

2001

George O. Smith and Lila J. Smith v. The Industrial Commission of Utah, Wehyner Counstruction Company, and State Insurance Fund : Brief of Appellant

Utah Supreme Court

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UTAH
SUPREME COURT
BRIEF
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BRIEF

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THE

SUPREME COURT

OF THE

STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

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GEORGE O. SMITH,
Deceased, and LILA J.
SMITH, Widow,

Appllicants and
Appellants,

vs.

Case No. 14275

THE INDUSTRIAL COMMISSION
OF UTAH, WEYHER CONSTRUC-
TION COMPANY and STATE
INSURANCE FUND,

Defendants and
Respondents.

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APPELLANTS' BRIEF

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Court, Utah

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APPELLANTS' BRIEF

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STATEMENT OF THE NATURE OF THE CASE

This is an original proceeding before the Supreme Court of Utah for the purpose of having the lawfulness of the award dated June 13, 1975 of the Industrial Commission of Utah in the proceeding entitled George O. Smith, deceased, and Lila J. Smith, widow, applicant, vs. Weyher Construction Company and the State Insurance Fund, defendants, File No. 1W 636-137, inquired into and determined as provided by Utah's Code Annotated, Section 35-1-83 (1953).

DISPOSITION BY INDUSTRIAL COMMISSION

On June 13, 1975, the Industrial Commission of Utah entered an order and award that Weyher Construction Company and the State Insurance Fund pay to Lila J. Smith in a lump sum payment the balance of total disability compensation for a period of 312 weeks at the rate of \$47.60, less credit for the previous paid total disability payments in the amount of \$10,043.60, entitling applicant to the amount of \$4,807.60 less attorney's fees of \$2,000.00. The Commission further ordered the defendants to pay Lila J. Smith \$525.00 in a lump sum for statutory burial benefits and hospital and medical expenses incurred in the hospitalization of George O. Smith. The State Insurance Fund filed with the Industrial Commission of Utah a Motion for Review on July 9,

1975 as required by Utah Code Annotated, Section 35-1-83 (1953) as amended, as a prerequisite for the filing of this action in the Supreme Court of Utah, which was denied on October 8, 1975 by the Industrial Commission of Utah.

RELIEF SOUGHT ON APPEAL

Lila J. Smith, upon this review, seeks to have the award of the Industrial Commission dated June 13, 1975 set aside by the Supreme Court of Utah, and a proper award made.

STATEMENT OF FACTS

An application for Physical Examination by the Medical Advisory Board of the Industrial Commission was filed by George O. Smith on March 13, 1969. (R. 10) The applicant claimed that on May 7, 1968, he was employed with Weyher Construction Company and was working at the Kennecott Copper Corporation Refinery in Garfield, Utah, and while attempting to climb over a pipe, he lost his balance, fell from a ladder, and struck the right side of his head against steel pipe supports. Following the accident he remained unconscious for several weeks at the L.D.S. Hospital.

The applicant appeared before the Medical Advisory Panel for disability rating on February 7, 1970. The Panel

did not make a final determination as to disability and referred him back to his attending physician for further evaluation. On January 22, 1971, George Smith filed with the Commission a second application for a physical examination. (R. 24) The attending physician, Dr. William L. Stoops, filed a Summary Medical Record on March 18, 1971, reporting that George Smith had a 100 percent permanent disability suffering from partial expressive aphasia. (R.27-30)

On November 18, 1971, the Commission held the first hearing on the application, (R. 41-56) and the medical issues involved were referred to a Medical Panel comprised of three physicians. The final report of this Panel was not received by the Commission until February 11, 1974. (R. 347) Before their final report was received, the applicant died at the University Medical Center on May 25, 1972, after he was hospitalized on several occasions during the previous year.

The widow of George Smith, Lila J. Smith, filed a Dependent's Application for Hearing with the Industrial Commission after the death of her husband, (R. 68) and through her attorney requested a hearing on that application. (R. 93) A second hearing was held before the Commission on January 25, 1973 (R. 104-202) At this hearing Lila Smith testified that she

was married to the deceased on March 23, 1929 and was still married to him at the time of his death. (R. 138). She also testified that she had lived with him constantly until the date of his death. (R. 139) The plaintiff introduced into evidence the medical records, and medical bills incurred during his hospitalization, as well as the expert testimony of several treating physicians. No final determination was made at this hearing and the matter was again referred to the Medical Panel.

After the final report of the Medical Panel was received on February 11, 1974, the attorney for the applicant filed objections to the Medical Panel Report. (R. 352) A hearing was held before the Commission on the basis of these objections on May 1, 1974. (R. 356) Based on this hearing and the other evidence presented in the record the Hearing Examiner, Kenneth Rigtrup, after taking the matter under advisement for more than one year, entered the findings of fact, conclusions of law and award which were passed by the Industrial Commission of Utah on June 13, 1975, and are the subject of this appeal. (R. 360-373).

In the findings of fact, the hearing examiner found that notwithstanding the "long delays occasioned by this case by the befuddlement of the Commission and the Medical Panel with

the extremely difficult and complex medical issues involved, the record amply supports the conclusion that George O. Smith was entitled to an adjudication of permanent total disability prior to his demise on May 25, 1972." (R. 366) The Hearing Examiner found that the brain injury and accompanying seizure disorders suffered by the plaintiff's husband as the result of the industrial accident of May 7, 1968, was a factor in his death. (R. 367) The findings of facts reaffirmed the conclusion that the plaintiff was continuously married to the deceased. (R. 368)

In the conclusions of law made by the Hearing Examiner and approved by the Industrial Commission, the examiner held that the deceased was entitled to Workmen's Compensation benefits as provided by Utah Code Annotated 35-1-67 (1953) for permanent total disability; and the plaintiff as widow of the deceased was entitled to the balance of these benefits. (R. 369) In addition, the plaintiff was found to be entitled to burial benefits and all hospital and medical expenses incurred in connection with the several accident-related hospital admissions of the deceased at the University Medical Center. (R. 370) Awards were entered pursuant to these conclusions of law. (R. 371)

The Hearing Examiner did not make an award to the plaintiff under Utah Code Annotated 35-1-68 for an injury causing

death. In his conclusions of law, the Hearing Examiner had concluded that the head injury and resulting complications received by George Smith was a significant factor which hastened his death and, therefore, was a cause of his death. (R. 370) However, the examiner stated that the plaintiff, as the widow, would be due any additional compensation beyond the award for compensation for permanent total disability only upon filing of proper application by the plaintiff with the Commission showing dependency in fact and a proper showing that under all circumstances she should be a dependent entitled to additional benefits. (R. 369) This statement apparently alludes to 35-1-70, commonly known as the "second injury fund."

The defendant Weyher Construction Company and The State Insurance Fund, filed a motion for review objecting to the findings of fact and conclusions of law made and entered in the case.

The motion was denied and the Order of the Hearing Examiner affirmed by the Industrial Commission on October 8, 1975 after the entire case was submitted to the Commission for their review. (R. 379)

The plaintiff's petition filed pursuant to Utah Code Annotated, Section 35-1-83, for review was granted by this Court on October 1, 1975. (R. 383)

POINT I

THE INDUSTRIAL COMMISSION ACTED CONTRARY TO LAW AND CONTRARY TO THE UNCONTROVERTED FINDINGS OF FACT IN REFUSING TO AWARD THE PLAINTIFF THE DEATH BENEFITS WHICH A WHOLLY DEPENDENT WIDOW IS ENTITLED TO RECEIVE UNDER UTAH CODE ANNOTATED, SECTION 35-1-68.

Utah Code Annotated, Section 35-1-67, provides for 312 weeks at a calculable rate for compensation in the case of permanent total disability:

"(1), for such period of time beginning with the time that the payments [as in this section provided] to be made by the employer or its insurance carrier terminate and ending with the death of the employee."

35-1-68, Utah Code Annotated, reads as follows:

"...In case injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided herein, and further benefits in the amounts and to the persons as follows:

(1) ... Any claim for compensation must be filed with the commission within one year from the date of death of the deceased, and, if at the end of one year from the date of death of the deceased, no claim for compensation shall have been filed with the commission, the said sum of \$15,600 shall be paid at that time into the state treasury by the employer or the insurance carrier. This payment shall be reduced by the amount of any weekly compensation payments paid to or due the deceased between the date of the accident and his death."

The above sum is increased by the fact of dependency of Mrs. Smith, and those amounts were subsequently increased by legislative enactment, which monies can be calculated based on this Court's ruling.

Under all provisions of 35-1-68, as modified in dollar amounts by the legislature, a person who qualifies as a dependent is entitled to receive the benefits outlined in the statute if (1) the accident related injury caused the death of an employee covered by the act and, (2) the death occurred within 6 years after the date of the accident. The clear language states that the Commission shall order that the statutory benefits be paid to the dependent upon the fulfillment of these conditions.

Utah Code Annotated, Section 35-1-71 reads as follows:

"Dependents-Presumption.-The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

(1) A wife upon a husband with whom she lives at the time of his death."

No contest has been raised as to Mrs. Smith's dependency.

In the findings of fact and conclusions of law, entered by the trial examiner (R. 360) and affirmed by the Industrial Commission (R. 376), it was specifically held on the basis of

the evidence presented that the death of George Smith was caused within six years by the injuries he had sustained in 1968. (At R. 370, second paragraph.) The injuries were found to be the result of the May 7, 1968 accident which occurred in the course of Mr. Smith's employment. (R. 362)

The award of the trial examiner, which was affirmed by the Industrial Commission, was contrary to the findings of fact which were entered. Because of the uncontroverted evidence presented to the Industrial Commission that the plaintiff was a wholly dependent person, the Commission as a matter of law was required to make an award of the statutory death benefits.

In reality, what the Industrial Commission did is to award to the plaintiff's wife the balance of the permanent total disability benefits which pursuant to Utah Code Annotated, Section 35-1-67, terminate on her husband's death, found that the death was contributed by his industrial injuries and awarded funeral expenses and medical bills for the industrial related hospitalizations.

CONCLUSION

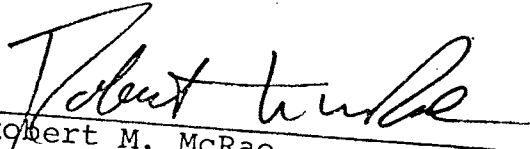
The plaintiff respectfully submits that the Industrial Commission of Utah acted contrary to law, and contrary to its findings of fact in not awarding the plaintiff the benefits in

case of death pursuant to Utah Code Annotated 35-1-67 and 68. The findings of fact, conclusions of law, and award entered by the Industrial Commission should be set aside and the Commission should be directed to award the plaintiff benefits which she is entitled to receive. Whether or not at the expiration of paying the above benefits plaintiff is entitled to additional benefits because of continued dependency, she should be entitled to make that application showing at that time.

DATED this 19th day of November, 1975.

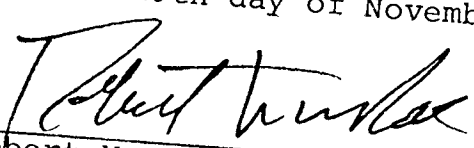
Respectfully submitted,

HATCH, McRAE & RICHARDSON

By 
Robert M. McRae
Attorney for Applicants and
Appellants

CERTIFICATE OF MAILING

This is to certify that I mailed two (2) copies of the foregoing brief to Robert D. Moore, Rawlings, Roberts & Black, Attorneys for Defendants and Respondents, 400 Ten Broadway Building, Salt Lake City, Utah 84101, this 19th day of November, 1975.


Robert M. McRae