

1948

Silver King Coalition Mines Company and Continental Casualty Company v. Industrial Commission of Utah and Dora R. Draper : Brief of Plaintiffs

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

SILVER KING COALITION MINES
COMPANY, a corporation, and CON-
TINENTAL CASUALTY COMPANY,
a corporation,

Plaintiffs,

vs.

INDUSTRIAL COMMISSION OF UTAH
and DORA R. DRAPER, widow of Jesse
R. Draper, deceased,

Defendants.

PLAINTIFFS' BRIEF

FILED

AUG 20 1943

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INDUSTRIAL COMMISSION OF UTAH
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R. Draper, deceased,

Defendants.

Case No.

7172

PLAINTIFFS' BRIEF

This case and case No. 7171 involving the same plain-
tiffs against the Industrial Commission and Susan J.
Mitchell, mother of Lester A. Mitchell, deceased, in many
respects are similar, and the court will find it helpful to
consider the cases together. By considering the cases
together this court will have a clearer idea of the un-
fairness and arbitrariness of the Industrial Commission,
apparent in either case but extremely manifest when
both cases are considered together.

Each case is here on Certiorari from the Industrial Commission to review an award of the Commission granting compensation on account of death claimed from an occupational disease, to-wit: silicosis. While the facts and the 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 -

Jesse R. Draper was an employee of the Silver King Coalition Mines Company in its mine at Park City, Utah. The Continental Casualty Company carries the Workmen's Compensation Insurance for the mining company. Mr. Draper discontinued his work with the Silver King March 31, 1947, and he died April 8, 1947, or approximately one week after he discontinued work. (R. 32) Although his widow testified that he was sick and losing weight and acutely ill for at least two years before he died and suffered from shortness of breath ever since 1940, (R. 63), no report was ever made to the company or the insurance carrier, and they did not even know he was sick or anything about his death until after he was buried. The first knowledge we had concerning Mr. Draper was from a letter, Exhibit 3, from the Industrial Commission (R. 102) advising that a claim had been made for death alleged to be due to an occupational disease. (R. 90, 91) As soon as we learned of this claim we immediately contacted Mr. Draper's physician, Dr. Nielsen, also Dr. Kerby, and the Tuber-

culosis Sanitorium in Ogden to try to find out what was wrong with Mr. Draper. At that time he had been dead and buried for more than a month. We then went personally to see Mrs. Draper, the widow, at Midway, Utah, and advised her on May 27, 1947, that we were unable to determine the cause of Mr. Draper's death and that the only way it could be determined was by means of an autopsy, that autopsy would absolutely establish the cause of his death, and that if he died as a result of a compensable disease we would begin payments at once. She refused to consent to an autopsy. (R. 92) We then attempted to get more information and the more we investigated the more questionable the case seemed, so we wrote a letter to her again requesting an autopsy. No reply was received to that letter and written request for an autopsy was then made to the Industrial Commission by letter dated June 3, 1947. (R. 93, Exhibit 4, R. 103) The Industrial Commission then had Mrs. Draper come down to Salt Lake where the commissioner advised her that she had the burden of proving that there was silicosis, but that "in deference to her wishes" "as it stands, I will not order an autopsy." (R. 93, 94) And on June 24, 1947, after we had exhausted all efforts and failed to secure definite evidence the Commission wrote us that in deference to the wishes of Mrs. Draper the petition for an autopsy would be denied. (R. 94, Exhibit 5, R. 104) In the Commission's letter the Commission said: "In view of information which seems to be available in connection with the death of Mr. Draper, a petition for an autopsy

is therefore denied at this time." The Commission did not point out what information or evidence was available, and actually there was no information or evidence available and none was produced at the hearing definitely establishing that Mr. Draper's death was due to silicosis.

At the beginning of the hearing the plaintiffs objected to proceeding with the hearing upon the ground that the applicant had refused permission to have an autopsy performed on the deceased for the purpose of determining the cause of death; that the application was timely made for the autopsy, which objection was overruled by the Commission. (R. 33) Both the Commission and Mrs. Draper were advised that competent pathologists were positive that an autopsy could be successfully performed even as late as six or eight months after death in a case of this kind. The pathologist was contacted within a month after Mr. Draper died, and he stated that the autopsy would accurately disclose the presence or absence of silicosis and the part, if any, that it played in the death of the deceased. (R. 95, 96)

Two hearings were held. The record of the first hearing is covered by the record pages 30 to 100 inclusive, together with the exhibits 1 to 5 inclusive, which are attached to the record as pages 101 to 104 inclusive excluding two x-ray pictures known as Exhibit 2 (a) and (b) which are here separately.

Four doctors testified at the first hearing, Dr. Harold I. Goodwin, Dr. James P. Kerby, Dr. Karl O. Nielsen and Dr. Paul S. Richards. At the conclusion of

the hearing and in due time the Commission announced its decision, (R. 13, 14), awarding compensation to the widow. Application for rehearing, (R. 15), was made upon the ground that there was no competent evidence to sustain the Commission and that the Commission had accepted hearsay and incompetent evidence and expert evidence from individuals who themselves denied their qualifications as experts, as against the positive testimony of the only qualified expert who testified, Dr. Paul S. Richards. The Commission agreed with the application for rehearing, (R. 24), in this language: "It appearing to the Commission that the request is just and reasonable; Now, therefore, it is ordered that the application for rehearing be granted, and that the cause be sent to the calendar for setting." The Commission itself recognized that the testimony at the first hearing was insufficient to support the award and granted a rehearing. A rehearing was held March 2, 1948, and on March 11 the Commission again awarded compensation. (R. 28) The record of the evidence in the second hearing is found in the record at pages 111 to 144 inclusive. The applicant produced no evidence at the second hearing that in any wise supplied the lack of evidence in the first hearing. On the contrary her evidence at the rehearing made her case even less tenable than it had been theretofore. At the second hearing Dr. Paul S. Richards testified again and illustrated his testimony by several x-ray pictures which are now before this court as Exhibits 6 to 9 inclusive.

A brief summary of the testimony of the two hearings follows:

When this court examines the testimony of the first hearing, it will find underscored on pages 36, 43, 51 and 70 the following: "It disclosed a pneumothorax and nodulation, silicosis, and tuberculosis—pneumoconiosis or tuberculosis." (R. 36, Dr. Goodwin.) "from silicosis and tuberculosis of the lungs?" (R. 43, Dr. Kerby.) "It was my impression that he had tuberculosis superimposed on silicosis." (R. 51, Dr. Nielsen). "fibroid tuberculosis." (R. 70, Dr. Richards). This underscoring appears to be the work of the Commissioner.

Upon receiving the first decision wherein the Commission states "that the preponderance of the evidence indicates that the deceased had silicosis and superimposed tuberculosis at time of death as a result of that employment," we became curious as to how the Commission could arrive at such a decision from the evidence. In an effort to determine the Commission's reasoning we examined the record and found the underscored quotations heretofore set forth and particularly noticed the one from Dr. Nielsen. Obviously the Commission had searched the record and seized upon every isolated phrase to be found therein for the purpose of making such a finding and had disregarded all the other evidence in the case. In the petition for rehearing we called these matters specifically to the attention of the Commission and pointed out that they were completely inadequate to justify any such finding and that the preponderance

of the evidence was directly against such a finding. The Commission agreed with us as heretofore pointed out, and ordered a rehearing upon the grounds that our request was "just and reasonable." The Commission itself recognized the lack of evidence in the record to support such finding. In the petition for rehearing we also called the attention of the Commission to the fact that found in the files was a letter from the Utah State Tuberculosis Sanitorium dated April 8, 1947, and addressed to Dr. Karl Nielsen, the deceased's physician; that this letter had not been offered in evidence, was incompetent, was not a part of the record, and should not be considered. That letter does not appear now in the files certified to this court, but another letter of the same date and from the same source appears at page 12 of the file certified here, that letter being addressed to the Industrial Commission and covering the same subject matter. Why that letter is certified does not appear because it is not a part of the record in this case. However, the letter does show that the X-rays taken by the Utah Tuberculosis Sanitorium did not disclose a characteristic X-ray pattern and also shows that the views of the writer are only impressions and are not supported by anything conclusive. In fact, the letter demonstrates that even the experts at the Ogden Sanitorium could come to no conclusion either as to tuberculosis or silicosis from whatever examination they made of the deceased. We do not know what part this letter played in the decision of the Commission, and we are mentioning it only because the Commission has included it in

the file transmitted to this court. That it is the habit of the Commission to go outside of the record to make determinations in these cases appears from the record itself on page 86 wherein the Commissioner blandly stated that in another case they had taken the X-rays introduced in evidence and had them examined by the Ogden Sanatorium and apparently adopted the incompetent opinion thus secured in making finding in another case. We shall refer to this statement of the Commissioner later in this brief.

With this background a consideration of the actual evidence is interesting. Dr. H. I. Goodwin testified that he examined and treated the deceased for pneumothorax in November, 1940, and that at that time he sent him to Dr. Kerby for an X-ray checkup, but that he has no record whatever of the deceased. (R. 36) At the hearing he was then shown an X-ray report which appears as Exhibit 1 (R. 101) in the record and stated that that was the report of Dr. Kerby's X-ray examination. The report is dated 12/20/40. Dr. Goodwin testified that he saw the deceased only the one time. (Certain medical phrases appear in the testimony—dyspnea, which means shortness of breath; emphysema, which means an enlarged chest, and nodulation, which means small round points of scar tissue always present and essential in a characteristic X-ray pattern if silicosis is present). Concerning his knowledge of the deceased Dr. Goodwin was asked.

Q. And then you sent him to Dr. Kerby's office for further examination?

A. Yes.

Q. And as a result of that examination it disclosed that he had silicosis and tuberculosis?

A. According to the X-ray findings that is what I am basing my opinion on. (R. 37)

* * * *

Q. Did you see him only one time?

A. That is all I recall of seeing him. (R. 37)

He then testified that he had never seen the X-ray pictures and that his entire testimony is based on Dr. Kerby's report, that he has no personal knowledge of the deceased's condition except the pneumothorax. (R. 38)

Q. Could you tell from your record whether he had silicosis or tuberculosis?

A. According to that report?

Q. No, I mean from your own knowledge.

A. No.

Q. You don't know whether he had either?

A. I didn't know whether he had either until I got the report.

Q. You don't know now from your examination?

A. *I don't know now, and I never did know.* (R. 38) (Italics added)

The doctor later upon leading questions from both counsel for the applicant and after prodding by the Commissioner became somewhat vague, but he did say again

on direct examination: "To say that all his physical condition was due to tuberculosis and silicosis would be just guesswork." (R. 39, 40) That his disability in 1940 was not caused by silicosis or tuberculosis but by a spontaneous pneumothorax, a condition that permits air to get out of the lungs in the pleural cavity and collapses the lung. (R. 40) In answer to applicant's counsel the following appears:

Q. * * * I will ask you, doctor, the immediate cause that brought the patient into the hospital was a pneumothorax?

A. Yes.

Q. It was not silicosis and it was not tuberculosis?

A. That is right. (R. 41)

Dr. Goodwin was quite positive that the disability in 1940 was not due to silicosis or tuberculosis even though the Commissioner by leading questions endeavored to have the doctor connect up the condition in 1940 with silicosis and tuberculosis. All of the doctor's testimony must be considered in view of his frank admission that he does not know anything about the man, as to silicosis and tuberculosis: "I don't know now, and I never did know." (R. 38) And it is also undisputed in the record that in 1946 when Mr. Peterson of the Continental Casualty Company contacted him Dr. Goodwin told Mr. Peterson that he couldn't remember the deceased at all. (R. 94) The underscored portion of Dr. Goodwin's testimony on page 36 of the record is clearly incompetent and

valueless. It is based entirely upon his opinion of what Dr. Kerby's report shows. The report itself discloses no such thing. Dr. Goodwin's testimony only pretends to relate to a condition that was supposed to exist in 1940, and he frankly admits that he personally knows nothing about the man except that in 1940 he had a pneumothorax from which he recovered.

Dr. Kerby was the next witness. Although his report appears in evidence as Exhibit 1, even that is not the original report. It appears on the letterhead of Drs. Kerby & Wilson, and Dr. Wilson was not associated with Dr. Kerby in 1940. (R. 46) When the Exhibit 1 was made, does not appear. Dr. Kerby never did see the deceased. (R. 42, 43) So far as the doctor recalls the X-ray was taken by some one in his office, and Exhibit 1 is a copy of the report made to him. He says that he saw the film, but has no recollection of the film at all other than from the report, Exhibit 1; that there is no way that this report can be checked with the picture because the X-rays have been lost. (R. 43, 44) In replying to a leading question Dr. Kerby made the underscored statement that in 1940, it was his opinion that the deceased was suffering "from silicosis and tuberculosis of the lungs." (R. 43) But he only can make that statement now because of the report, Exhibit 1. He did not take any sputum tests. (R. 44, 45) He could not say that the man had active pulmonary tuberculosis. He did not know what degree of silicosis the films disclosed. He did not know whether the silicosis he thought was present

was disabling, (R. 45); does not remember the man or the film, and all he remembers now is what is in this report which was made seven years ago, and there is no way now that it can be checked. (R. 46) Counsel for the applicant attempted to have Dr. Kerby testify about heart disease. Dr. Kerby frankly stated, "I am not a heart specialist." (R. 48)

Exhibit 1, which is the only basis we have for the testimony of Dr. Goodwin and Dr. Kerby, shows that the heart is normal, the diaphragm is normal; that there is no fluid in either pleurae; that the lung fields show an extensive area corresponding to more than half of the upper lobe field of the right lung where there is radiolusence. (Radiolusence simply means that the lung lets the light go through more readily because there is less density of tissue and more air in the lungs in that area.) The report then says that the X-ray shows a fine linear strand extends from the apex to the collapsed lung. (A linear strand is merely tissue that casts a shadow in the form of a line.) The report says "there is a generalized mottling of both lungs, fairly symmetrical. In addition dense areas are seen in each apex. These probably represent tuberculous changes." The report does not have one single word to describe silicosis or anything characteristic of silicosis. It doesn't even mention nodulation. The generalized mottling mentioned in the report represents, according to the report itself, tuberculous changes. Mottling is nothing at all like nodulation, and the pneumothorax (air in chest cavity) is

not confined to the lungs and is not silicosis. The only thing in the report to indicate anything at all with reference to silicosis is the single word "silicosis" at the bottom of the report. There is not one word in the report itself that described anything resembling silicosis.

Both Dr. Kerby and Dr. Goodwin were describing a condition supposed to exist in 1940 where the primary evidence is non-existent. And the secondary evidence from which they assume to testify in no wise supports their evidence. Silicosis has a definite and also a statutory definition which we shall discuss later. There is not one word of competent testimony from either Dr. Goodwin or Dr. Kerby to show that even in 1940 the deceased had silicosis. And certainly there is not even a suggestion in their testimony to support a finding that in 1947 he died as a result of "silicosis and superimposed tuberculosis." As a matter of fact there is nothing at all in the record to show that silicosis caused his death.

Dr. Nielsen next testified. He is the doctor who signed the death certificate and attended the deceased in his last illness. The death certificate was never introduced in evidence although it was frequently referred to and actually appears at page 6 in the record certified to this court.

Dr. Nielsen gave the cause of death as acute myocarditis, that is acute heart disease. (R. 53) How acute heart disease can be due to pulmonary silicosis was not disclosed by any of the witnesses. Silicosis is a chronic,

progressive disease. It does not cause acute myocarditis or a sudden heart attack. Other discrepancies in Dr. Nielsen's testimony will appear as we proceed.

He states that the deceased became a patient of his eight or nine years ago and that he had a tendency to have a barrel type of chest and an emphysematous type of chest, and he had marked limitations of respiratory motions, that is he had air sacs all during that period causing him to be barrel chested and short of breath. His shortness of breath, or dyspnea, increased markedly within the last two or three years. There was relatively little change in his dyspnea, or shortness of breath for four or five years. (R. 49, 50) He then stated the underscored testimony that in the last two years, "It was my impression that he had tuberculosis superimposed on silicosis." (R. 51) But when asked what caused the tuberculosis and the shortness of breath he answered, "That is quite a question."

Q. Whatever foreign substance created the silicotic nodules in the lungs or any other irritation whatsoever furnished a fertile ground for tubercular attack?

A. They would not necessarily have to have silicosis. (R. 51)

He then states that his conclusion as to the death was as follows: "My conclusion was that the man had an acute heart failure." (R. 52) On cross-examination the doctor admitted that as late as June, 1947, and after the death of the man he told Mr. Peterson of the Con-

tinental Casualty Company that his diagnosis of the deceased was "questionable tuberculosis;" that he signed the death certificate that way and that his position now is the same as it was at that time. (R. 53) He also stated that he is not equipped to do sputum examinations and that all he had to back up his opinion as to any tuberculosis was a clinical examination. (R. 53) He then later stated that although he had made no sputum tests and signed the death certificate "questionable tuberculosis", he at that time was of the opinion that it was tuberculosis and he put questionable on the death certificate and stated it was questionable to Mr. Peterson because he couldn't prove it. (R. 54)

Dr. Nielson took no X-rays himself, (R. 54), but he did see some X-rays which are now in evidence as Exhibits 2 (a) and (b). (These X-rays become more important in view of the testimony of Dr. Kerby at the second hearing to which attention will be directed later in this brief.) Dr. Nielsen frankly stated that he was not an expert in diagnosing X-rays. He pointed to some little spots on the pictures as being silicotic nodules. He was not sure. He said: "My impression is that these are silicotic nodules." (R. 55) He could not state whether what he called silicosis represented first, second or third degree. "I don't think I am qualified on that." (R. 55) He did not see any evidence in these pictures of tuberculosis. The pictures gave him no assistance whatever in determining whether the deceased had tuberculosis. (R. 57) Upon further questioning the doctor

finally admitted that the death certificate he signed was untrue and that he did not regard himself as an expert on tuberculosis or as an X-ray specialist. (R. 59, 60) The pictures that Dr. Nielsen was testifying to were taken at the Ogden Sanatorium shortly before the death of Mr. Draper.

The deceased's wife stated that he had been suffering from shortness of breath since 1940 and that for more than two years prior to his death he was very sick and going down all the time. (R. 63) (Never at any time during this period, however, did the deceased or his wife make any claim upon the plaintiffs. Whether it was because they believed they had no claim or whether it was upon advice to her not to submit a claim until it was too late for the plaintiffs to make any examination, which advice was given as appears from the record in the companion case No. 7171 now pending in this court, or for what reason, does not appear. The fact does appear, however, that no claim of any kind was made to the plaintiffs with reference to Mr. Draper until after he was dead and buried, and it was impossible to secure an autopsy without the consent of his widow. This consent was refused, and the Industrial Commission upheld the widow in her successful effort to suppress this evidence.)

Dr. Paul S. Richards was the only witness at the first hearing whose testimony had probative or substantial value. As to his qualifications, we need only refer to the voluntary statement of applicant's counsel

at the second hearing. On pages 131, 132 Mr. Beck had the following to say with reference to Dr. Richards:

Q. Now doctor, so that there won't be any misunderstanding about your qualification, I think I would agree that at least in the Western States there has not been anyone in the Medical Profession who has directly had as much practical experience with silicosis in this area as you have, and I will further admit that you are a medical expert of great and unusual talent; but isn't there a very much unsettled theory about the effects of silicosis, just what silicosis is, and just the tracks it runs throughout the woof and warp, even at Seranac?

A. Yes, there is a lot of controversy.

At this point the next question and answer may be pertinent:

Q. Isn't there a great deal of silicosis contracted by persons who are susceptible of silicosis wherein the evidence is not even nodulation and yet they have silicosis?

A. I have never seen that. I have heard of it—I have heard of that very type of thing that you bring up, but I have never contacted it, neither have I been able to get confirmatory opinion out of men who have contacted silicosis exposure to bring out a positive view on the point you bring up. (R. 132)

Dr. Richards after testifying to his long experience with silicosis and the taking of X-rays and interpreting them and diagnosing from them, examined the X-rays, Ex-

hibits 2 (a) and (b), of Mr. Draper taken by the Utah State Tuberculosis Sanatorium at Ogden April 7, 1947. He stated that there are three stages of silicosis, first, second and third, and that the disabling stage is the third stage. The X-rays of Mr. Draper did not disclose any silicosis. The spots pointed out by Dr. Nielsen as being silicotic nodules and the fibrosis which he said was silicotic have nothing to do with and are not at all similar to silicosis. The X-rays do not disclose any characteristic X-ray pattern of silicosis. (R. 68, 69) The X-rays do disclose emphysema, that is air sacs beyond their normal capacity forming more or less air wells and do show a pattern which is common in tuberculosis, and which the doctor would classify in this case as *fibroid tuberculosis*. (Underscored by the Commissioner. Nothing to do with silicosis.) Tuberculosis causes all of the symptoms from which the deceased is alleged to have suffered. There is no evidence of silicosis (R. 70, 71) On cross-examination the doctor testified that the chemical process involved in silicosis is a biological process and not a mechanical process; that if Draper had silicosis in 1940 he also had it in 1947, (R. 72, 73); that if he had it in 1940 it would show up in 1947, and there must be an X-ray pattern before a diagnosis of silicosis can be made; that shortness of breath in silicosis per se is unknown; (R. 74) that silicosis X-rays show a sort of a snow storm in the lungs. (R. 75) That while this would appear to impede materially the functioning of the lungs actually it does not do so in the absence of infection, because when a stereoptican view is taken the

nodulation is comparatively minor when you compare it with the whole area of the lung. The doctor has never yet found an individual skilled in pathology or in silicosis who has been able to demonstrate a case of right heart involvement from a silicosis per se. "It just does not occur in anyone's experience I am able to obtain." (R. 75, 76) The emphysematous area would not conceal the presence of nodulation, but there is no evidence of nodulation even in the unobscured area of the lung that is disclosed by these X-rays. (R. 76, 77) There is "no characteristic even nodulation and dissemination that I must see in a lung before I can make a definite diagnosis of silicosis." (R. 78) If this lung had been brought to a pathologist (autopsy) he could have disclosed beyond a question the presence or absence of silica. (R. 78) The nodules are actually destroyed tissue from normal circulation which have contracted down to scar tissue, and we do not have a definite pattern of silicosis in these pictures as defined by our Statute, nor is there any pathologic change in this lung which shows that silicosis is present. (R. 79) If you took 100 men and exposed them to harmful quantities of silicon dioxide over a period of sixteen years and keep them continually exposed for a period of eight hours a day, probably 25 out of that group would have an early diagnosis of silicosis, provided there had been no accelerating effects of tuberculosis or other types of infection which are rather rare. Of these 25 men some might be more advanced than others. Draper would not be one of the susceptible ones or his pictures would show an entirely different pattern

than they do. (R. 80, 81, 85) However, had there been an autopsy in this case there would be no question at all as to whether silicosis had anything to do with this man's death. With an autopsy there would be no reason for speculation (R. 83) But even without an autopsy the doctor could find no evidence of silicosis. Dr. Richards also testified that there is nothing in Dr. Kerby's report, Exhibit 1, to indicate the presence of silicosis except the two words at the bottom of the report, "Tuberculo-silicosis." There is no statement of nodulation and nothing in the report that is essential to show the presence of silicosis. (R. 84, 85) There is nothing in the pictures to show that death was caused by silicosis and there is in the pictures no silicosis that would cause death.

The Commissioner himself demonstrated the necessity for having films present for examination and the incompetency of Dr. Kerby's report without the supporting films with this statement:

"It was called to my attention in another case that we had where the pictures were examined by one doctor and he said definitely there was no indication of silicosis, and another doctor said there was. We had them examined by the Sanatorium, and they said one was over exposed and another was under exposed, and neither was correct." (R. 86, 87)

No one knows what kind of films the Kerby films were or anything about them except as appears from Exhibit 1 which gives no helpful information of any kind in this

case. Dr. Richards testified that the films in evidence here are very good films.

The Commissioner asked the doctor and then underscored this testimony, omitting to underscore the pertinent part:

Q. *Is it possible he may have silicosis and still it not be seen?*

A. *Yes, there is a possibility, and that is why I made the statement in my interpretation of those X-rays. I would be happy to place this openly before pathologists and have them make a decision.*

MR. JONES: By autopsy?

A. Yes.

From the underscoring it is fair to assume that the "possibility" was used as the basis for the decision against us, and that completely disregarded is the positive testimony of the doctor that the possibility did not exist in this *case*. Even the remote possibility of minor silicosis could be cleared up beyond a question by autopsy, but autopsy was refused and speculation substituted. Under our statute "possibilities" will not support an award, nor can award be made regardless of possibilities if silicosis cannot be seen in the X-ray.

The plaintiffs never knew anything about Mr. Draper until he was dead and buried, but they proceeded at once to try and find out something about him, and discovered the medical testimony to be so vague and

inconclusive that Mr. Peterson asked Mrs. Draper for permission to make an autopsy, which was refused and which refusal the Commission affirmed. He told the Commissioner that he had gone as far as he could, but in spite of this the Commissioner stated in deference to Mrs. Draper, (the one benefitting by her refusal), he would not order an autopsy but to go in quest of more medical information when there was no more medical information that could be had except an autopsy. (R. 87-94) There is no question in this case about the request for an autopsy being made timely, and it is undisputed that at the time it was requested it could have been made effectively. (R. 96) Mr. Peterson had contacted Drs. Goodwin, Galligan, Kerby, Lindberg and Nielsen. Lindberg had said he was not sure whether the man had silicosis or tuberculosis. Kerby had said that to determine whether tuberculosis was present would require clinical study, and Peterson didn't remember what he said about silicosis. Dr. Galligan said he didn't know, but would like the pictures submitted to Dr. Richards because he was more qualified. (R. 96, 97) Dr. Nielsen as we have already shown admitted that he told Mr. Peterson that the tuberculosis was questionable. Nothing was said about silicosis, while Dr. Goodwin told Mr. Peterson that all his records had been destroyed and he didn't remember Mr. Draper. (R. 94) Mrs. Draper was told specifically that the only way to determine the presence or absence of silicosis was to have an autopsy and if the autopsy disclosed that her husband

died as a result of silicosis, payments to her would begin at once. (R. 92) .

At the second hearing held March 2, 1948, Exhibits 2 (a) and (b) were admitted without objection, (R. 113) and the applicant called Dr. James P. Kerby who had testified at the first hearing. Dr. Kerby was shown the Ogden X-rays, Exhibits 2 (a) and (b) and stated that they both showed essentially the same thing; that they showed predominantly tuberculosis, and that to read into these pictures things incident to some type of dust inhalation he had to go back to his 1940 pictures, and that these films now appear to have been taken of "an entirely different individual." (R. 115, 116) Dr. Kerby couldn't tell whether the tuberculosis was active, that other tests would be necessary, and he couldn't tell from the pictures whether tuberculosis or silicosis were causes of the man's death; that tuberculosis was predominant; that he would not be of the opinion (contrary to Dr. Nielsen) that tuberculosis could cause acute myocarditis. (R. 117) There is nothing in the films to indicate that silicosis was the cause of myocarditis. (R. 117, 118); that the films show that tuberculosis was the principal cause of death, but that he thinks would not cause acute myocarditis. From the films alone he couldn't express an opinion as to what, if any, silicosis there was present. Neither from these films nor from his report of 1940 could he say that silicosis if it was present was disabling or could he tell what degree of silicosis was present. (R. 118, 119) These pictures are very different from the

ones he took in 1940, and the pathologic change incident to silicosis that was present in 1940 are scarcely apparent at this time. "I would say the manifestations of silicosis seen in 1940 cannot be seen at this time." (R. 120) The only way to determine certainly in this case the presence or absence of silicosis is by post mortem examination. (R. 120, 121) If Mr. Draper had silicosis in 1940, he would still have it at the time the pictures, Exhibit 2 (a) and (b) were taken. There are two schools of thought as to whether silicosis can produce heart failure. He is of the opinion that it could, but he would not say that it would and he is not a heart specialist, makes no pretense of doing anything more than X-ray work, and all he knows about silicosis with relation to heart failure is what he has read in books. (R. 123, 124) From the examination of these films alone he would not say that the man had silicosis. (R. 124)

Dr. Paul S. Richards again testified and produced for illustrative purposes four X-rays, Exhibits 6, 7, 8 and 9 showing the characteristic X-ray pattern of silicosis from a mere suggestion down through its stages to conglomeration by infection. Exhibit 8 is the third stage of silicosis, and Exhibit 9 shows the same stage with conglomeration caused by infection.

Prior to this testimony the doctor gave somewhat more extended reference to his experience (R. 125, 126), which shows extensive familiarity with and knowledge of silicosis in all of its phases, the ability and skill to take X-rays and interpret them with reference to silicosis,

and a wide knowledge of the history and study of silicosis down to the most recent and advanced knowledge on the subject. Dr. Richards testified that advanced silicosis is discernible by X-ray; that the nodules that must be found in order to establish the presence of silicosis are little spots that resemble a snow storm; that there is a definite pattern that develops and the pattern is similar in everybody. (R. 127, 129) He also testified that silicosis is always equally diffused throughout both lungs. It is chronic and it always has a definite characteristic pattern if it is present. The third stage is the disabling stage. If there is no nodulation equally diffused through both lungs in a pattern that is the same in all cases, there is no silicosis. (R. 130, 131) The exhibits produced by Dr. Richards are stereo films taken by him and rated for him by the Seranac Laboratories, which is the outstanding institution in the study of silicosis and other diseases of the chest. (R. 126, 128) Exhibit 6 is the earliest possible type of discernible nodulation. (R. 130) Exhibit 7 is only different in degree by assuming that Exhibit 6 is a silicotic subject. (R. 133) Exhibit 8 is definite full blown silicosis, and No. 9 is the stage of No. 8 with the complication commonly called conglomeration where the nodules are pulled together in a conglomerate mass. The areas are becoming solid, and this is the disabling stage. The other is not. The snow storm in No. 9 is conglomerated. (R. 130) These films were admitted in evidence and are now here before this court, and merely a cursory comparison will disclose that there is nothing resembling a characteristic X-ray pattern

present in either Exhibits 2 (a) or 2 (b), the only X-rays we have of the deceased. Exhibit 8 is the clear cut picture of nodulation, and No. 9 is nodulation plus conglomeration. (R. 133) On cross-examination Dr. Richards testified at some length concerning silicosis generally, again emphasizing that it is always uniformly disseminated throughout both lungs; that fibrosis is produced by infection. (R. 135) Silicosis per se is not disabling. It is only disabling when accompanied by infection and silicosis even with tuberculosis does not produce a strain on the heart unless it is in extremely advanced stages of silicosis, which advanced stages are not present in the case at bar. (R. 137, 138) He again emphasized that the silicotic pattern is uniform in all patients. (R. 139)

Dr. Richards also pointed out that there are two schools of thought. He follows the school of thought recognized in our Statute and approved by our Legislature. He also emphasized that microscopic examination by pathologists by means of autopsy is recognized, and that a man cannot have silicosis unless even nodulation is present; that if a picture fails to disclose the elements above described the subject has not silicosis. (R. 140, 141)

This testimony of the second hearing the Commission entirely misconstrued. It considered it to be so favorable to the applicant as to justify another decision in her favor, and, the Commission again awarded her compensation. Whereas, the evidence at the second hear-

ing completely destroys what, if anything, of applicant's case was left after the first hearing.

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.
5. The award of attorney's fees 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 throughout 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 maximum 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 dependents 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, mar-

riage, 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 Workmen'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 COM-
PENSATION**

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 previously mentioned, No. 7171 in this court, while differing in detail, essentially give rise to the same principles of law with which we are concerned in this case. A consideration of the cases involve two main subjects: (I) Is there substantial competent evidence having probative value to support the

findings of the Commission, and (II) Did the Commission abuse its discretion in refusing an autopsy in this case. Under the first heading naturally come the questions of the Kerby report, Exhibit 1, does the evidence comply with the statutory definition of silicosis, and what actually is the substance of the evidence as disclosed by the testimony of *all* of the witnesses. Under heading No. II should be considered the rights, if any, that parties have under the autopsy statute, whether the statute has any meaning whatever or serves any protective purpose to any party if it may be used as it was used by the Commission in these cases; also should be considered 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. Proper evidence of silicosis is not present and even tuberculosis is very doubtful.

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. An individual, even a doctor, who admits he is not an expert on certain subjects is not competent to testify on subjects he himself concedes are not within his scope. And certainly, evidence has not the value of proof where it is either given by an incompetent person or where the evidence itself discloses that it does not prove the fact for which it is 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, (42-1a-43, supra), but the findings of the Commission must be "supported by substantial competent evidence having probative value." (42-1a-39 (b)) 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 each lung; 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 that Dr. Goodwin frankly admitted that so far as silicosis and tuberculosis were concerned he did not know anything about the patient. "I don't know now, and I never did know", he said. (R. 38) All he attempted to do was to testify from Dr. Kerby's report, Exhibit 1, which isn't even the original report. The original report as we have already shown

was on Dr. Kerby's letterhead before he became associated with Dr. Wilson, so we have Dr. Goodwin testifying from a copy of a report of another doctor concerning his examination of missing X-rays, which even the second doctor cannot remember independent of his report. The doctor who made the report did not take the X-rays, never saw the patient, knew nothing about him, and has now no independent recollection of the X-rays except as disclosed by the report. The report itself does not contain one single word to comply with the statutory definition of silicosis, and the only thing it contains that would indicate that it involved silicosis at all are the two words at the bottom of it, "Tuberculo—silicosis, both lungs." It probably needs no citation of authority to recall the rule that one expert cannot base his opinion upon the opinion of another expert. *Howarth vs. Adams Exp. Co.*, (Pa.) 112 A, 536; *Louisville, N. A. & C. R. Co. vs. Falvey*, (Ind.) 3 N.E. 389, (rehearing denied, 4 N.E. 908); *Parrish vs. State*, (Ala.) 36 So. 1012; *Coughlin vs. Cuddy*, (Md.) 96 A. 869; *Hunder vs. Rindlaub*, (N.D.) 237 N.W. 915. As a matter of fact, Dr. Goodwin did not testify or pretend to testify as to the cause of death. There is nothing whatever in his testimony to support any finding of the Commission. The supposed X-rays were taken seven years earlier and were not present, and we have no way of knowing what was in them except from a report from which the court can readily see for itself there is no basis for even a finding of silicosis under our statute, let alone death from silicosis.

Silicosis being a chronic disease and progressive, one would have to find it present in the X-rays taken of the deceased the day before he died if it had been present in 1940. Dr. Kerby, the applicant's own witness, and concededly one who confines himself exclusively to X-ray work could see no silicosis in the Exhibits 2 (a) and (b) that would account for the man's death, nor did Dr. Kerby pretend to testify as to the cause of his death. In fact, he, himself, stated that it was impossible to determine from his original X-rays, which are missing, whether the amount of silicosis present was disabling or not, and certainly even if it existed it did not cause death for the man lived seven years. The plates taken the day before death did not, according to Kerby, appear to be the plates of the same individual. He very frankly stated that they would not be considered as pictures of the same person. The plates themselves are in evidence; also in evidence are the only X-rays shown to disclose a characteristic X-ray pattern, Exhibits 8 and 9. There is no word of evidence in the record to dispute Dr. Richards that 8 and 9 show third degree silicosis which is the only stage where it becomes disabling. No one disputes Dr. Richards that absent the condition shown in 8 and 9 there is no disabling silicosis. The pictures are here and need only to be looked at to see that Exhibits 2 (a) and (b) have no resemblance whatever to a characteristic X-ray pattern of silicosis. Dr. Kerby frankly admitted it and Dr. Richards positively testified that they do not show any silicosis at all, and cer-

tainly no silicosis that could be a contributing cause of death.

Of course, it is our contention that when our statute requires a characteristic X-ray pattern there can be no finding of silicosis if there are no X-rays at all which we can examine through our own experts and upon which we can cross-examine the person who took them if they are produced by the other side. Even in the absence of a statute such as ours, X-ray reports are not admissible unless the X-rays are produced. In the case of *Marion vs. B. G. Coon Construction Company*, 110 N.E. 444, the third headnote is as follows:

“Objections to the admission of testimony as to what X-ray plates showed, on the ground that the plates, which were not produced, were the best evidence, need not be coupled with a demand for production of the plates, for defendant to have the benefit of the objection.”

Under our statute, (42-1a-43), it was not necessary for us to make any objections, although we did make objections and specifically made this objection again in our petition for rehearing which was granted. In *Jolman vs. Alberts*, 158 N.W. 170, the Michigan Court approved an instruction of the trial court for the jury to disregard entirely any statements as to what X-rays showed when the X-rays themselves were not produced. As a matter of fact, Kerby's report is a report of his examination of X-rays taken by others. He never did see the man. Concerning this kind of evidence the

Maryland court in *Mt. Royal Cab Company vs. Dolan*, 179 A. 54, (1935), said that to permit this kind of evidence "would destroy the premises of fact upon which an expert, by reason of his own peculiar technical skill and knowledge, is permitted to give in evidence his own inference and opinion." The Supreme Court of California in the case of *Oglivie vs. Aetna Life Insurance Company*, 209 Pac. 26, held that the report of an autopsy surgeon even if made to the coroner and filed with the Clerk is not admissable in an action upon a policy of accident insurance held by decedent. Dr. Kerby didn't even take the X-rays. There was no way we could cross-examine him with reference to the X-rays. They were gone. This is not even a case of a doctor making a report of an examination made by him of an individual. The material evidence here was the X-rays. Both the X-rays and the patient are gone. In addition to the foregoing, Dr. Kerby frankly stated that no one could say from his X-rays that the silicosis he thought was present in 1940 was disabling, and there is not a word of evidence from Dr. Kerby to show that silicosis was a contributing cause of death. His testimony at the second hearing shows positively that the X-rays taken at the Ogden Sanatorium did not disclose silicosis and certainly not under our statutory definition. Nor could Dr. Kerby state that from the Ogden pictures silicosis was a cause of death. As we have already pointed out, the Commissioner himself at the first hearing pointed out the vice of testifying from pictures that are not in evidence, (R. 86) He called attention to the fact that in another

case when the Commission had gone outside the record, it developed that the X-rays were poor, one being overexposed and another underexposed. We do not know anything about Kerby's X-rays. Certainly, his report contains nothing to bring them within the statutory definition.

The testimony of Dr. Richards as we have already shown is positive, conclusive and largely undisputed. No one disputes him that the X-rays taken at the Ogden Sanatorium did not disclose disabling silicosis. In addition Dr. Richards testified that Kerby's report contains nothing to indicate the presence of silicosis except the word "silicosis". He also testified positively that there is no evidence whatever of silicosis in Exhibits 2 (a) and (b). He stated that there are no discrete (separate, distinct) nodules similarly disseminated throughout both lungs. This is discernible to any one, particularly to any one having before him the characteristic X-ray pattern disclosed in Exhibit 8. The only thing in the record that remotely supports the Commission in its finding is a guess by Dr. Nielsen. He did not take any X-rays, and he frankly admitted that he was not a specialist on either silicosis or X-rays. Nothing in his testimony complies with the required definition of silicosis. He admittedly was not qualified to testify on the subject. He also admitted that he signed the death certificate which gives the wrong cause of death. The death certificate is not in evidence but it is thoroughly discredited by the very person who made it. Dr. Nielsen's testimony was neither

substantial nor competent evidence nor is it evidence having probative value. The most Dr. Nielsen said was, "It was my impression that he had tuberculosis superimposed on silicosis." (R. 51) This is almost the exact language of the Commission in its first decision in awarding compensation. Even he, immediately stated that silicosis would not necessarily have caused the tuberculosis. (R. 51) In Dr. Nielsen's testimony the deceased's shortness of breath was emphasized as were other symptoms which are also common to tuberculosis and which even exist as a matter of common knowledge in the absence of any particular disease. There is nothing in Dr. Nielsen's evidence to prove that the deceased died from silicosis either as a direct or contributing cause. In fact the Industrial Commission in granting the rehearing agreed with us that the testimony of the first hearing did not justify the decision. Certainly the testimony at the second hearing added nothing to the applicant's case. On the contrary, the testimony at the second hearing definitely established both by Kerby and by Richards that the Ogden films did not show a degree of silicosis necessary to be a contributing cause of death.

Measuring Dr. Nielsen's testimony by the yardstick set forth in the statute, it is neither competent nor substantial. At the most it is merely his impression, he having, himself, admitted that he was not qualified as an expert in the lines to which he testified. It certainly has no probative value when he himself admitted that he filed a false death certificate and that he did not have the

facilities, the skill or the experience necessary either to diagnose silicosis or interpret X-ray plates concerning it.

II

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

We have discussed the evidence in this case as we do in 7171, 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 very fact that the record is marked up and underscored as it is, as we have indicated, demonstrates that 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. 7171 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 sought to exact money from us upon the premise that her husband died from an occupational disease. He was then dead and buried. Surely she should not be allowed to ask us for money upon the plea that her husband 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 deceased did or did not die from silicosis she became too sensitive to allow us to investigate or discover that question. The mere fact that the Commission gauged our right to an autopsy by the wishes of our opponent 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 except that Mrs. Draper didn't want one. If Mrs. Draper 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. Draper to profit at our expense by denying us a right which we earnestly insist every fair-minded man would consider we were 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. Draper 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 suspicion, surmise, impression, reports on

non-existent x-rays, testimony of self-admitted incompetent persons 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 provision of 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 to 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 instant case as to the facts and circumstances under which the demand for an autopsy was made, and no doubt that such autopsy would have ‘postively’ 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.*” (Italics added) (613) In *Clay vs. Aetna Life Insurance Company*, 53 Fed. (2) 689, (Minn. D. Court) Judge Sanborn also dis-

cusses the propriety of autopsy and quotes from the case of *Whitehouse vs. Travelers' Insurance Company* at page 692 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 although according to his own wife he had been sick for seven years and rapidly declining for at least two years. The Commission knew that the medical evidence was very 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 except deference to the wishes of the applicant, the one who would benefit if an autopsy were refused, an autopsy was refused. Then 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 searched out isolated sentences in the testimony and disregarded other substantial and convincing evidence in order to find some basis to make an award against us. Other true and positive evidence lay locked in the vault with the keys in the hands of the Commission. They refused to open the vault. Furthermore the Commission recognized the flimsy foundation upon which its first award stood and granted us a rehearing and then made another award against us after even the flimsy foundation upon which its first award was based had been destroyed. 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 or attainment of majority of a dependent the compensation ceases or is diminished. (42-1a-33) In this case, however, the Commission awards the maximum, (R. 28, 29), 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.

It should also order the attorney's fee allowed the applicant to be paid and deducted from the amount of the award. 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,

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