

2001

George O. Smith, deceased, and Lila J. Smith,  
widow v. The Industrial Commission of Utah,  
Weyher Construction Company and State  
Insurance Fund : Brief of Respondent

Utah Supreme Court

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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

Applicants and  
Appellants,

Case No. 14275

-vs-

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

Defendants and  
Respondents.

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RESPONDENTS' BRIEF - INDUSTRIAL COMMISSION

-----oo0oo-----

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FILED

JAN 29 1976

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#### STATEMENT OF THE NATURE OF THE CASE

Respondents agree generally with Appellents' statement of the nature of the case.

#### DISPOSITION BY INDUSTRIAL COMMISSION

Respondents agree generally with Appellants' statement of the disposition by the Industrial Commission.

#### RELIEF SOUGHT ON APPEAL

Respondents seek to have the award of the Industrial Commission dated June 13, 1975 affirmed by the Supreme Court of Utah.

#### STATEMENT OF FACTS

Respondents agree generally with Appellants' statement of facts.

POINT I

The Industrial Commission acted according to law in not awarding lifetime death benefits.

1. The only point plaintiff makes on appeal to this court is:

"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"

There were no lifetime death benefits provided in our Workmen's Compensation Law until 1973. The plaintiff's industrial accident was on May 7, 1968, and plaintiff died on May 25, 1972.

Although plaintiff does not indicate which part of section 35-1-68 UCA 1953 is relied upon for dependent widow's benefits, the only applicable portions of that section would be the second paragraph of subsection 4 and subsections 5 and 6. All of this is new material added by the 1973 session of the legislature.

The law governing the award in this case is that law in effect when the injury occurred. Utah State Road Commission v. Industrial Commission 168 P2, 319.

The award made by the Commission complied with the law existing when the injury occurred.

## POINT II

Plaintiff did not exhaust her administrative remedies.

In the Conclusions of Law of the trial examiner he states:

"If there are any additional compensation benefits due the widow Lila J. Smith beyond the 312 weeks of weekly compensation for permanent total disability, such compensation would be dependent upon the filing of a proper petition or application with the Commission and upon a proper showing of dependency in fact, and on a proper showing that under all reasonable circumstances she should be entitled to additional benefits. Such a finding and conclusion is the exclusive province of the Commission as a whole, not that of its Hearing Examiners. (R-369.)"

The plaintiff did not file a petition or application with the Commission.

A timely Petition for Review was filed by the defendants, Weyher Construction Company and the State Insurance Fund. (R-377). This Petition cannot be relied upon by Plaintiff as the Plaintiff was not a party thereto. The objections raised in the Petition were not those now objected to by the Plaintiff and therefore the Commission was never presented the issues here raised by the plaintiff.

A part of the Order in this case stated:

"IT IS FURTHER ORDERED that any Motion for Review or specific written objections hereto be filed with the Commission within fifteen (15) days from date of this Award, or it shall be the final Award of the Commission, not subject to further review or appeal. (R-372) "

The manner of filing such a motion is contained in 35-1-82.55 UCA 1953. The Plaintiff did not exhaust the administrative remedies available and as directed so to do in the Conclusions of Law.

As the Plaintiff has not complied with the statutory requirements for a review by the Commission, the Award is final.

#### CONCLUSION

The Order of the Industrial Commission was a valid Order made pursuant to the law existing at the date of injury. The Plaintiff failed to make a timely request for review and therefore the Order of the Commission is final.

Dated this 28th day of January, 1976.

Respectfully submitted,

VERNON B. ROMNEY  
Attorney General


by: 

FRANK V. NELSON  
Assistant Attorney General  
Attorney for Defendants and  
Respondents



CERTIFICATE OF MAILING

This is to certify that I mailed two (2) copies of the foregoing brief to Robert McRae, HATCH, McRAE & RICHARDSON, Attorney for Applicants and Appellants, 370 East Fifth South, Salt Lake City, Utah 84111; and one (1) copy to Robert D. Moore, RAWLINGS, ROBERTS & BLACK, Attorney for another party Defendant and Respondent, 400 Ten Broadway Building, Salt Lake City, Utah 84101, this 28 day of January, 1976.



FRANK V. NELSON