

2009

# Kelari Mecham, Personal Representative of the Estate of Thomas Keller, deceased v. Utah Labor Commission, Scott's Roustabout Service Travelers Insurance Co., and Employers Reinsurance Fund : Brief of Appellant

Utah Court of Appeals

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Virginius Dabney; Dabney & Dabney; Counsel for Petitioner.

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# IN THE UTAH COURT OF APPEALS

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KELARI MECHAM, Personal  
Representative of the Estate of  
THOMAS KELLER, deceased

Petitioner/Appellant,

v.

UTAH LABOR COMMISSION,  
SCOTT'S ROUSTABOUT SERVICE,  
TRAVELERS INSURANCE CO., and  
EMPLOYERS REINSURANCE FUND

Respondents/Appellees

Case No. 2000-0328

Labor Commission No.05-0406

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## BRIEF OF PETITIONER KALARI MECHAM

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### PETITION FOR REVIEW FROM ORDER OF THE UTAH LABOR COMMISSION

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FILED  
UTAH APPELLATE COURTS  
OCT 27 2009

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## IN THE UTAH COURT OF APPEALS

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KELARI MECHAM, Personal  
Representative of the Estate of  
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Petitioner/Appellant,  
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UTAH LABOR COMMISSION,  
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Respondents/Appellees.

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## **JURISDICTION OF THE COURT**

This appellate review proceeding arises from the Labor Commission's March 31, 2009 Order Affirming ALJ's Decision dismissing Ms. Mecham's Application as Personal Representative of the Estate of Thomas Keller for workers compensation benefits with prejudice. The Utah Court of Appeals has jurisdiction to hear this case pursuant to Utah Code Annotated § 78-2a-3 (2) (a) (1953, as amended), Utah Code Annotated § 34A-2-801 (8) (1997) and Rule 14 of the Utah Rules of Appellate Procedure.

### **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

Issue 1: Did the ALJ and the Labor Commission abuse their discretion in dismissing this matter with prejudice.

Standard of Review: This is a question of law which is reviewed under a broad 'abuse of discretion' standard. Sierra Club v. Utah Solid Hazardous Waste Control Board, 964 P.2d 335, 344 (Utah Ct. App. 1998).

Issue 2: Did Mr. Keller's death extinguish his Estate's claim for Permanent Total Disability benefits.

Standard of Review: This is a question of law where appellate review gives no deference to the agency's determination, because the appellate court has the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction. Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah 1997). Such an Issue is reviewed for correctness. LaSal Oil Co. V. Department of Environmental

Quality, 843 P.2d 1045, 1047 (Utah Ct. App. 1992).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. E.g., State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984); and McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

Preservation for Appeal: All of the above issues were raised by Petitioner before the Labor Commission. A Petition for Review was timely filed with this Court. R. at 249).

### **DETERMINATIVE STATUTE AND RULE**

There is no particular “determinative” Statute or Rule. Utah Code Ann. §34A-2-423 (2003) which was enacted after the ruling by Administrative Law Judge Eblen, dismissing the case without prejudice. (10/23/02), but before the Order of Dismissal with prejudice by Administrative Law Judge Sessions (06/16/06) and the Order Affirming ALJ’s Decision by the Utah. Labor Commission (03/31/09).

### **STATEMENT OF THE CASE**

Nature of the Case: The Petitioner seeks review of the Labor Commission’s Order affirming the decision of the Administrative Law Judge dismissing Petitioner’s Application for workers’ compensation benefits with prejudice.

Course of Proceedings/Statement of Facts: The relevant facts in this matter



are simple, straightforward and not really disputed by the parties.

1. Thomas Keller, was injured in a compensable industrial accident on July 25, 1975 while employed as a welder for Respondent Scott's Roustabout Service. On that date he was cutting some pipe when gas fumes ignited and caused a massive explosion in a nearby battery tank. There were several fatalities and Mr. Keller, then known as Thomas Kane sustained extensive thermal burns on his upper abdomen, arms, hands face and scalp. He was resuscitated in the Intensive Care Unit and required several surgeries and multiple skin grafts. (Medical Records Exhibit at 1).

2. The parties entered into a Compensation Agreement for Permanent Partial Disability based on a 25% whole body impairment, which was approved by the Labor Commission on June 29, 1978. (R. at 1). He never returned to gainful work thereafter. He was unaware of the fact that he could file for lifetime benefits for 22 years, the Employer, Carrier and the Utah Labor Commission failing to inform him about a Permanent, Total Disability Claim.

3. On December 1, 2000, Mr. Keller filed an Application for Hearing claiming entitlement to Permanent Total Disability compensation as the result of his July 25, 1975 industrial injury. However, before his Application for Hearing could be heard Mr. Keller died on September 3, 2002.

4. On October 23, 2002, Administrative Law Judge Sharon Eblen, without request or Motion by any party, unilaterally dismissed the Application for Hearing

without prejudice. (R. at 4).

5. On April 29, 2005, Kelari Mecham, the Personal Representative of Mr. Keller's Estate, filed an Amended Application for Hearing seeking Permanent Total Disability compensation on Mr. Keller's behalf and for the benefit of his Estate. (R. at 6).

6. On June 16, 2006, ALJ Dale W. Sessions entered a Memorandum Decision and Order of Dismissal with prejudice. (R. at 189-199).

7. That Order was affirmed by the Utah Labor Commission on March 31, 2009. (R. at 246-249).

8. Petitioner timely filed a Petition for Review with this Court on April 27, 2009. (R. at 249).

### **SUMMARY OF ARGUMENT**

The Estate's Amended Application for Hearing should not have been dismissed by the Administrative Law Judge nor the Labor Commission with prejudice. The statutory requirement that the Labor Commission maintain "continuing jurisdiction" over cases filed before it, makes dismissals with prejudice inappropriate.

In addition, the death of an injured worker does not extinguish his/her pending workers compensation case. Utah case law as well as recent statutory modifications make clear that this is the public policy of the State of Utah.

This case should have been allowed to go to Hearing on the merits.

## **ARGUMENT**

### **I**

#### **PETITIONER'S AMENDED APPLICATION FOR HEARING WAS IMPROPERLY DISMISSED WITH PREJUDICE.**

The Administrative Law Judge and the Labor Commission dismissed the Amended Application for Hearing with prejudice, but did not make any findings or conclusions to support that result. Administrative Law Judge Eblen dismissed this case in 2002 without prejudice and while two cases seeking clarification of this point of law were on appeal. The dismissal without prejudice impliedly recognized that the case could be refilled. The case was in fact refilled in 2003 when the Legislature had statutorily clarified the law on this point.

There is no Statute or Rule which authorizes the dismissal of an Application for Hearing with prejudice. Indeed what statutory authority which does exist, mandates that the Labor Commission exercise "continuing jurisdiction" over cases which come before it.

Utah Code Annotated, Section 34A-2-420, specifically provides that:

(1) (a) The powers and jurisdiction of the commission over each case shall be continuing.

(b) After notice and hearing, the Division of Adjudication, commissioner, or Appeals Board in accordance with part 8, Adjudication, may from time to time modify or change a former finding or order of the Commission.

Neither the Administrative Procedures Act nor the Administrative Rules of the

Labor Commission provide any support for a dismissal with prejudice. The Utah Court of Appeals in Doubletree v. Industrial Commission, 797 P.2d 464 (Utah App. 1990) held that the Commission had authority under the Utah Administrative Procedures Act to dismiss “without” prejudice. That rational has subsequently been upheld in Bourgeois v. Department of Commerce, 981 P.2d 414 (Ut. Ct. App. 1991) and Bacon v. Industrial Commission, 854 P.2d 548 (Ut. Ct. App. 1991).

The concept of a “dismissal with prejudice,” meaning that a case can never again be refilled, is entirely inconsistent with the Commission’s statutorily mandated continuing jurisdiction.

## II

### **A PENDING WORKERS COMPENSATION CLAIM IS NOT EXTINGUISHED UPON THE DEATH OF THE INJURED WORKER.**

The Labor Commission held that Mr. Keller’s claim for permanent total disability was extinguished upon his death, prior to a final order being entered by the Commission on his pending claim, and thus no compensation was owed to him. In so ruling, the Labor Commission misinterpreted prior law, ignored releant statutory authority and its own precedent.

There are four published Utah cases which address the issue of what happens in Utah when an injured worker dies while his/her claim for workers compensation benefits is pending and none support the result claimed by the Labor Commission here.

The first case is Heiselt Construction Co. Industrial Commission of Utah, 197 P. 589 (Utah 1921). This case is old and contains some arcane language that makes it a little confusing. However, its clear holding and significance have been clarified by latter decisions. Despite some difficulty with syntax, a careful reading of the case reveals that it supports Petitioner's position.

The Heiselt Court did not address the issue of entitlement to accrued but unpaid compensation, since the injured worker had been paid all benefits accrued to the date of his death. The Court held that the unpaid, unaccrued benefits did not pass to the injured worker's Estate as an asset. Since the Petitioner herein is not claiming entitlement to unaccrued, future benefits after Mr. Keller's death, neither the facts nor holding of Heiselt are contrary to her position.

The second case addressing this issue was Parker v. Industrial Commission, 50 P.2d 278 (Utah 1935). In that case, there was also no dispute that the worker suffered an accident arising out of his employment. An Order was made by the Commission awarding him compensation from the approximate date of his injury up to the time of the award with "all accrued payments to be paid in a lump sum." The injured worker, however, died after the Order was made and entered by the Commission but before a check could be issued. The Commission denied the request to pay the estate on the basis that Parker's death terminated the right to further benefits. The Supreme Court reversed the Commission and directed that the entire award be paid to the estate, stating as follows:

The payment of compensation is, in a sense, a disability wage, and is earned by operation of law. The conditions making it payable all pertaining, the employee is entitled to it just as much as he is entitled to wages earned by contract. As disability payments are 'earned,' they become vested, and if the employee dies before they are paid, his estate is entitled to them.

\*\*\*\*\*

If the payments which accrued over more than a year had been paid to the deceased just before his death, they would have gone into his estate and been used, perhaps to pay creditors, some of whom may have extended credit necessary for him to live. Then why should they not become part of the estate after death? Id. at 278.

The Court went on to amplify it's prior decision in Heiselt stating that in that case:

... the question was as to whether 'unaccrued' payments for partial permanent disability passed to the estate.... In the Heiselt Construction Co. case the injured employee had been paid at the time of his death for nine weeks, or \$144, which was for the period of temporary total disability. No award had been made for permanent partial disability for the loss of parts of four fingers until after the death of the decedent. It is clear the court in that case did not intend to lay down any rule to the effect that compensation payments accrued at the time of the death would not pass to the estate." (Emphasis added). Id. at 279.

The third case is Pacific States Cast Iron Pipe Co. v. Industrial Commission, 218 P.2d 970 (Utah 1950) and it was an occupational disease case from the 1950's and focused on very specific language contained in the 1943 occupational disease statute unique to a benefits claim for silicosis at that time.

Specifically, the occupational disease statute in effect at the time of the Pacific States decision required in a death case that the deceased worker die within two years from the date of his last occupational exposure to silicosis, or within five years from the date of his last occupational exposure to silicosis but only if the injured

worker at the time of his death was receiving permanent, total disability benefits. Those requirements are no longer contained in Utah law. That is why it is inapplicable to the present case or even workers compensation cases in general.

The Utah Court of Appeals in the fourth, most recent and probably leading appellate case on this point, Caporoz v. Utah Labor Commission, 945 P.2d 141 (Utah App. 1997), affirmed the denial of benefits to the dependents of a deceased worker because they had failed to show that the Commission erred in determining that they were not “dependent’s”; and because no claim for benefits due the Deceased was pending before the Commission when the Deceased died. The Court referenced all three prior decisions of the Utah Supreme Court cited above on this question and concluded:

Petitioners contend they are entitled to temporary total disability benefits, on behalf of decedent, even though no claim for temporary total disability benefits was ever filed prior to his death. Long before UAPA was enacted, the Utah Supreme Court ruled on this issue as follows:

The right to compensation for injuries is a right personal to the employee and unless payments have accrued or a determination has been made by the Commission there is no right to which the personal representative or a dependent can succeed. ... Unless an employee has reduced his claim to an award or has been receiving compensation [,] his cause of action for injuries does not pass to either his personal representative or his dependents.

Pacific States Cast Iron Pipe Co. v. Industrial Commission, 118 Utah 46, 54-55, 218 P.2d 970, 974 (1950) (citing Parker v. Industrial Commission, 87 Utah 468, 50 P.2d 278 (1935), and Heiselt

Construction Co. v. Industrial Commission, 58 Utah 59, 197 P. 589 (1921). Because no claim for temporary total disability benefits was filed before decedent's death, the Commission's decision denying temporary total disability benefits was proper. (Emphasis added).

Caporoz is readily distinguished because in that case "no claim for total disability benefits was ever filed prior to [the injured workers] death." Id. at 145.

When Mr. Keller died, his industrial claim was unquestionably pending before the Commission.

On June 29, 1978, he entered into a Compensation Agreement for Permanent Partial Disability compensation based on a 25% whole body impairment. On December 1, 2000, Mr. Keller filed an Application for Hearing seeking Permanent Total Disability benefits on the basis of his injury. His industrial claim for benefits included accrued benefits due and owing from his employer. Mr. Keller died on September 3, 2002 while his case was still pending.

In 2003, the Utah Legislature passed Utah Code Ann. § 34A-2-423 (2003) which makes it clear that claims like Petitioner's do not lapse on the death of the injured worker. This statute was passed at the urging of the Labor Commission following another case had been before this Court and the Supreme Court of Utah raising this very issue. That Statute clarified existing law that workers compensation benefits were not extinguished upon the death of an injured worker.

Contrary to the claims of the ALJ (and implicitly adopted by the Labor Commission) the law at the time of Mr. Keller's injury did not provide that workers'



compensation claims lapsed upon the death of the injured worker. The ALJ and Labor Commission misinterpreted Pacific States Cast Iron Pipe Co. V. Industrial Commission, 218 P. 2d 970 (Utah 1950) as argued above.

The claim that a workers compensation claim lapses upon the death of an injured worker was challenged before this Court in Smith v. Labor Commission, (Ut. Ct. App. Case No. 20001019). In that case as in this one, the Labor Commission had held on Motion for Review that death of an injured worker extinguished his/her workers compensation claim.

On Petition for Review, however, follow oral argument before this Court and after the Court referred the case to the Supreme Court of Utah, the Commission confessed error and stipulated to remand for the payment of benefits notwithstanding the injured worker's demise while his case for benefits was still pending before the Commission. (See, Addendum "A").

In addition, few principles of workers compensation law are as well established in this State as that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah 1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, 567 P.2d 153 (Utah 1977); Baker v. Industrial Commission,

405 P.2d 613 (Utah 1965); Askrew v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v. Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, supra, first discussed the proper construction of the Workers' Compensation Act and the underlying purposes of the Act, and stated as follows:

[O]ur statute requires that the statutes of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.'

\* \* \* \* \*

The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or his dependents as the case may be. Id. at 1021-1022. (Emphasis added)

The Labor Commission in rendering its Order Affirming Decision of the ALJ did not properly apply this vital rule of construction and the Order fails to evidence a "liberal construction" and "resolution of doubt in favor of the claim".

Whenever any doubt or uncertainty appears in the record, it must be resolved in favor of the injured worker and the awarding of benefits. In this case doubt and uncertainty were construed against - rather than for - the Petitioner and his claim. In short, the Commission disregarded this fundamental principle of Utah Workers' Compensation law.

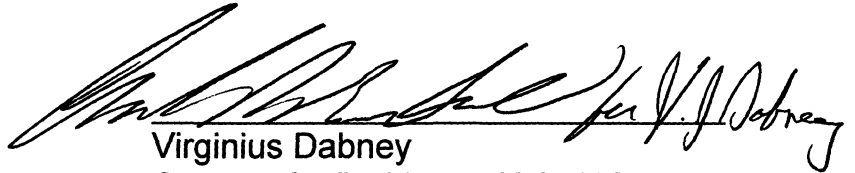
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**CONCLUSION/STATEMENT OF RELIEF SOUGHT**

For the reasons above cited, Petitioner respectfully requests that the Court of Appeals reverse the Labor Commission and direct that the case be remanded to the Administrative Law Judge for an evidentiary Hearing on the merits. Petitioner further requests that oral argument be granted and that this case be reported.

DATED this 27th day of October, 2009.

DABNEY & DABNEY, p.c.

  
Virginius Dabney  
Counsel for Petitioner, Kelari Mecham

**CERTIFICATE OF SERVICE**

I hereby certify that on the 27th day of October, 2009, a copy of the foregoing BRIEF OF PETITIONER KELARI MECHAM was hand-delivered and/or mailed, as follows:

UTAH COURT OF APPEALS 450 South State Street - 5 <sup>TH</sup> Floor P.O. Box 140230 Salt Lake City, Utah 84111-0230	(1) original and (7) copies
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VIRGINIUS DABNEY  
Counsel for Kelari Mecham

Addendum A

Notice of Decision, Order of Remand and Stipulation for Dismissal and Remand

Utah Supreme Court

Orville D. Smith v. Utah Labor Commission

Case No. 200010738-SC

**FILED**  
UTAH SUPREME COURT

APR 28 2003

PAT BARTHOLOMEW  
CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF UTAH

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NOTICE OF DECISION

Orville D. Smith,

Petitioner,

v.

Case No. 20010738-SC

Utah Labor Commission,  
Dixie College, Workers  
Compensation Fund, and  
Employers' Reinsurance Fund.

The above-entitled case was submitted to the court for decision  
and the attached order has been issued.

Order Issued: April 28, 2003

Notice of Decision Issued: April 28, 2003

Record: 1 VOL

LABOR COMMISSION  
00-1063



Pat H. Bartholomew  
Pat H. Bartholomew  
Clerk of Court

By Sum Willis  
Deputy Clerk

4/28/03  
Date

IN THE UTAH SUPREME COURT

\*\*\*\*\*

**FILED**  
UTAH SUPREME COURT

APR 28 2003

PAT BARTHOLOMEW  
CLERK OF THE COURT

ORVILLE D. SMITH,

Petitioner,

vs.

UTAH LABOR COMMISSION, DIXIE  
COLLEGE, WORKERS COMPENSATION  
FUND and EMPLOYERS' REINSURANCE  
FUND,

Respondents.

)  
)  
) ORDER OF REMAND  
)  
)

) Labor Commission Case No. 97-0408  
)

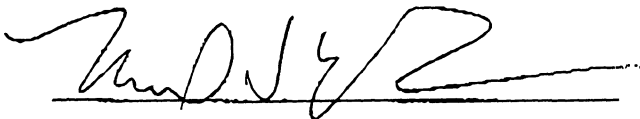
) Supreme Court Case No. 20010738-SC  
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Pursuant to the parties' stipulation, and good cause appearing therefore, IT IS HEREBY ORDERED that the petition for review now pending in this matter before this Court is dismissed. It is further ordered that this matter be remanded to the Utah Labor Commission for further proceedings consistent with the parties' stipulation.

Dated this 28<sup>th</sup> day of April, 2003.

FOR THE COURT:



Alan Hennebold (4740)  
160 East 300 South 3<sup>rd</sup> Floor  
PO Box 146600  
Salt Lake City Utah 84114-6600

Attorney for Respondent Labor Commission

IN THE UTAH SUPREME COURT

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ORVILLE D. SMITH,

Petitioner,

vs.

UTAH LABOR COMMISSION, DIXIE  
COLLEGE, WORKERS COMPENSATION  
FUND and EMPLOYERS' REINSURANCE  
FUND,

Respondents.

STIPULATION FOR  
DISMISSAL AND REMAND

Labor Commission Case No. 97-0408

Supreme Court Case No. 20010738-SC

\*\*\*\*\*

Johnnie L. Smith, Administrator of the Estate of Orville D Smith, has petitioned for appellate review of the Utah Labor Commission's determination that Orville Smith's death extinguished his pending claim for workers' compensation benefits. Mr. Smith's petition for review is currently pending before the Utah Supreme Court and was scheduled for oral argument on Tuesday, April 8, 2003.

The Utah Legislature during its 2003 general session passed Senate Bill 126, which has now been signed by Governor Leavitt. Among other elements, S.B. 126 adds §34A-2-423 to the Utah Workers' Compensation Act, specifically providing that an injured worker's pending claim for benefits is not extinguished by the worker's death.



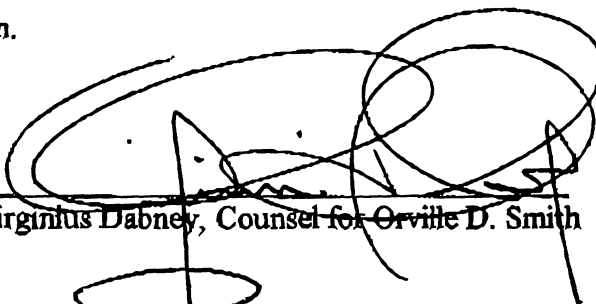
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The parties to this proceeding agree that the recent enactment of S.B. 126 is declarative of public policy in Utah and, as such, determinative of the issue raised in Mr. Smith's petition for appellate review. The parties therefore stipulate as follows:

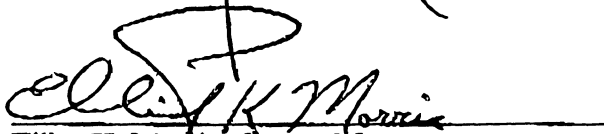
1. That the Utah Supreme Court dismiss Mr. Smith's petition for appellate review and remand this matter to the Utah Labor Commission for entry of the Commission's order as described in item 2, below.

2. On remand, the Utah Labor Commission shall enter its order: a) concluding that Orville Smith's claim for workers' compensation benefits was not extinguished by his death; and b) returning Orville's Smith's claim for workers' compensation benefits to the Commission's Adjudication Division for such proceedings as are necessary to adjudicate the merits of the claim.

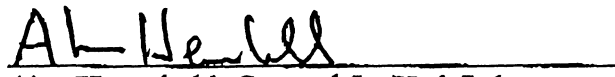
The parties hereby respectfully move this Court for its order consistent with the foregoing stipulation.

  
Virgilus Dabney, Counsel for Orville D. Smith


APRIL 11, 2003  
Date

  
Elliot K. Morris, Counsel for  
Workers Compensation Fund

4-23-03  
Date

  
Alan Hennebold, Counsel for Utah Labor  
Commission

4-22-3  
Date

  
Deidre Marlowe, Counsel for Employers'  
Reinsurance Fund

4/22/03  
Date