

2009

# Kelari Mecham v. Labor Commission; Scott's Roustabout Service; Travelers Insurance Co.; Employers Reinsurance Fund : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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KELARI MECHAM,

Petitioner,

vs.

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

Respondents.

Case No. 20090328-CA

**(Oral Argument Requested)**

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**RESPONSE BREIF OF SCOTT'S ROUSTABOUT SERVICE AND  
TRAVELERS INSURANCE CO.**

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UTAH APPELLATE COURTS

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## **JURISDICTIONAL STATEMENT**

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Section 78-2a-3(2)(a) (2006); see also Utah Code Ann. § 63G-4-403 (2008) (providing for judicial review of formal adjudicative proceedings) and § 34A-2-801(8) (2009).

## **ISSUE**

Issue: Did the Commission properly dismiss Mr. Keller's claim and the subsequent claim filed by his estate due to the death of Mr. Keller?

Standard of Review: This is a question of law where appellate review gives no deference to the agency's determination. Drake v. Industrial Comm'n, 939 P.2d 177 (Utah 1997).

## **CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS**

Utah Code Annotated § 35-1-67 (1975) was the permanent total disability statute in effect at the time of Mr. Keller's industrial accident and is controlling. Section 34A-2-423 is also referenced. Full copies of the statutes are provided in Addendum A.

## **STATEMENT OF THE CASE & FACTS**

This case involves primarily procedural issues. Therefore, the statement of the facts and the statement of the case are combined.

1. On July 25, 1975, Thomas Keller was injured in a compensable industrial accident.
2. On June 29, 1978, a Compensation Agreement was approved by the Commission memorializing an impairment rating.

3. On December 1, 2000, Mr. Keller filed an Application for Hearing claiming entitlement to permanent total disability benefits retroactively to his July 25, 1975 date of injury. (Addendum E).
4. During the litigation of his claim, Mr. Keller refused to cooperate with discovery, including the taking of his deposition to establish the pertinent facts of the case. (Addendum F). The deposition was never accomplished.
5. On September 3, 2002, Mr. Keller passed away. (R. at 124).
6. Contrary to the petitioner's alleged facts, On October 11, 2002, these respondents sent a letter to Judge Eblen requesting the claim be dismissed with prejudice due to Mr. Keller's passing and the current state of the law. (Addendum G).
7. On October 23, 2002, Judge Eblen dismissed the Application for Hearing noting that under the current law the "claim cannot proceed". (R at 4, Addendum D).
8. On December 10, 2002, counsel for petitioner requested the proceedings in the matter be stayed pending a decision from the appellate courts on a similar case. (R. at 151, Addendum H). The letter was filed, untimely, 18 days after the time allowed for a Motion for Review. The Commission took no action in response to the letter.
9. Utah Code Annotated § 34A-2-423, which allows a claim previously filed by an injured worker to be pursued by the estate in case of death, was enacted in 2003.

10. On April 25, 2005, Kelari Mecham filed an Amended Application for Hearing on behalf of the estate. (R at 6).
11. On June 16, 2006, Judge Sessions entered an Order of Dismissal with prejudice that stated, among other things, that the estate could not pursue benefits. (R at 189, Addendum C). The decision was affirmed by the Commission by Order dated March 31, 2009. The Commission specifically noted the law at the time of Mr. Keller's injury, and at the time of his death, did not allow the estate to pursue benefits. (R at 246, Addendum B).
12. On April 27, 2009, petitioner filed both a Petition for Review and a Docketing Statement.
13. On May 6, 2009, this Court issued a briefing schedule giving the petitioner until June 18, 2008 to file a brief.
14. On June 22, 2009, this Court granted the petitioner an extension to file a brief by July 20, 2009.
15. Petitioner failed to file a timely brief and respondents requested dismissal of this appeal, which was granted on July 29, 2009, but gave the petitioner additional time to respond. Thereafter, petitioner requested another extension, which was granted over objections to the same on August 13, 2009. The Order gave petitioner until September 16, 2009 to file a brief and specifically stated no further extensions would be granted absent a showing of emergency circumstances.
16. Petitioner filed a Motion for Summary Disposition on August 28, 2009.



17. On October 19, 2009, the Court issued an Order denying the Motion for Summary Disposition and requiring the petitioner to file a brief compliant with the Rules of Appellate Procedure by October 27, 2009.
18. On October 27, 2009, petitioner filed her brief.
19. On November 17, 2009, the Court issued an Order requiring petitioner file to file a courtesy brief.
20. Respondents believe no courtesy brief was ever filed by petitioner.

### **SUMMARY OF ARGUMENTS**

The Commission properly dismissed with prejudice the claim for permanent total disability benefits arising from Mr. Kellers' July 25, 1975 industrial accident. Long-established case law held that benefits that had not vested at the time of the injured worker's death were not payable to the injured worker's estate. Therefore, Mr. Keller's death extinguished his claim for permanent total disability benefits.

In addition, Mr. Kellers' death made it impossible for the Commission to make a final finding of permanent total disability due to the requirement in Utah Code Annotated § 35-1-67 that the Commission refer the injured worker to the divisional of vocational rehabilitation for certification of the injured workers ability to work or be retrained. Because no final finding could be made, benefits could not be awarded to Mr. Keller or his estate.

The Commission's dismissal of these matters with prejudice was proper under the doctrine of res judicata afforded formal adjudicative proceedings in administrative settings.

The petitioner's brief did not comply with the Utah Rules of Appellate Procedure as required by prior Order of this Court. Therefore, the matter should be dismissed.

## **ARGUMENT**

### **I. Mr. Keller's claim for permanent total disability failed upon his death.**

Case law at the time of Mr. Kellers' death did not allow the estate, or his dependents to receive benefits based on undetermined benefits. The Court in Pacific States Cast Iron Pipe Co. V. Industrial Comm'n, 218 P.2d 970, 971 (Utah 1950) indicated,

under the terms of the statute [the decedent's] dependents cannot obtain the benefits of the extension [of the limitations period] unless his claim has ripened into an award for or payments of compensation.

Id. at 974.

Although petitioner correctly notes that Pacific States was a case involving the occupational disease of silicosis, the argument that the case is inapplicable is in error. The Court in Pacific States relied on analogous case law from Parker v. Industrial Comm'n, 50 P.2d 278 (Utah 1935) and Heiselt v. Industrial Comm'n, 197 P. 589 (Utah 1921). Parker was a case involving temporary total and permanent partial disability benefits from an industrial accident (not an occupational disease claim for silicosis). In Parker, the order awarding benefits was issued prior to the injured workers death.

In Heiselt, the Court noted, "[w]e can hardly conceive of a right passing to an estate unless the right had vested in some one while living." Heiselt at 591. However, that claim dealt with permanent partial disability benefits, not permanent total disability

benefits. The injured worker in that case suffered injuries that resulted in amputations to his fingers. Id. at 589-90. Unlike some impairments, amputations are and were covered by a specific schedule. As noted by the Court, permanent partial disability benefits, based on the loss of a member, immediately vested by virtue of the statute. Id. at 591. These cases established the principle of law that after the death of the injured worker an estate may only receive payment for accrued benefits that have vested.

Pacific States merely explained the meaning of “accrued benefits” further and how they vest. The Court in Pacific States specifically explained,

Since no award had been made prior to the death of the employee and since no determination of causation or the weekly amounts to be paid had been made before that time, it would appear that **no payments could have accrued**. . . . It would, therefore, appear that had the legislature when it passed the latter act, intended to modify the rule that unaccrued payments would vest rights in dependents or personal representatives, it would have provided for tolling the limitation period by the filing of a claim so that an award could be made after death.

Id. at 974. (Emphasis added).

Petitioner suggests that because there was an accident with an impairment rating that the permanent total disability benefits had accrued and were “due and owing from his employer.” (Petitioner’s Brief at 10). However, the passage of time alone does not mean benefits accrue.

Moreover, whether or not the benefits may have accrued, the Petitioner has failed to address the vesting of the benefits. Mr. Keller did not have a vested interest in permanent total disability benefits because no determination regarding whether he was

permanently and totally disabled had been made prior to his death and the benefits did not vest pursuant to any statute. At the time of Mr. Keller's death, there had been no determination of causation, i.e, compensability of the claim for permanent total disability benefits. There is no record of whether Mr. Keller worked after his injury, what jobs he looked for, what other health conditions he may have had, or other factors that may affect whether Mr. Keller was truly permanently and totally disabled and, if so, whether the industrial accident caused the disability. Therefore, entitlement to benefits ceased upon his death.

The law in effect at the time of the injury, which governs this claim, did not include any provisions that would allow the estate to maintain a claim for undetermined benefits. As the Court noted in Pacific States, it would have been an easy thing for the legislature to remedy the issue so death did not end liability, Id., but no such remedy was made until 2003 in the form of U.C. A. § 34A-2-423. Although the estate filed its claim in 2005, the 1975, not the 2005, law governs this matter.

Mr. Keller, the injured worker died in 2002. Although § 34A-2-423 was amended in 2003 to allow claims to survive the death of the injured worker, the statute is substantive, not procedural, and, therefore, cannot be applied retroactively. (If retroactive application of the statute were allowed, retroactive application of other statutes, such as the 12 year statute of limitations on filing the claim found in § 34A-2-417, would also be required, thus barring even the decedent's claim for permanent total disability.)

Therefore, respondents assert this claim is barred by the death of Mr. Keller based on long-standing case law and statutes that existed at the time of the accident and even at the

time of Mr. Keller's death and holds that an estate may not pursue benefits that have not accrued and vested in the injured worker at the time of death.

## **II. Section 35-1-67 (1975) prevents an award in this matter.**

Not only is retroactive application of § 34A-2-423 not appropriate due to the substantive nature of the statute, but it would conflict with § 35-1-67(1975), which prevents an award in this matter. Section 35-1-67 (1975) states,

that a finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such employee to the division of vocational rehabilitation . . . for rehabilitation training . . . . If and when the division of vocational rehabilitation . . . certifies to the industrial commission of Utah in writing that such employee has fully co-operated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, then the commission shall order that there be paid to such employee weekly benefits . . .

(Emphasis added). Unlike the present permanent total disability statute, § 34A-2-413, which allows payment of subsistence benefits following the tentative finding of permanent total disability, but before a final award is made, benefits may only be paid out under § 35-1-67 (1975) after the final order is issued. Because a deceased injured worker cannot be referred to the division of vocational rehabilitation and thereby have his ability to be retrained assessed, there can be no final order and the Commission can never order that benefits be paid. Based on the above, this claim is moot.

### **III. A Stipulation in a separate case with different parties is not binding.**

Petitioner's only other argument is that the stipulation reached in Smith v. Labor Comm'n, Supreme Court Case No. 20010738-SC (incorrectly cited by petitioner) is controlling. However, the Supreme Court did not issue an opinion in Smith and the Stipulation reached in Smith provides no precedential support.

There is no decision from the Supreme Court in Smith on whether a claim survives the death of the injured worker. Rather, the employer and insurance carrier in Smith stipulated that the changes to § 34A-2-423 governed that claim, and the Commission, having no liability in the matter, signed off on the Stipulation because it was a party to the appeal. Therefore, the true impact of the Stipulation was on the employer and carrier in that matter, not the Commission, and does not set policy or establish a principle of law. Because there is no supporting case law for applying § 34A-2-423 to cases before its enactment, petitioner's argument is in essence that respondents are bound by the Stipulation reached in Smith, when respondents were not even a party to that case. However, such a stipulation does not meet the requirements of res judicata and has no effect on these proceedings. See Macris & Assoc., Inc. v. Neways, Inc., 2000 UT 93.

### **IV. The Commission has authority to dismiss claims with prejudice.**

Petitioner argues that the Commission lacks the ability to dismiss claims with prejudice based on the Commission's continuing jurisdiction. The cases relied upon by Petitioner for this argument do not support the same. Doubletree v. Industrial Comm'n,

797 P.2d 464 (Utah App. 1990) was addressing the Commission's authority to dismiss a case without prejudice. It is clearly implied from the body of that decision that the Commission had authority to dismiss claims with prejudice, but that a dismissal based on procedural errors is more properly done without prejudice. Id. Bacon v. Industrial Comm'n, 854 P.2d 548 (Ut. App. 1991), addressed the issue of whether the Commission abused its discretion by dismissing a claim with prejudice again for procedural errors. Once again, it is clear that the Commission had the discretion to dismiss a claim with prejudice, but the issue was whether it was done properly. Id. at 549.

In essence, petitioner argues that the Commission lacks the authority to issue a binding decision that would have res judicata effect on subsequent proceedings. This argument stands in direct opposition to many appellate cases specifically upholding the application of res judicata in workers compensation matters. See Acosta v. Salt Lake Regional Medical Center, 2004 UT App. 411, Crafts v. Labor Comm'n, 2005 UT App. 238, and Strate v. Labor Comm'n, 2006 UT App. 179.

If Commission decisions had no res judicata effect, workers compensation litigation would be meaningless as any party could continually challenge an adverse decision. However, there is simply no statutory or case law support to assume that the Commission lacks the authority to dismiss a case with prejudice simply because it has continuing jurisdiction. Therefore, the argument should be rejected and the Commission's decision upheld.

## **V. Petitioner's Brief does not comply with Rules of Appellate Procedure.**

Petitioner filed a Motion for Summary Disposition on August 28, 2009. The Motion was denied by the Court on October 19, 2009. In its Order, the Court specifically ordered that the petitioner's brief shall conform to Rule 24 of the Utah Rules of Appellate Procedure. The Court stated that, if petitioner's brief did not conform to Rule 24, the appeal may be dismissed.

Rule 24 (a)(11)(C) requires the brief to contain an addendum including the challenged findings of fact and conclusions of law. The addendum to the brief, however, contains none of the orders related to the case at hand. All the information contained in the addendum is from other cases.

In addition, due to petitioner's failure to file a courtesy brief, the Court issued an Order on November 17, 2009 requiring the courtesy brief be filed within seven days. No courtesy brief has been filed. Based on the above, petitioner's brief does not comply with the Utah Rules of Appellate Procedure and this matter should be dismissed.

## **CONCLUSION**

The Commission properly dismissed the claim for permanent total disability benefits whether filed by Mr. Keller himself or re-filed by his estate. The death of Mr. Keller extinguished his claim for permanent total disability benefits because there had not been, nor could there be a finding of permanent total disability at the time of his




death. Therefore, no benefits had been awarded, nor had any benefits vested in Mr. Keller.

The Commission properly dismissed the claim with prejudice because the doctrine of continuing jurisdiction does not eliminate the Commission's ability to adjudicate claims and issue rulings that have res judicata effect. Therefore, the Commission's decision should be upheld.

Petitioner's appeal should be dismissed for failure to comply with prior Orders from this Court.

DATED this 24 day of Dec, 2009.

RICHARDS BRANDT MILLER NELSON

  
\_\_\_\_\_  
MARK R. SUMMISON  
Attorneys for Petitioners

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 24 day of Dec, 2009, to the following:

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A handwritten signature in black ink, appearing to read 'Alan Hennebold', is written over a horizontal line.

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**Addendum A**  
**Statutes and Rules**

**\*1975 Amendment\***

**35-1-67. Schedule of benefits for permanent total disability.**

In cases of permanent total disability the employee shall receive 66⅔% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent wife and \$5 for each dependent minor child under the age of eighteen years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week. However, in no case of permanent total disability shall the employer or its insurance carrier be required to pay such weekly compensation payments for more than 312 weeks, and provided further, that a finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had:

Where the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer such employee to the division of vocational rehabilitation under the state board of education for rehabilitation training and it shall be the duty of the commission to order paid to such vocational rehabilitation division, out of that special fund provided for by section 35-1-68(1), not to exceed \$1,000 for use in the rehabilitation and training of such employee; the rehabilitation and training of such employee shall generally follow the practice applicable under section 35-1-69, and relating to the rehabilitation of employees having combined injuries. If and when the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that such employee has fully co-operated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, then the commission shall order that there be paid to such employee weekly benefits at the rate of 66⅔% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent wife and \$5 for each dependent minor child under the age of eighteen years, up to a maximum of four such

dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week out of that special fund provided for by section 35-1-68(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. No employee, however, shall be entitled to any such benefits if he fails or refuses to co-operate with the division of vocational rehabilitation as set forth herein.

Commencing July 1, 1971, all persons who are permanently and totally disabled and on that date or prior thereto were receiving compensation benefits from the special fund provided for by section 35-1-68(1) shall be paid compensation benefits at the rate of \$60 per week.

Commencing July 1, 1975, all persons who were permanently and totally disabled on or before March 5, 1949, and were receiving compensation benefits and continue to receive such benefits shall be paid compensation benefits from the special fund provided for by section 35-1-68(1) at a rate sufficient to bring their weekly benefit to \$60 when combined with employer or insurance carrier compensation payments.

The division of vocational rehabilitation shall, at the termination of the vocational training of the employee, certify to the industrial commission of Utah the work the employee is qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

[Effective May 13, 1975-May 9, 1977.]

eyeglasses, the employer or insurance carrier shall provide a replacement of the artificial means or appliance.

(4) An administrative law judge may require the employer or insurance carrier to maintain the artificial means or appliances or provide the employee with a replacement of any artificial means or appliance for the reason of breakage, wear and tear, deterioration, or obsolescence.

(5) An administrative law judge may, in unusual cases, order, as the administrative law judge considers just and proper, the payment of additional sums:

- (a) for burial expenses; or
- (b) to provide for artificial means or appliances. 1997

#### **34A-2-419. Agreements in addition to compensation and benefits.**

(1) (a) Subject to the approval of the division, any employer securing the payment of workers' compensation benefits for its employees under Section 34A-2-201 may enter into or continue any agreement with the employer's employees to provide compensation or other benefits in addition to the compensation and other benefits provided by this chapter or Chapter 3, Utah Occupational Disease Act.

(b) An agreement may not be approved if it requires contributions from the employees, unless it confers benefits in addition to those provided under this chapter or Chapter 3, Utah Occupational Disease Act, at least commensurate with the contributions.

(c) An agreement for additional benefits may be terminated by the division if:

- (i) it appears that the agreement is not fairly administered;
- (ii) its operation discloses defects threatening its solvency; or
- (iii) for any substantial reason it fails to accomplish the purposes of this chapter or Chapter 3, Utah Occupational Disease Act.

(d) If the agreement is terminated, the division shall determine the proper distribution of any remaining assets.

(e) The termination under Subsection (1)(c) becomes a final order of the commission effective 30 days from the date the division terminates the agreement, unless within the 30 days either the employer or employee files an application for hearing with the Division of Adjudication in accordance with Part 8, Adjudication. The application for hearing may contest:

- (i) the recommendation to terminate the agreement;
- (ii) the distribution of remaining assets after termination; or
- (iii) both the recommendation to terminate and the distribution of remaining assets.

(2) (a) Any employer who makes a deduction from the wages or salary of any employee to pay for the statutory benefits of this chapter or Chapter 3, Utah Occupational Disease Act, is guilty of a class A misdemeanor.

(b) Subject to the supervision of the division, nothing in this chapter or Chapter 3, Utah Occupational Disease Act, may be construed as preventing the employer and the employer's employees from entering into mutual contracts and agreements respecting hospital benefits and accommodations, medical and surgical services, nursing, and medicines to be furnished to the employees as provided in this chapter or Chapter 3, Utah Occupational Disease Act, if no direct or indirect profit is made by any employer as a result of the contract or agreement.

(3) The purpose and intent of this section is that, where hospitals are maintained and medical and surgical services and medicines furnished by the employer from payments by, or assessments on, the employer's employees, the payments or

assessments may not be more or greater than necessary to make these benefits self-supporting for the care and treatment of the employer's employees. Money received or retained by the employer from the employees for the purpose of these benefits shall be paid and applied to these services. Any hospitals so maintained in whole or in part by payments or assessment of employees are subject to the inspection and supervision of the division as to services and treatment rendered to the employees. 1997

#### **34A-2-420. Continuing jurisdiction of commission — No authority to change statutes of limitation — Authority to destroy records — Interest on award — Authority to approve final settlement claims.**

(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.

(c) This section may not be interpreted as modifying in any respect the statutes of limitations contained in other sections of this chapter or Chapter 3, Utah Occupational Disease Act.

(d) The commission may not in any respect change the statutes of limitation referred to in Subsection (1)(c)

(2) Records pertaining to cases that have been closed and inactive for ten years, other than cases of total permanent disability or cases in which a claim has been filed as in Section 34A-2-417, may be destroyed at the discretion of the commission.

(3) Awards made by a final order of the commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.

(4) Notwithstanding Subsection (1) and Section 34A-2-108, an administrative law judge shall review and may approve the agreement of the parties to enter into a full and final:

(a) compromise settlement of disputed medical, disability, or death benefit entitlements under this chapter or Chapter 3, Utah Occupational Disease Act; or

(b) commutation and settlement of reasonable future medical, disability, or death benefit entitlements under this chapter or Chapter 3 by means of a lump sum payment, structured settlement, or other appropriate payout. 1997

#### **34A-2-421. Lump-sum payments.**

An administrative law judge, under special circumstances and when the same is deemed advisable, may commute periodic benefits to one or more lump-sum payments. 1997

#### **34A-2-422. Compensation exempt from execution.**

Compensation before payment shall be exempt from all claims of creditors, and from attachment or execution, and shall be paid only to employees or their dependents. 1997

#### **34A-2-423. Survival of claim in case of death.**

(1) As used in this section:

(a) "Estate" is as defined in Section 75-1-201.

(b) "Personal representative" is as defined in Section 75-1-201.

(2) The personal representative of the estate of an employee may adjudicate an employee's claim for compensation under this chapter if in accordance with this chapter, the employee files a claim:

(a) before the employee dies; and

(b) for compensation for an industrial accident or occupational disease for which compensation is payable under this chapter or Chapter 3, Utah Occupational Disease Act.

(3) If the commission finds that the employee is entitled to compensation under this chapter for the claim described in Section (2)(a), the commission shall order that compensation be paid for the period:

- (a) beginning on the day on which the employee is entitled to receive compensation under this chapter; and
- (b) ending on the day on which the employee dies.

(4)(a) Compensation awarded under Subsection (3) shall be paid to:

- (i) if the employee has one or more dependents on the day on which the employee dies, to the dependents of the employee; or
- (ii) if the employee has no dependents on the day on which the employee dies, to the estate of the employee.

(b) The commission may apportion any compensation paid to dependents under this Subsection (4) in the manner that the commission considers just and equitable.

(5) If an employee that files a claim under this chapter dies from the industrial accident or occupational disease that is the basis of the employee's claim, the compensation awarded under this section shall be in addition to death benefits awarded in accordance with Section 34A-2-414. 2003

## PART 5

### INDUSTRIAL NOISE

#### 34A-2-501. Definitions.

(1) "Harmful industrial noise" means:

- (a) sound that results in acoustic trauma such as sudden instantaneous temporary noise or impulsive or impact noise exceeding 140 dB peak sound pressure levels; or
- (b) the sound emanating from equipment and machines during employment exceeding the following permissible sound levels, dBA slow response, and corresponding durations per day, in hours:

Sound Level	Duration
90	8
92	6
95	4
97	3
100	2
102	1.5
105	1.0
110	0.5
115	0.25 or less

(2) "Loss of hearing" means binaural hearing loss measured in decibels with frequencies of 500, 1,000, 2,000, and 3,000 cycles per second (Hertz). If the average decibel loss at 500, 1,000, 2,000, and 3,000 cycles per second (Hertz) is 25 decibels or less, usually no hearing impairment exists. 1997

#### 34A-2-502. Intensity tests.

- (1) The commission may conduct tests to determine the intensity of noise at places of employment.
- (2) An administrative law judge may consider tests conducted by the commission, and any other tests taken by authorities in the field of sound engineering, as evidence of harmful industrial noise. 1997

#### 34A-2-503. Loss of hearing — Occupational hearing loss due to noise to be compensated.

- (1) Permanent hearing loss caused by exposure to harmful industrial noise or by direct head injury shall be compensated according to the terms and conditions of this chapter or

(2) A claim for compensation for hearing loss for harmful industrial noise may not be paid under this chapter or Chapter 3, Utah Occupational Disease Act, unless it can be demonstrated by a professionally controlled sound test that the employee has been exposed to harmful industrial noise as defined in Section 34A-2-501 while employed by the employer against whom the claim is made. 1997

#### 34A-2-504. Loss of hearing — Extent of employer's liability.

(1) An employer is liable only for the hearing loss of an employee that arises out of and in the course of the employee's employment for that employer.

(2) If previous occupational hearing loss or nonoccupational hearing impairment is established by competent evidence, the employer may not be liable for the prior hearing loss so established, whether or not compensation has previously been paid or awarded. The employer is liable only for the difference between the percentage of hearing loss presently established and that percentage of prior hearing loss established by preemployment audiogram or other competent evidence.

(3) The date for compensation for occupational hearing loss shall be determined by the date of direct head injury or the last date when harmful industrial noise contributed substantially in causing the hearing loss. 1997

#### 34A-2-505. Loss of hearing — Compensation for permanent partial disability.

(1) Compensation for permanent partial disability for binaural hearing loss shall be determined by multiplying the percentage of binaural hearing loss by 109 weeks of compensation benefits as provided in this chapter or Chapter 3, Utah Occupational Disease Act.

(2) When an employee files one or more claims for hearing loss the percentage of hearing loss previously found to exist shall be deducted from any subsequent award by the commission.

(3) In no event shall compensation benefits be paid for total or 100% binaural hearing loss exceeding 109 weeks of compensation benefits. 1997

#### 34A-2-506. Loss of hearing — Time for filing claim.

An employee's occupational hearing loss shall be reported to the employer pursuant to Section 34A-2-407 within 180 days of the date the employee:

- (1) first suffered altered hearing; and
- (2) knew, or in the exercise of reasonable diligence should have known, that the hearing loss was caused by employment. 1997

#### 34A-2-507. Measuring hearing loss.

(1) The degree of hearing loss shall be established, no sooner than six weeks after termination of exposure to the harmful industrial noise, by audiometric determination of hearing threshold level performed by medical or paramedical professionals recognized by the commission, as measured from 0 decibels on an audiometer calibrated to ANSI-S3.6-1969, American National Standard "Specifications for Audiometers" (1969).

(2) (a) In any evaluation of occupational hearing loss, only hearing levels at frequencies of 500, 1,000, 2,000, and 3,000 cycles per second (Hertz) shall be considered. The individual measurements for each ear shall be added together and then shall be divided by four to determine the average decibel loss in each ear.

(b) To determine the percentage of hearing loss in each ear, the average decibel loss for each decibel of loss exceeding 25 decibels shall be multiplied by 1.5% up to the maximum of 100% which is reached at 91.7 decibels.

(3) Binaural hearing loss or the percentage of binaural

**Addendum B**  
**“Order Affirming ALJ’s Decision” dated March 31, 2009**



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**UTAH LABOR COMMISSION**

**KELARI MECHAM, personal  
representative of the estate of  
THOMAS KELLER, deceased,**

**Applicant,**

**vs.**

**SCOTTS ROUSTABOUT SERVICE,  
TRAVELERS INSURANCE CO., and  
EMPLOYERS REINSURANCE FUND,**

**Respondents.**

**ORDER AFFIRMING  
ALJ'S DECISION**

**Case No. 05-0406**

---

Kelari Mecham, in her capacity as personal representative of the estate of Thomas Keller, deceased, ("the Estate" hereafter) asks the Utah Labor Commissioner to review Administrative Law Judge Sessions' dismissal of the Estate's claim for permanent total disability compensation under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated, on behalf of Mr. Keller.

The Labor Commissioner exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers Compensation Act.

**BACKGROUND**

While employed by Scotts Roustabout Services on July 25, 1976, Mr. Keller was injured in a work-related accident. In 1978, the Utah Industrial Commission (predecessor to the current Labor Commission) approved an agreement between Mr. Keller, Scotts Roustabout Services, and its insurance carrier, Travelers Insurance Co., (referred to jointly as "Scotts" hereafter) for payment of permanent partial disability compensation to Mr. Keller.

In December 2000, Mr. Keller filed an application for hearing with the Commission claiming permanent total disability compensation from Scotts and the Employers' Reinsurance Fund ("ERF")<sup>1</sup> for permanent total disability compensation. Mr. Keller died on September 3, 2002. On October 23, 2002, Judge Eblen dismissed Mr. Keller's claim on the grounds that the claim was extinguished by his death. Judge Eblen's ruling was not contested and became final on November 23, 2002.

---

<sup>1</sup> Under the law in effect at the time of Mr. Mecham's accident in 1976, the ERF is liable for a portion of the benefits paid to individuals who are permanently and totally disabled as a result of work-related injuries. See § 34A-2-413(3) of the Utah Workers' Compensation Act.

## **ORDER AFFIRMING ALJ'S DECISION**

**KELARI MECHAM** personal representative of the estate of **THOMAS KELLER**

**PAGE 2 OF 3**

On April 25, 2005, the Estate filed a new application for hearing, seeking to compel Scotts and the ERF to pay permanent total disability compensation to the Estate for Mr. Keller's alleged permanent total disability. Scotts and the ERF moved for dismissal of the application. On June 16, 2006, Judge Sessions granted the motions on the grounds, among others, that the Estate was not entitled to pursue a claim for permanent total disability compensation under the circumstances of this case.

In its motion for review in this matter, the Estate challenges each of the grounds upon which Judge Sessions dismissed the Estate's application. However, because the Commission concludes that Judge Sessions was correct in his determination that the Estate is not entitled to pursue benefits in this matter, the Commission limits its discussion to that that issue.

### **DISCUSSION**

Prior to 2003, Utah's appellate courts had ruled that "[t]he 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. . . ." *Pacific States Cast Iron Pipe Co. v. Industrial Commission*, 218 P.2d 970, 974 (Utah 1950).

As already noted, Mr. Keller had filed a claim for permanent total disability compensation in December 2000, but died in 2002 while the foregoing rule was in effect. For that reason, Judge Eblen dismissed Mr. Keller's then-pending claim. As also noted, there was no effort to appeal Judge Eblen's decision. Consequently, the determination that Mr. Keller's claim terminated upon his death became final and binding on November 23, 2002, 30 days after Judge Eblen issued the decision.

The Commission notes the Estate's effort to revive this matter by relying on § 34A-2-423 of the Workers' Compensation Act. However, that statute was not enacted until 2003, after Judge Eblen's ruling already had become final. The Commission concludes that, under these circumstances, § 34A-2-423 does not apply to the Estate's claim.

### **ORDER**

The Commission affirms Judge Sessions' decision. It is so ordered.

Dated this 31<sup>st</sup> day of March, 2009.



Sherrie Hayashi  
Utah Labor Commissioner

**IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.**

**ORDER AFFIRMING ALJ'S DECISION**

**KELARI MECHAM personal representative of the estate of THOMAS KELLER**  
**PAGE 3 OF 3**

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

**CERTIFICATE OF MAILING**

I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of Kelari Mecham, Personal Representative of the estate of Thomas Keller, Case No. 05-0406, was mailed first class postage prepaid this 31<sup>st</sup> day of March, 2009, to the following:

Kelari Mecham  
Personal Representative, Estate of Thomas  
Keller  
Box 803  
Roosevelt UT 84066

Virginius Dabney, Esq.  
1060 S Main St Ste 2  
St George UT 84770

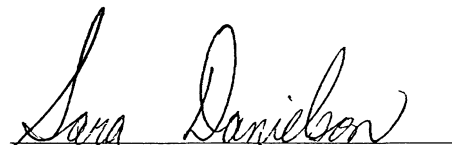
Scotts Roustabout Service  
Not Available

Mark R. Sumsion, Esq.  
Richards Brandt Miller & Nelson  
Box 2465  
Salt Lake City UT 84110

Employers Reinsurance Fund  
160 E 300 S  
P O Box 146611  
Salt Lake City UT 84114

Edwin C. Barnes, Esq.  
One Utah Center 13th Fl  
201 S Main St  
Salt Lake City UT 84111

Travelers Insurance Co  
P O Box 173762  
Denver CO 80217

  
Sara Danielson  
Utah Labor Commission

Addendum C  
“Memorandum Decision and Order of Dismissal” dated June 16, 1006

UTAH LABOR COMMISSION  
ADJUDICATION DIVISION  
PO Box 146615  
Salt Lake City, Utah 84114-6615  
801-530-6800

<b>KELARI MECHAM PERSONAL REPRESENTATIVE, Petitioner,</b>	<b>MEMORANDUM DECISION AND ORDER OF DISMISSAL</b>
<b>vs.</b>	<b>Case No. 05-0406</b>
<b>SCOTTS ROUSTABOUT SERVICE and/or EMPLOYERS REINSURANCE FUND; TRAVELERS INSURANCE CO, Respondent.</b>	<b>Judge Dale W Sessions</b>

THIS MATTER comes before the Labor Commission by way of a Motion to Dismiss filed by the Employers Reinsurance Fund and Respondent Scotts Roustabout Service. While the record shows that each Respondent has filed a Motion to Dismiss, they are treated as one motion for purposes of this Order.

The issues raised by each party can be summarized as follows:

1. Respondent argues that no provisions of the Utah Code Annotated and in particular the Worker's Compensation Act permit a personal representative of an injured worker to file a claim for permanent total disability compensation. Petitioner argues that no provisions prohibit a claim to be initiated by Petitioner's estate.
2. The claim filed by the injured worker in a prior case was dismissed without prejudice and there is no basis for the estate of the injured worker to seek permanent total disability compensation.
3. The Respondent(s) assert that the Labor Commission lacks jurisdiction to proceed to hear this matter and the Application for Hearing should be dismissed.
4. Benefits after death are limited to those already accrued during life.
5. Utah Code Ann., §35-1-67 in effect at the time of injury applies in this case. That statute required the Labor Commission to refer the injured worker who had been found to be tentatively permanent total disabled to the Division of Vocational Rehabilitation. Only after full cooperation and inability to be rehabilitated was demonstrated did permanent total disability compensation payments commence.
6. Utah Code Ann., §34A-2-423 became new law in 2003 and cannot be retroactively applied in this case.
7. Dismissal of the Application for Hearing in this case in the earlier filing was without prejudice and therefore preserved the right to re-file in the estate.
8. Both parties argue the application or denial of the application of a statute of

limitations in permanent total disability cases.

### **UNDISPUTED FACTS**

From the arguments of counsel, the following facts are not disputed. They form the basis for the legal arguments in the briefs submitted with the motion(s) and the responses thereto. They are:

- A. July 25, 1975 Petitioner was injured in a compensable industrial accident.
- B. June 29, 1978 a Compensation Agreement was approved by the Commission.
- C. August 14, 1978 the Commission issued a Lump Sum Order.
- D. December 1, 2000 the injured worker filed an Application for Hearing claiming permanent total disability compensation.
- E. May 21, 2002 the Commission granted a Motion to Compel Petitioner to cooperate with discovery.
- F. September 3, 2002 Petitioner died.
- G. October 23, 2002 the Commission dismissed the Application for Hearing without prejudice. No objection was filed and no appeal taken from that final order.
- H. April 25, 2005 the estate of the injured worker, by and through the duly appointed personal representative, filed a new Application for Hearing and entitled it "Amended Application for Hearing." This application sought permanent total disability compensation and interest. It alleged industrial accident, occupational disease and death claims. In the Applicant's Amended Pre-trial Disclosures filed by Petitioner's Estate, the claim is reduced to permanent total disability benefits only.

### **DISCUSSION OF ISSUES AND CONCLUSIONS OF LAW**

**ISSUE #1: Respondent argues that no provisions of the Utah Code Annotated and in particular the Worker's Compensation Act permit a personal representative of an injured worker to file a claim for permanent total disability compensation. Petitioner argues that no provisions prohibit a claim to be initiated by Petitioner's estate.**

This issue is best seen in light of the language of the Workers Compensation Act. Utah Code Ann., §34A-2-413(1)(b) provides that: "To establish entitlement to permanent total disability compensation, **the employee** has the burden of proof to show by a preponderance of evidence . . . ." (Emphasis added.) Utah Code Ann., §34A-2-104(1)(b) defines employee as "each person in the service of any employer, as defined in Section 34A-2-103, who employs one or more workers or operatives regularly in the same business, or in or about the same establishment. . . ." There is no provision in the Workers Compensation Act that acknowledges a personal representative in any manner.

While it is true that there are neither permissive or prohibitive terms pertaining to a personal representative making a filing for permanent total disability benefits, reason and reasonable inference can supply the answer. Utah Code Ann., §63-46(b)(1)(a) of the Utah Administrative Procedures Act ("UAPA") defines "party" as "the agency or other persons commencing an adjudicative proceeding, all respondents, all persons permitted by the presiding officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding." *See also Carter v. Sportform Health*, Labor Commission #00-0675 (February 2002). In no case does the Worker's Compensation Act or UAPA refer to or imply that anyone can commence an action except in death benefit cases (which is not the case here) other than the injured employee. U.C.A., §34A-2-423 also requires that the employee file a claim **before he dies** in order to preserve adjudication of his claim after he has died.

The only and best source of the physical characteristics of an injured worker is the actual injured worker. Without the worker, there can be no meaningful evaluation of a claim for disability including partial or total and temporary or permanent conditions as well. Death benefits aside, there is a burden on the injured worker to demonstrate proof of the permanent and total disability factors as required by statute that would have been in effect at the time of injury, *Latorre v. Delta Airlines*, Labor Commission #00-1144 (September 2002); *Abel v. Industrial Commission of Utah*, 860 P.2d 367 (UT. APP. 1993), to wit: Utah Code Ann., §35-1-67.

In 1975, §35-1-67 was amended to require permanent total disability benefits to be determined by a process. First, a tentative finding of permanent total disability must be made. Then it was mandatory for the employee to be referred to the Utah Division of Vocational Rehabilitation under the State Board of Education for rehabilitation training. Only when, after full cooperation of the injured worker, the Division determined that the injured worker could not be rehabilitated and the Division so certified to the Labor Commission, would benefits commence.

It follows that the express language of the statute cannot be complied with since the injured worker is deceased. It is true that the estate could supply some of the medical information and other relevant information. However, the ultimate required finding and certification from the Division of Vocational Rehabilitation would not be possible given that a deceased person would not be able to fully cooperate with rehabilitation services. As a result, the Motion to Dismiss should be granted.

**ISSUE #2: The claim filed by the injured worker in a prior case was dismissed without prejudice and there is no basis for the estate of the injured worker to seek permanent total disability compensation.**

The Application for Hearing was dismissed without prejudice and the ALJ included in the order the notice of rights to appeal. No objections thereto were made and no appeal was

taken. In this way, the dismissal became voluntary. Although the dismissal was not sought by a party, no party resisted the order and it could rightfully be considered a voluntary dismissal under Utah law. “An ALJ’s decision becomes final 30 days after it is issued unless a motion for review is filed within that period.” Paulus v. Moroni Feed Co., Labor Commission #00-0882 (August 2004). Utah Code Ann., §34-46b-12(1)(a) establishes a 30 day jurisdictional time limit for filing the Motion for Review. *See also* Giles v. Oakridge et al, Labor Commission #00-1228 (July 2000).

The inquiry then turns on the effect of the dismissal without prejudice. For guidance, we turn to the Utah Supreme Court opinion announced in Career Services Review Board v. Utah Department of Corrections, 942 P.2d 933 (Utah 1997). “Indeed this court has also stated that a “voluntary dismissal without prejudice ‘renders the proceedings a nullity and leave the parties as if the action had never been brought.’” Barton v. Utah Transit Authority, 872 P.2d 1036 (Utah 1994)(quoting In re Piper Aircraft Distribution Systems Antitrust Litigation, 551 F.2d 213, 219 (8<sup>th</sup> Cir. 1977). . . .[W]e see no reason . . . why the effect should not be the same for the dismissal of an appeal from the decision or order of an administrative agency.” The effect is “the dismissal of his action and the right to bring a later suit on the same cause of action, without adjudication of the merits.” Barton. (Other citations omitted.)

In another case, Bowles v. State, 652 P.2d 1345 (Utah 1982) the Utah Supreme Court explained in footnote 3 of the opinion: “[t]here are numerous rulings to the effect that a dismissal may be final for the purpose of appeal although it is without prejudice to the bringing of another action . . . 4 Am.Jur.2d, Appeal & Error §108 and cases cited therein. *See also* Sherry v. Sherry, 622 P.2d 9960 (Alaska 1981); and Carter v. Small Business Administration, 573 P.2d 564 (Colo., 1977).” The ALJ dismissed the instant case without prejudice and included the Notice of Rights of Appeal at the close of the Order. It was a final order. No appeal was taken. No party protested the order and the dispute appeared resolved.

McVinnie v. University of Utah Hospital, 2004 UT App 63 (UT. CT. APP. 2004) states: The dismissal without prejudice in this case “disposed of the case and has the effect of a final order, thus permitting appellate review.” Hales v. Oldroyd, 2000 UT App 75, P1,n.2, 999 P.2d 588. Because the dismissal concluded the action on the complaint and would require McVinnie to file a new complaint after fully complying with all statutory prerequisites, it is final for purposes of appeal. *See* Bowles v. State, 652 P.2d 1345 (Utah 1982)(stating if a new action must be commenced, the judgment ending the action is final for purposes of appeal). Such is the case here. The injured worker would have to start the case again by filing a new Application for Hearing. The dismissal was a final appealable order from which no appeal was taken. The Motion to Dismiss should be granted on this basis.

**ISSUE #3: The Respondent(s) assert that the Labor Commission lacks jurisdiction to proceed to hear this matter and the Application for Hearing should be dismissed.**



This issue raises jurisdiction. Utah Code Ann., §34A-1-301 confers jurisdiction and power to the Labor Commission. That statute provides “[t]he commission has the duty and the full power, jurisdiction and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers.” The Commission may exercise such powers only as are expressly or by necessary implication conferred upon it by statute. University of Utah v. Industrial Commission, 229 P. 1103 (Utah 1924); Parker v. Industrial Commission, 241 P. 362 (Utah 1925).

In the instant case, an Application for Hearing has been filed. Although incorrectly entitled “Amended Application for Hearing” the application has invoked the jurisdiction over the filing itself. A determination must be made as to the sufficiency of the filing and the standing of the person(s) involved in bringing the matter before the Labor Commission. The Labor Commission does have jurisdiction to adjudicate the claim in all of its aspects from that point of filing.

However, when standing is considered it might well be noted that by previous discussion in this decision, it would not be wise to permit claims that were not appropriately filed by a living injured worker to be filed posthumously through his estate (excepting death benefit claims) when the estate is not capable of demonstrating compliance with existing law at the time of injury. In that sense, the Labor Commission must determine whether the relief requested can be granted. When it cannot, the claim is moot and must be dismissed. “It is a well established principle of Utah law that courts, and by extension, administrative agencies, should not adjudicate claims when such adjudication will have no practical effect. “If the requested judicial relief cannot affect the rights of the litigants, the case is moot and a court will normally refrain from adjudicating it on the merits.” (Citations omitted.) Duran v. Morris, 635 P.2d 43, 45 (Utah 1981).” “Once a controversy has become moot, a trial court should enter an order of dismissal.” Merhish v. H.A. Folsom & Associates, 646 P.2d 732 (Utah 1982)(quoted in Lu v. St. Mark’s Hospital, Labor Commission Appeals Board Decision #8010440 (January 2005).

The Labor Commission has jurisdiction to consider the current matter until it is determined that adjudication will have no practical effect. The injured worker is deceased and cannot participate in the matter as required by law to establish entitlement to a tentative and/or final permanent total disability determination for benefits then to be determined. The issue is, therefore, moot. The case should be dismissed as a matter of law. The Motion to Dismiss should be granted on this basis.

#### **ISSUE #4: Benefits after death are limited to those already accrued during life.**

This issue relies on the Utah Supreme Court decision announced in Pacific States Cast Iron Pipe Co., v. Industrial Commission, 218 P.2d 970 (Utah 1950). There the court stated that “under the terms of the statute . . . dependants cannot obtain the benefits . . . unless [the] claim has ripened into an award for payments of compensation.” Id., at 971. Further, the court

This issue was discussed in Issue #2 above. Nothing was preserved in the dismissal without prejudice except a right to re-file. It is not the estate that had the right, but the injured worker. (It is noted that by the time the dismissal without prejudice was issued by the ALJ, the injured worker was deceased.) The inaction of the injured worker's estate at the time of the dismissal showed acquiescence in the dismissal and the ALJ's order became final after 30 days. Paulus; Utah Code Ann., §34-46b-12(1)(a). No right to re-file existed for the estate to file upon. Nothing remained for the estate to relate to in filing the 'Amended Application for Hearing.'

The initial application was a nullity. Barton. The failure to timely act on the order of dismissal is fatal to the estate's argument.

Petitioner includes as an exhibit to his Response to the Motion to Dismiss both references to and documents from the case of Smith v. Labor Commission, (UT. Ct. App. Case #20001019) (however the case numbers on the actual documents are Case No. 20010736-SC on the Notice of Decision and Labor Commission Case No. 97-0408 on the Order of Remand and on the Stipulation for Dismissal and Remand. The case was pending on appeal at the time the legislature changed the law in 2003. The parties stipulated to a remand of the case. The stipulation sets forth reasoning that is not in alignment with the opinion of Counsel on the subject. The stipulation contains the following paragraph:

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 S34A-2-423 to the Utah Worker's Compensation Act, specifically providing that an injured worker's pending claim for benefits is not extinguished by the worker's death." Page R-2-055.

This evidences an understanding of the legislation that Petitioner's counsel (both in that case and the instance case) has now abandoned. He would rather the ALJ determine that any benefits arising during life are continued in the rights of the personal representative in the estate of the injured worker. The better interpretation of the new statute is that the pending claims of an injured worker survive the death of the injured worker. The new statute clearly states:

... (2) The personal representative of the estate of an employee may adjudicate an employee's claim for compensation under this chapter if in accordance with this chapter, the employee files a claim:

(a) before the employee dies; and

(b) for compensation for an industrial accident or occupational disease for which compensation is payable under this chapter or Chapter 3, Utah Occupational Disease Act. (Emphasis added.)

Because the estate failed to file and prevail against the ALJ's dismissal within the period allowed by law, they lost the right to proceed on the Application for Hearing. The Motion to Dismiss should be granted on this basis.

**ISSUE #8: Both parties argue the application or denial of the application of a statute of limitations in permanent total disability cases.**

Order

Kelari Mecham Personal Representative vs. Scotts Roustabout Service and/or Employers  
Reinsurance Fund; Travelers Insurance Co Case No. 05-0406  
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The state of the law at the time of the injury governs the case. At that time, there was no statute of limitations concerning permanent total disability claims. Vigos v. Mountainland Builders, 993 P.2d 207, P14 (Utah 2000). However, there was a process by which the establishment of such claims could be brought about. It is a fact that the injured worker did not establish his claim prior to his death, but he had filed an Application for Hearing. Utah Code Ann., §34A-2-423 did not yet exist. The injured worker's initial attempt to establish his claim was dismissed after he was deceased. The estate failed to preserve his claim by filing a timely motion for review of the ALJ's decision. Even if they had appealed, it is doubtful that any change in the ruling of the ALJ would have been made. A deceased person cannot participate in the statutorily required process to establish a claim under the 1975 law. There is no conceivable way that the estate can comply with the 1975 law at this time. (See discussion of Issue #5 above.) No statute of limitations has application to the facts and circumstances of this case. The Motion to Dismiss should be granted on this basis.

Finally, to the extent that Vigos v. Mountainland Builders, 993 P.2d 207 (Utah 2000) requires that the Labor Commission acknowledge the prior filing as sufficient to overcome the technical filing requirement, it would make no difference in this case. The relief requested by the injured worker's estate cannot be granted because the injured worker is deceased and cannot conform to the requirements of the 1975 statute which was in effect at the time of his injury. The relief contemplated by the claim for permanent total disability compensation cannot be fairly determined without the full cooperation of the injured worker. Accordingly, the claim is moot and must be dismissed on that basis.

### **ORDER**

**IT IS THEREFORE ORDERED** that the 'Amended Application for Hearing' filed April 25, 2005 be and hereby is dismissed with prejudice.

**IT IS FURTHER ORDERED** that the scheduling clerk of the Labor Commission be directed to cancel any further proceedings scheduled in this case.

DATED THIS June 16, 2006.

UTAH LABOR COMMISSION



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Dale W Sessions

Administrative Law Judge

Order

Kelari Mecham Personal Representative vs. Scotts Roustabout Service and/or Employers  
Reinsurance Fund; Travelers Insurance Co Case No. 05-0406

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### NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

### CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Order was mailed by prepaid U.S. postage on June 16, 2006, to the persons/parties at the following addresses:

Kelari Mecham Personal Representative  
Box 803  
Roosevelt UT 84066

Employers Reinsurance Fund  
160 E 300 S 3rd Fl  
Salt Lake City UT 84114

Travelers Insurance Co  
P O Box 173762  
Denver CO 80217

Virginus Dabney Esq  
1060 S Main St Ste 2  
St George UT 84770

Mark Sumsion Esq  
50 S Main St Ste 700  
P O Box 2465  
Salt Lake City UT 84110

00197

Order

Kelari Mecham Personal Representative vs. Scotts Roustabout Service and/or Employers

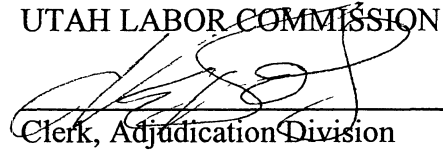
Reinsurance Fund; Travelers Insurance Co Case No. 05-0406

Page 10

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Edwin C Barnes Esq  
One Utah Center 13th Fl  
201 S Main St  
Salt Lake City UT 84111

UTAH LABOR COMMISSION

  
Clerk, Adjudication Division

Addendum D  
“Order of Dismissal” dated October 23, 2002

160 East 300 South, 3d Floor, PO Box 146615  
Salt Lake City, UT 84114-6615

Case No. 20001132

THOMAS KELLAR

Petitioner,

v.

SCOTTS ROUSTABOUT SERVICE  
WORKERS COMPENSATION FUND OF UT\*  
EMPLOYERS REINSURANCE FUND

ORDER OF DISMISSAL

Respondents(s).

\*  
\*  
\*  
\*  
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\*  
\*

The above captioned matter having been duly considered, and it having been determined that:

The petitioner in this matter has passed away. Under current Utah law his claim cannot proceed. However, the Utah appellate courts are reviewing this issue. Petitioner has not requested in writing that this matter be held in abeyance until we receive a ruling from the appellate courts.

And it appearing that the foregoing constitutes good cause for dismissing the claim,


NOW, THEREFORE, IT IS ORDERED that the claim of the Petitioner be, and the same is hereby, dismissed without prejudice.

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

DATED THIS October 23, 2002.

UTAH LABOR COMMISSION  
  
Sharon J. Eblen  
Administrative Law Judge



CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached  
Order of Dismissal was mailed, postage prepaid on October 23,  
2002 to the following persons at the following addresses:

WORKERS COMPENSATION 392 EAST 6400 SOUTH P O BOX 57929

SALT LAKE CITY UT 84157-0929

THOMAS KELLAR PO BOX 32 MYTON

SALTUT 84052

EDWIN C BARNES, Atty 201 SOUTH MAIN #1300 SALT LAKE CITY UT 84111-2216

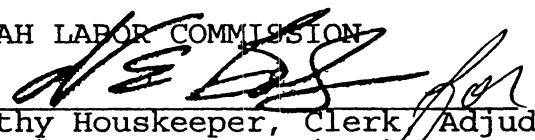
VIRGINIUS DABNEY, Atty 1060 SOUTH MAIN STREET #2 ST GEORGE UT 84770

BRAD BETEBENNER, Atty 50 S. MAIN STREET 7TH FLOOR

P.O. BOX 2465 SALT LAKE CITY UT 84110-2465

DEIDRE MARLOWE, Atty 160 E 300 S 3RD FLOOR PO BOX 146600 SLC UT 84114

UTAH LABOR COMMISSION

  
Kathy Houskeeper, Clerk / Adjudication Division  
(801) 530-6344 or (800) 530-5090

Addendum E  
Application for Hearing filed December 1, 2000

Thomas Keller

Employee/Applicant

Thomas Keller

Maize Name and/or Other Name(s) Used by Employee

vs.

Scott's Roundabout Service

Employer

N/A

Employer's Street Address

Maize, UT 84052

City, State and Zip Code

(435) 949-6911

Employer's Phone Number

Traveler's Insurance Company

Employer's Workers' Compensation Insurance Carrier

## APPLICATION FOR HEARING

\* Industrial Accident/Occupational Disease/Death Claim \*

(NOTE: Including Exhibits A through F, attached)

\*\* I request that a "Claims Resolution Conference" be scheduled to resolve the issues checked below (#5).

☒ Yes ☐ No

### EMPLOYEE ALLEGES AND REQUESTS RESOLUTION CONCERNING THE FOLLOWING UNDER TITLE 34A:

1. The employee sustained an injury/death by accident and/or disease arising out of and in the course of employment with the Employer on/between July 23, 1975 at the following location: 60 miles south of Moen Lake Canyon, UT

2. The accident/disease occurred as follows: Welder was cutting pipe, ignited gas flames resulting in oil tanks blowing up and giving me extensive burns.

3. The injury/disease the employee sustained is: severe burns on upper body

4. The injury/disease caused time off work from July 23, 1975 to present; and continuing

5. The employee claims: (Please mark an "X" next to any issue you want an immediate hearing on and attach supporting documentation for each issue marked - see reverse side.)

A. ☐ Medical Expenses

F. ☐ Temporary Partial Compensation

K. ☐ Burial Expenses

B. ☐ Recommended Medical Care

G. ☐ Permanent Partial Compensation

L. ☐ Travel Expenses

C. ☐ Temporary Total Compensation

H. ☒ Permanent Total Compensation

M. ☐ Interest

D. ☐ Weekly Compensation Rate

I. ☐ Dependent Compensation

N. ☐ Rehabilitation

E. ☒ To protect rights - UCA 34A-2-417 I. ☐ Other: \_\_\_\_\_

6. The employee's date of birth is/was April 13, 1928; and the employee's date of death (if applicable) was N/A. At the time of injury/disease/death the employee's wage was \$4.35 per hour and the employee was working 66 hours per week. Also, the employee was married and had 2 dependent children under the age of 18 when the employee was injured/died.

(If you need additional space to provide the information requested on either side of this form, you may attach additional pages.)

Date: December 1, 2000

VIRGINIA DARNBY

Printed Name of Attorney for Employee/Applicant State Bar #

Signature of Attorney for Employee/Applicant

1000 South Main Street, Suite 2

Street Address for Attorney for Employee/Applicant

St. George, Utah 84770

City/State/Zip Code

(435) 642-8501

Telephone #

Thomas Keller

Printed Name of Employee/Applicant

Signature of Employee/Applicant

P.O. Box 32

Street Address of Employee/Applicant

Maize, UT 84052

City/State/Zip Code of Employee/Applicant

(435) 6463047 / 528-44-8370

Telephone #

Social Security #

UNSIGNED OR INCOMPLETE FORMS, AND FORMS NOT INCLUDING EMPLOYEE'S SUPPORTING DOCUMENTATION AND INFORMATION REFERENCED ON THE REVERSE SIDE OF THIS FORM WILL BE FILED, BUT RETURNED FOR COMPLETION IN FULL.

**Addendum F**  
**Order Granting Motion to Cancel Hearing and Compel Petitioner to Cooperate in**  
**Discovery dated May 21, 2002**

Utah Labor Commission  
Adjudication Division  
Case No. 20001132

---

THOMAS KELLAR,

Petitioner,

v.

SCOTTS ROUSTABOUT SERVICE  
and EMPLOYERS' REINSURANCE  
FUND,

Respondents.

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ORDER GRANTING  
MOTION TO  
CANCEL HEARING  
AND COMPEL

PETITIONER TO COOPERATE  
IN DISCOVERY

Judge Sharon J. Eblen

---

FINDINGS OF FACT

The petitioner filed an application for hearing seeking the payment of workers' compensation benefits on December 1, 2000 seeking an award of permanent total disability benefits for accident which occurred on July 25, 1975. An Amended Request for Answer was mailed to the parties, joining Employers' Reinsurance Fund, on January 4, 2001. On January 30, 2001, ERF filed a Notice of Appearance naming new counsel on the case. On June 25, 2001, the ERF filed an answer denying liability on the claim.

On November 28, 2001 this matter was scheduled for hearing in St. George, Utah on January 24, 2002. On November 28, 2001, the ERF requested the matter be rescheduled due to a calendaring conflict. On December 10, 2001, the petitioner objected to rescheduling the hearing. On request of the petitioner and the ALJ the ERF examined the schedules of its other potentially available counsel to determine whether the matter may be reassigned to counsel available on the hearing date. However, no other attorneys were available to take the case as scheduled. Therefore, on December 17, 2001, this matter was continued due to the calendaring conflict of Ms. Marlowe.

On January 9, 2002, the petitioner requested that the matter be scheduled for hearing to motivate the parties to discuss settlement in a timely manner. Petitioner mailed several letters to the ALJ requesting that the ERF waive its defense of no liability in the event that the petitioner passes away before the matter is concluded. The ERF has apparently refused to do so, which is its right.

On March 20, 2002, this matter was scheduled for hearing on June 3, 2002. All parties are available for a hearing on this date. On or about March 6, 2002, Attorney Marlowe sent an email to Attorney Dabney requesting several dates that Mr. Kellar would be available for a deposition. Attorney Dabney refused to make his client

available for a deposition stating, "Sorry, you should have done that before the last hearing." Conditioning Mr. Kellar's appearance at a deposition on the ERF's waiver of defenses in the event of Mr. Kellar's death before the matter is finally resolved. On April 1, 2002, the petitioner wrote Attorney Betebenner requesting a computer printout showing the compensation and medical expenses paid on the claim and threatening a Motion to Compel should the requested information not be provided.

On May 10, 2002 the Adjudication Division recieved a Motion to Compel the petitioner to cooperate in the taking of his deposition which was dated May 3, 2002. On May 10, 2002, the division received a letter from Attorney Betebenner joining in the ERF's motion to compel, indicating that there is important information which needs to be obtained from the petitioner about his employment after the accident of July 25, 1975, his Social Security award and a third party action. As of May 21, 2002, the petitioner has not responded to the Motion to Compel.

#### PRINCIPLES OF LAW

All workers' compensation matters before the Labor Commission are governed by the Utah Administrative Procedures Act, § 63-46b-1-22, U.C.A. ("UAPA") and the Workers' Compensation Act, § 34A-2-101-803, U.C.A. UAPA provides that "the agency may, by rule, prescribe means of discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses. If the agency does not enact rules under this section, the parties may conduct discovery according to the Utah Rules of Civil Procedure."

The Workers' Compensation Act specifically provides that the commission is not bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, other than as provided in this section or as adopted by the commission pursuant to this chapter and Chapter 3, Utah Occupational Disease Act." § 34A-2-802, U.C.A.

The Labor Commission rule regarding discovery provides:

Upon filing of the Answer, the defendant may commence discovery with appropriate sets of interrogatories. Such discovery should focus on the accident event, witnesses, as well as past and present medical care. The defendant shall also be entitled to appropriately signed medical releases to allow gathering of pertinent medical records. The defendant may also require the applicant to submit to a medical examination by a physician of the defendant's choice. Failure of an applicant to comply with such requests may result in the dismissal of a claim or delay in scheduling of a

hearing.

R602-2-1.H U.A.C.

Section 34A-1-308, Utah Code provides that, "any party may in any investigation cause depositions of witnesses residing within or without the state to be taken as in civil actions."

### ANALYSIS

Petitioner filed an application for hearing seeking permanent total disability benefits allegedly caused by an accident on July 25, 1975 in December 2000. A hearing is scheduled on June 3, 2002, however, the petitioner refuses to cooperate in making himself available for a deposition prior to the hearing. The petitioner refuses to make himself available on the notion that the respondents should have completed discovery prior to the hearing scheduled in January 2002. However, it is noted that the petitioner requested discovery from respondents on April 1, 2002, well after the January 2002 canceled hearing date.

There was no scheduling order entered in this matter limiting discovery to a specific time frame. Further, Labor Commission rules do not specify a specific time period by which discovery must be completed prior to a hearing. Although it is desirable that the parties complete discovery well in advance of the hearing, the respondents' request that the petitioner make himself available for a deposition in March 2002 is not unreasonable. The petitioner has made it clear that he will not make himself available for a deposition unless the respondents waive their potential defense that the claim dies when the petitioner does. Such a request is unreasonable and there is no reasonable justification offered for the petitioner's refusal to cooperate in discovery. Due to the petitioner's refusal to cooperate in scheduling a deposition, this matter will not be ready for hearing as scheduled on June 3, 2002. Accordingly, the hearing will be canceled and not rescheduled until the petitioner cooperates with discovery.

### ORDER


IT IS THEREFORE ORDERED that the hearing scheduled for June 3, 2002 in St. George, Utah is cancelled based upon the petitioner's failure to cooperate with discovery.

IT IS FURTHER ORDERED that the petitioner may have until 5:00 p.m. on Friday June 28, 2002 to make himself available for a deposition. If Petitioner fails to

provide discovery by the above deadline, respondents may request that this matter be dismissed.

DATED this 21 day of May, 2002.

THE LABOR COMMISSION

  
Sharon J. Eblen  
Administrative Law Judge



MAILING CERTIFICATE

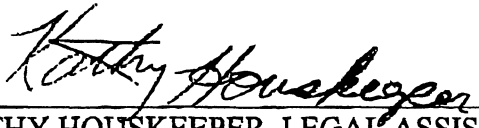
I hereby certify that on the <sup>21ST</sup> day of May, 2002, I mailed a copy of the attached **ORDER GRANTING MOTION TO CANCEL HEARING AND COMPEL PETITIONER TO COOPERATE IN DISCOVERY**; in the case of Thomas Kellar v. Scotts Roustabout Service and/or Employers' Reinsurance Fund(Case No. 2001132) postage prepaid to the following:

TRUDY PENDLETON  
1660 W SUNSET BLVD APT D1  
ST GEORGE UT 84770-6514

VIRGINIUS DABNEY ESQ  
1060 S MAIN STREET STE 2  
ST GEORGE UT 84770

BRAD C BETEBENNER ESQ  
PO BOX 2465  
SLC UT 84110-2465

DEIDRE MARLOWE ESQ  
160 E 300 S 3<sup>RD</sup> FL  
SLC UT 84114

  
\_\_\_\_\_  
KATHY HOUSKEEPER, LEGAL ASSISTANT  
UTAH LABOR COMMISSION

**Addendum G**  
**Letter requesting dismissal dated October 11, 2002**



BRANDT  
MILLER  
NELSON

A PROFESSIONAL LAW CORPORATION

ROBERT L. STEVENS  
DAVID L. BARCLAY †  
BRETT T. PAULSEN \*\*  
LYNN S. DAVIES  
RUSSELL C. FERICKS  
MICHAEL K. MOHRMAN  
MICHAEL A. EMERY  
MICHAEL P. ZACCHEO  
GARY L. JOHNSON  
GEORGE T. NAEGLI

S. BAIRD MORGAN  
BRAD C. BETLBENNER  
ROBERT G. WRIGHT \*  
CHRISTIAN W. NELSON ††  
MATTHEW C. BARNECK  
MARK L. McCARTY  
CARRIE T. TAYLOR  
ELIZABETH A. HIRBY MILLS  
HOLLY B. PITTLER \*  
MELINDA A. MORGAN \*

DIANA G. MATKIN  
MARTHA KNUDSON  
MARK R. SUMSION  
BRIAN C. WEBBER  
BRANDON B. HOBBS  
WAYNE Z. BENNETT  
ZACHARY E. PETERSON =  
CHRISTIAN S. COLLINS  
RAMONA E. GARCIA  
CHRISTOPHER STRINGHAM

ROBERT W. BRANDT  
PETER K. ELLISON

WILLIAM S. RICHARDS (1929-2002)  
ROBERT W. MILLER (1940-1983)

ALSO ADMITTED IN	** ARIZONA
† CALIFORNIA	COLORADO
* FLORIDA	†† IDAHO
MASSACHUSETTS	~ MONTANA
* WASHINGTON	* WYOMING

KEY BANK TOWER  
50 SOUTH MAIN 7th FLOOR  
POST OFFICE BOX 2465  
SALT LAKE CITY, UTAH 84110-2465  
(801) 531-7000 FAX (801) 531-5506  
E-MAIL ADDRESS: mnl@rbmn.com

October 11, 2002

The Honorable Sharon J. Eblen  
Labor Commission of Utah  
Adjudication Division  
P. O. Box 146615  
Salt Lake City, UT 84114-6615

Re: Kellar, Thomas v. Scotts Roustabout Service  
Claim No.: 042CBAXW0159E  
DOI: 7-25-75  
RBMN No.: 6724-1568

Dear Judge Eblen:

On September 27, 2002, Mr. Dabney informed me that Mr. Kellar had unfortunately passed away. He indicated at that time, he would be requesting this matter be stayed pending the outcome of a current appellate case, which as I understand could purportedly allow Mr. Kellar's estate to pursue the benefits accrued through the date of his death. However, I have seen no such request.

Based on the above, and the present state of the law, which terminates all claims upon the injured workers' death, I request the hearing presently scheduled for October 29, 2002 be cancelled and this matter be dismissed with prejudice. Thank you for your attention to this matter.

Very truly yours,

RICHARDS, BRANDT, MILLER & NELSON

Mark R. Sumsion

cc: Ms. Deidre Marlowe  
Virginius Dabney  
Barbara McDaniel

**Addendum H**  
**Letter from Mr. Dabney requesting stay of proceedings**  
**dated December 10, 2002**

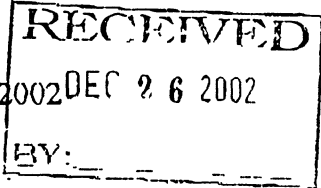
BARA A. DABNEY

DABNEY & DABNEY  
A PROFESSIONAL CORPORATION

SOUTH MAIN PLAZA, SUITE 2  
1060 SOUTH MAIN STREET  
ST. GEORGE, UTAH 84770

FACSIMILE: (435) 652-1111

www.dabneylaw.com  
jaguar@dabneylaw.com



December 10, 2002

12/11/02 2:18 pm

FAX NO: 801-530-6333

Hon. Sharon J. Eblen  
UTAH LABOR COMMISSION  
Post Office Box 146615  
Salt Lake City, Utah 84114-6615

RE: Applicant: Thomas Kellar  
Injury Date: 7/25/75  
Employer: Scott's Roustabout Service  
Carrier: Travelers Ins. Co. and ERF  
Case No.: 2000-1132

Dear Judge Eblen:

Please find enclosed a copy of Mr. Kellar's Death Certificate showing that he died on September 3, 2002

The Utah Labor Commission has taken the position for over 50 years that industrial claims terminate when an injured worker dies. Even though there is no published decision of this State's highest Court indicating that, the misconception continues.

My office currently has five death cases, one of which is going to clarify this legal issue. The Utah Supreme Court will be deciding the case of Orville E. Smith v. Utah Labor Commission next year. Oral argument has been set. The decision in Smith will likely be dispositive of whether Mr. Kellar's family, through his estate, may pursue his industrial claim. We respectfully request that an Order staying proceedings in this case be entered pending a decision in the Smith case.

Very truly yours,

A large, stylized handwritten signature in black ink, which appears to read "Virginius Dabney".

VIRGINIUS DABNEY

VD:bd

Enclosure

cc: Mr. Mark R. Sumsion, Mr. Edwin C. Barnes, Thomas Kellar Estate c/o Ms. Kellar  
Kellar; File

C:\FILES\KELLAR\EBLEN 7

00151

- PRACTICE LIMITED TO SOCIAL SECURITY DISABILITY, WORKERS COMPENSATION AND RELATED PERSONAL INJURY LITIGATION -