

1948

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

Utah Supreme Court

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In the  
**SUPREME COURT**  
of the  
**STATE OF UTAH**

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

*Plaintiffs,*

vs.

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

*Defendants.*

Case No.  
7172

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**DEFENDANTS' BRIEF**

**FILED**

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CLERK, SUPREME COURT, UTAH

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## I N D E X

STATEMENT OF THE CASE .....	1
QUESTIONS TO BE CONSIDERED .....	2
Question No. I. ....	2
Question No. II. ....	9
Question No. III. ....	10
CONCLUSION .....	10

### AUTHORITIES CITED

#### CASES

Bain vs. Industrial Commission, 58 Utah 370, 199 Pac. 666 .....	4
Chief Consolidated Mining Company vs. Industrial Commission, 70 Utah 333, 260 Pac. 271 .....	4
Kelley vs. Industrial Commission, 80 Utah 73, 12 Pac. (2d) 112 .....	3
Kent vs. Industrial Commission, 89 Utah 381, 57 Pac. (2d) 724 .....	4
Milkovich vs. Industrial Commission, 91 Utah 498, 64 Pac. (2d) 1290 .....	4
Norris vs. Industrial Commission, 90 Utah 256, 61 Pac. (2d) 413 .....	4
Ostler vs. Industrial Commission, 84 Utah 428, 36 Pac. (2d) 95 .....	4
Park Utah Consolidated Mines vs. Industrial Commission, 84 Utah 481, 36 Pac. (2d) 979 .....	3
Parker vs. Industrial Commission, 78 Utah 509, 5 Pac. (2d) 573 .....	4
Russell vs. Industrial Commission, 86 Utah 306, 43 Pac. (2d) 1069 .....	3
Sugar vs. Industrial Commission, 94 Utah 56, 75 Pac. (2d) 3117 .....	4
Tintic Standard Mining Company vs. Industrial Commission, 100 Utah 96, 110 Pac. (2d) 367 .....	4
Utah Consolidated Mining Company vs. Industrial Commission, 66 Utah 173, 240 Pac. 440 .....	3
Woodburn vs. Industrial Commission—Utah—, 181 Pac. (2d) 209 .....	3

#### CONSTITUTIONAL AND STATUTORY PROVISIONS

##### Utah Code Annotated, 1943

42-1a-29 .....	5
42-1a-33 .....	10
42-1a-47 .....	9

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DEFENDANTS' BRIEF

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STATEMENT OF FACTS

The Defendants feel that the Plaintiffs' Statement of Facts contained in their Brief on file herein sufficiently presents the basic facts of this case necessary to an understanding of the issues involved. The Defendants, therefore, have no additional statements of fact to make at this time. Defendants do, however, feel that

the facts already before the Court do need some amplification and further interpretation, but in order to avoid duplications said facts will be referred to in the Defendants' argument.

## QUESTIONS TO BE CONSIDERED

### QUESTION No. 1

Was the Industrial Commission's decision supported by the evidence or did the commission exceed its powers by arbitrarily and capriciously disregarding uncontradicted evidence?

### QUESTION No. II

Did the commission abuse its discretion in refusing an autopsy in this case?

### QUESTION No. III

Was the award in conformance with the occupational disease law of the State of Utah?

## ARGUMENTS

WAS THE INDUSTRIAL COMMISSION'S DECISION SUPPORTED BY THE EVIDENCE OR DID THE COMMISSION EXCEED ITS POWERS BY ARBITRARILY AND CAPRICIOUSLY DISREGARDING UNCONTRADICTED EVIDENCE?

The Defendants hardly feel it necessary to point out to this Court with any high degree of elaboration the numerous rulings which this honorable body and the Supreme Courts of all other states have handed down

relative to the respective duties of the Industrial Commission and the Supreme Courts in relation to those cases which are decided by industrial commissions. The Defendants desire, therefore, only to briefly and summarily refer to the law of this state on that issue. Our Supreme Court is limited to a determination of whether or not said commission has exceeded its powers in relation to the facts or has disregarded some provision of law in the making or denying of an award, or whether or not the commission in the decision in question has arbitrarily or capriciously disregarded uncontradicted evidence.

(See Utah Consolidated Mining Company vs. Industrial Commission, 66 Utah 173, 240 Pac. 440 and Kelly vs. Industrial Commission, 80 Utah 73, 12 Pac. (2d) 1112).

If the commission's findings are supported by the evidence and if any inference may be reasonably drawn from the evidence presented to support said findings, our Supreme Court has no authority to upset the Industrial Commission's decision.

(See Park Utah Consolidated Mines vs. Industrial Commission, 84 Utah 481, 36 Pac. (2d) 979; Russell vs. Industrial Commission, 86 Utah 306, 43 Pac. (2d) 1069; Woodburn vs. Industrial Commission, ..... Utah ....., 181 Pac. (2d) 209).

The Supreme Court does not weigh conflicting evidence nor determine which witnesses are to be believed nor can it in any substitute its own judgment for that of the commission.

(See Parker vs. Industrial Commission, 78 Utah 509, 5 Pac. (2d) 573; Bain vs. Industrial Commission, 58 Utah 370, 199 Pac. 666; Ostler vs. Industrial Commission, 84 Utah 428, 36 Pac. (2d) 95; Tintic Standard Mining Company vs. Industrial Commission, 100 Utah 96, 110 Pac. (2d) 367; Norris vs. Industrial Commission, 90 Utah 256, 61 Pac. (2d) 413).

The Industrial Commission is the final arbiter of the facts and conflicts in the testimony and has the right to weigh the testimony of the various witnesses and to test their credibility.

(See Milkovich vs. Industrial Commission, 91 Utah 498, 64 Pac. (2d) 1290; Chief Consolidated Mining Company vs. Industrial Commission, 70 Utah 333, 260 Pac. 271; Norris vs. Industrial Commission supra; Kent vs. Industrial Commission, 89 Utah 381, 57 Pac. (2d) 724; Sugar vs. Industrial Commission, 94 Utah 56, 75 Pac. (2d) 3117).

Innumerable other cases could be referred to to support the rules given above relative to the respective duties of the Supreme Court and the Industrial Commission, but to cite further cases would be merely cumulative rather than informative.

The Defendants submit that the testimony taken in this case at the hearing before the Industrial Commission contains considerable evidence supporting the decision of the commission to the effect that the deceased contracted silicosis, an occupational disease arising out of and in the course of his employment, and as a result of his exposure to silicon dioxide dust while employed

by the Silver King Coalition Mines at Park City, Utah, which silicosis, an occupational disease, caused the death of said Lester A. Mitchell, deceased.

Silicosis, under Utah law, is defined in Section 42-1a-29 U.C.A., 1943 as follows:

“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 ( $\text{SiO}_2$ ) characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing a characteristic X-ray pattern, and by variable clinical manifestations.”

Dr. Harold I. Goodwin was a practicing physician in Park City, Utah for many years. He is now practicing in Salt Lake City, Utah. He examined the deceased, Jesse R. Draper at Park City for the first time in November or December, 1940. He made a personal examination and took an X-ray picture on December 20, 1940 and diagnosed his trouble as “pneumothorax and nodulation, silicosis, and tuberculosis—pneumoconiosis or tuberculosis,” or as the doctor more briefly states he found that the deceased was suffering from silicosis and tuberculosis, which resulted in his being hospitalized at that time. The deceased was ordered to rest for several weeks but he refused to stay in the hospital and insisted on going home. (Tr. 36 and 37). The X-ray taken by Dr. Goodwin was sent to Dr. James P. Kerby of Salt Lake City for examination. Dr. Kerby submitted a report of his findings to Dr. Goodwin, which findings were to the effect that the deceased had silicosis and tuberculosis. Dr. Goodwin bases his diagnosis on the symp-

toms he personally observed and Dr. Kerby's report. (Tr. 40, 41 and 42).

Dr. James P. Kerby, an X-ray specialist from Salt Lake City, Utah, was next called as a witness. He advised that he had examined an X-ray of the chest of the deceased and had made a report thereon to Dr. Goodwin. From his examination of the X-ray he concluded that the deceased was suffering from silicosis and tuberculosis of the lungs and that both lungs were affected. Dr. Kerby re-emphasized throughout his testimony the fact that the deceased had silicosis complicated by tuberculosis and affirmed his convictions several times. (Tr. 43, 44 and 45). Dr. Kerby also testified that even though there are two schools of thought as already indicated relative to the effect of silicosis on the heart, that it is a very good considered opinion that silicosis does produce a "secondary heart pathology" and that Dr. Kerby was one of those who believes from observation that the heart can be affected by silicosis. (Tr. 48). A re-hearing was granted in this case before the Industrial Commission. At this re-hearing certain X-ray pictures were introduced which had been taken of the deceased at the Tuberculosis Sanitarium at Ogden on the 4th day of April, 1947. In the meantime Dr. Kerby had seen these X-rays, had studied them and was of the opinion that the deceased also at the time those pictures were taken was suffering from silicosis and tuberculosis. The Doctor was also convinced that the tuberculosis at the time of the pictures predominated and that the deceased died primarily from tuberculosis. (Tr. 115, 116, 117, 120 and

122). Dr. Kerby again reiterated his convictions that silicosis can cause heart trouble. (Tr. 121). Certain references were made in the testimony to a report of Dr. Lindberg on the X-ray of the chest of the deceased, which Doctor is located at the Ogden Tuberculosis Sanitarium. Dr. Lindberg apparently indicated a finding of silicosis. Dr. Kerby emphasizes that he felt that Dr. Lindberg's report was correct and that his findings were otherwise compatible with his conclusion that the deceased had both tuberculosis and silicosis. (Tr. 124).

Dr. Karl O. Nielsen has been practicing medicine and surgery in Heber City, Utah for over eleven years. He had known and had treated the deceased for about eight or nine years. Dr. Nielsen gave him physical examinations and had on several occasions examined the deceased's chest especially in relation to his lungs. He had found shortness of breath, pain in the chest, with marked limitation of respiratory motions. During the said eight or nine years this condition of course started in a minor stage and became more pronounced in the latter years. During the last two years Dr. Nielsen was treating the deceased, this condition was very pronounced and had resulted in a case of tuberculosis superimposed by silicosis. (Tr. 49 to 52). Dr. Nielsen also found a condition of heart trouble with the deceased. In spite of severe cross examination, Dr. Nielsen showed a definite conviction that the deceased was suffering from tuberculosis and silicosis at and just prior to his death. Dr. Nielsen made out the death certificate for the deceased and indicated a questionable conviction as

to tuberculosis. He explained that this was done for statistical reasons because he had not been able to make a sputum test, which apparently is the final and positive test of tuberculosis, but Dr. Nielsen still insisted that for his personal conviction he needed no sputum test and was positive the deceased had tuberculosis. (Tr. 53 to 59). Because of these convictions the deceased had been urged by Dr. Nielsen to go to the Tuberculosis Sanitarium at Ogden, to which sanitarium the deceased did finally go just before he died. In the latter part of his testimony Dr. Nielsen emphasized that the silicosis had been with the deceased for some time; that tuberculosis had developed only during the last two years before his death and that the silicosis condition had been scattered throughout both lungs. (Tr. 58 and 60).

It might be pointed out that the deceased had been with the Silver King Coalition Mines continuously for sixteen years prior to his death and that all of those sixteen years were spent in underground work. (Tr. 62, 64, 65).

Dr. Paul S. Richards, a practicing physician from Bingham Canyon, Utah also testified on behalf of the mining company and the insurance company. The X-ray pictures taken of the deceased had been sent to Dr. Richards. Dr. Richards was inclined to think that the deceased had not been suffering from silicosis. He had not seen the deceased personally but based all opinions on his observations of the X-rays. (Tr. 69 and 70). After much discussion of silicosis generally and its various ramifications, Dr. Richards wound up his testimony by

saying that he was not positive as to whether or not the deceased was suffering from silicosis. (Tr. 83). Also that even though he had been unable to see silicosis through the medium of the X-rays it was still possible that the deceased could have been suffering from silicosis. (Tr. 86).

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

Our State law does provide for the ordering of an autopsy in those cases where "in the opinion of the commission it is necessary to accurately and scientifically ascertain the cause of death." (42-1a-47, U.C.A., 1943). It is conceded that the commission refused to order the autopsy in this case partly out of deference to the wishes of the deceased's family but primarily because at no time did it appear to the commission that the cause of death could not be otherwise determined. The facts which must be depended upon by the commission to rule on the cause of death are so closely related to this particular issue that the Defendants feel that a decision on that question would more or less automatically decide the issue in this particular problem. In other words, if the commission properly acted within its powers in deciding that silicosis was the cause of death, then a decision that no autopsy was necessary would also be proper because we must then say that a decision as to the cause of death needed no autopsy. We submit that the granting or the failure to grant an order for an autopsy is purely discretionary with the commission and whether the right

to such an autopsy was properly or improperly denied in this case will be automatically determined in the issue of whether or not there was sufficient evidence to support the decision and the award of the commission.

The Plaintiff objects further to the manner in which the decision was worded. The Plaintiff apparently fears that in case of death or re-marriage, the award remains as is regardless of any other contingency that might happen. Defendants desire to submit that this manner of making awards has been going on for some time; that as yet no trouble has arisen and that a study of Section 42-1a-33 should reveal that the statute protects the Plaintiff against any of these contingencies arising. This section provides that immediately upon these contingencies arising, the beneficiary shall be entitled to receive one-third of the benefits remaining unpaid. Defendants fail to see where any particular wording or failure to insert some particular wording would cancel the effect of this statute.

### CONCLUSION

In conclusion it is submitted that the decision of the commission awarding compensation to the wife of the deceased should be affirmed for the reasons herein stated.

Respectfully submitted,

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