

“Since there is no dispute in the instance case as to the facts and circumstances under which the demand for an autopsy was made, and no doubt that such autopsy would have ‘positively’ established the cause of death, we believe that the

effect of the refusal of the beneficiary to consent to an autopsy presented 'a question of law for the court, rather than a question of fact for the jury'." * * * (613) "When the insurance company has no information regarding the death or the cause thereof until after the body has been buried and there is reason to believe the post-mortem examination will disclose facts which will release the company from liability, it may be just and proper to hold an autopsy even after burial."

That court also rejected the argument that provisions for an autopsy are in great disfavor with the courts with this statement which is also applicable here: "In this case, the Company had no knowledge of the death of the insured until after the body was interred." (613) And the court also said on this point with reference to the argument that courts disfavor autopsy: "It has had no reference to post-mortem examinations for the purpose of detecting the commission of crime or of fraud or *injustice in civil proceedings*." (613) (Italics added) In *Clay vs. Aetna Life Insurance Company*, 53 Fed. (2) 689 (Minn. D. Court), Judge Sanborn also discusses the propriety of autopsy and quotes from the case of *Whitehouse vs. Travelers' Insurance Company* at page 693 as follows:

"The necessity of the provision in accident policies that insurer shall have the right to make an autopsy can be seen 'where a man might die and be buried, and it be alleged afterward that the death was caused by accident, whereas, if an autopsy had been made, it might have been shown otherwise'."

The court expressly declared that there was no public policy against autopsy under circumstances such as are present here.

The Industrial Commission apparently proceeded upon the assumption that it had the absolute right without rhyme or reason to refuse an autopsy and that the plaintiffs here had no rights or remedy whatever in the matter. We do not so concede the law to be. The Industrial Commission at the most had only the right to exercise a sound judicial discretion. The statute itself permits the Commission when in its opinion it is necessary to accurately and scientifically determine the cause of death to order an autopsy. That opinion must be based upon legitimate reasons. We do not concede the law to give the Commission the right to say "in our opinion it was not necessary" when the record discloses, as it does here, that an autopsy is necessary and conclusive and that without it there is nothing but speculation, conjecture and inference to support the award of the Commission.

The Commission was required to act honestly, fairly and justly. What constitutes a sound discretion has been judicially discussed on many occasions and this court also holds in line with the authorities "That an abuse of discretion may be reviewed is established by the authorities." *Salt Lake City vs. Anderson*, 106 Utah 350, 361, 148 Pac. (2) 346.

Citation of a few of the cases discussing judicial discretion may be of value to the court in this case. There

is no dissent from the principles announced in the following cases: The Rhode Island Supreme Court in *Strzebinska vs. Jary*, 193 A. 745, defines judicial discretion as follows: "Stated in general terms 'judicial discretion' means sound discretion, exercised not arbitrarily or willfully, but with just regard to what is right and equitable under the circumstances and the law." The Supreme Court of Iowa in *Arthaud vs. Griffin*, 217 N.W. 809, approved several definitions, all of which amount to the same thing, as follows:

"Judicial discretion is a phrase of great latitude; but it never means the arbitrary will of the judge. * * * It is a legal discretion founded upon conditions which call for judicial action as distinguished from mere individual or personal view or desire."

And from 18 C. J. page 1135, Sec. 3:

"However incapable of exact definition, it is clearly recognized that discretion is not absolutely without elements, conditions, or limitations. The term implies the absence of a hard and fast rule, yet it should not be another word for 'arbitrary will', 'inconsiderate action', or 'unstable caprice'."

In *Lee vs. Baltimore Hotel Company*, 136 S.W. (2) 695, the Missouri Supreme Court said:

"We have said that such a discretion does not mean a mere whim or caprice, but it means an honest attempt, in the exercise of a judge in his duty and power to see that justice is done, to establish a legal right."

In the case now before us the Commission knew that we had never heard of this case until the man was dead and buried. The Commission knew that the medical evidence was hazy; that we had evidenced a willingness to pay if it was demonstrated that the deceased died as a result of silicosis; that autopsy was now the only way we could get this information. The Commission knew that we had talked to all the doctors and knew what they had told us. In spite of this and for no reason whatever an autopsy was refused. Then on the basis of such hazy evidence and in the absence of an autopsy an award was made against us allowing the applicant to profit by refusing us a reasonable, justifiable and honest request to secure information which, without question, would have established whether or not the applicant was entitled to compensation. The Commission used its power to thwart justice not to promote it; it used its power to conceal evidence not to bring it to light; it used its power arbitrarily and capriciously and inexcusably discriminated against us in this proceeding. Then the Commission disregarded substantial and convincing evidence in order to find some basis upon which to make an award against us when true and positive evidence lay locked in the vault with the keys in the hands of the Commission. They refused to open the vault. We submit that the Industrial Commission flagrantly abused its discretion in this case, and the award should not stand.

We also call to the court's attention the wording of the award. As we understand the statute (42-1a-25) as

amended, (1945) compensation when properly awarded is payable at the rate of \$16.00 plus per week with a certain maximum beyond which it cannot go. In the event of death or remarriage of a dependent the compensation ceases or is diminished. In this case, however, the Commission awards the maximum, (R. 13), regardless of any contingency that may happen in the future, whereas, in our judgment it should have awarded weekly payments in accordance with the statute not to exceed the allowable maximum. The Commission made no finding whatever that Mrs. Mitchell is a dependent. There is nothing in the record to show that she was dependent. She testified that she owned her own home, she bought her own clothes. After the death of her son she put in a telephone, and she paid the lights. She receives money from social security or public welfare. Her son bought her food and his food. What that amounted to does not appear. He paid the taxes on the house, and at some time in the past had done something towards remodeling it, whether by means of money or his own work does not appear, nor does it appear of what the remodeling consisted. We think that it would be impossible for a fair-minded person to hold that this applicant was dependent upon her son. Certainly, there is no evidence in this record to support such a finding, and in fact there is no such finding. The award is not supported by any finding whatever in this case, nor is there any evidence to support the funeral, medical or hospital expenses awarded. It may be that these matters are technical and not the real vice of these cases. But the Commission

persists in making its awards in this fashion, and to avoid complications that might arise we submit that the award should conform with the statute. If the dependent died or remarried, there might be an argument that the award in a total sum was a judgment and had become final and not subject to review and the employer might be confronted with improper demands because of the form of the award.

For the foregoing reasons we submit that the award of the Commission should be set aside and annulled.

Respectfully submitted,

SHIRLEY P. JONES

Attorney for Plaintiffs.