

1953

Silver King Coalition Mines Company et al v. Industrial Commission of Utah and Lorna Mitchell : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Callister; Andrew R. Hurley; Attorneys for the Defendants and Respondents;

Recommended Citation

Brief of Respondent, *Silver King Coalition Mines Co. v. Industrial Comm. Of Utah*, No. 8029 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/2033

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

✓

IN THE SUPREME COURT
of the
STATE OF UTAH

SILVER KING COALITION MINES
COMPANY, a corporation, and CONTIN-
ENTAL CASUALTY COMPANY, a cor-
poration,

Plaintiffs and Appellants,

vs.

INDUSTRIAL COMMISSION OF UTAH
and LORNA MITCHELL, Widow of
Glade Mitchell, Deceased,

Defendants and Respondents,

Case No.

8029

RESPONDENTS' BRIEF

E. R. CALLISTER,
Attorney General

ANDREW R. HURLEY,

Attorneys for the Defendants
and Respondents.

I N D E X	PAGE
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	10
ARGUMENT	10
POINT 1. THE COMMISSION WAS CORRECT IN HOLDING THAT SECTION 42-1a-13 (b) (3) UCA 1943, HAD NO APPLICATION, BUT THAT THE AMENDMENT OF 1951 NOW 35-2-13 (b) (3) UCA 1953 WAS APPLICABLE.....	10
POINT 2. THE COMMISSION WAS CORRECT IN HOLDING THAT THE EVIDENCE DISCLOSES THAT THE DECEASED DIED AS A RESULT OF SILICOSIS AS DEFINED BY THE LAWS OF UTAH 19	
CONCLUSION	22

AUTHORITIES CITED

82 American Law Reports 1244, 1247.....	17
58 American Jurisprudence, Sec. 73.....	18
71 Corpus Juris Secundum, Sec. 63.....	18

CASES CITED

Georgianna Cote, Admr. of Zephirin Cote, Deceased, v. Bachelder-Worcester Co., (N. H. 1932) 82 ALR 1239, 160 At. 101	17
Hampton Roads Stevedoring Corp. v. O'Hearne, (USCA, 4th Cir. 1950) 184 F. 2d 76.....	19
Hirsch v. Hirsch Bros. Inc. (N. H. 1952) 92 At. 2d 402.....	17
Pacific States Cast Iron Pipe Co. v. Industrial Commis- sion, (Ut. 1950) 218 P. 2d 970, 971.....	16, 17
Penn. Jersey Welding Co. v. Lowe, (USCA, 3rd Cir. 1950) 183 F. 2d 936.....	19

Silver King Coalition Mines Co. v. Industrial Commission, two cases, 205 P. 2d 811 and 205 P. 2d 817.....	16
State ex rel Bessler v. Industrial Commission, (Ohio 1952) 105 NE 2d 264.....	12
State ex rel Efford v. Industrial Commission, (Ohio 1949) 84 NE 2d 493.....	12
State ex rel Venys v. Industrial Commission, (Ohio 1950) 91 NE 2d 7.....	12
State of Ohio Industrial Commission v. Kamrath, (Ohio 1928) 160 NE 470.....	12
Travelers Ins. Co. v. Toner, (USCA-DC 1951) 190 F. 2d 30....	19

STATUTES CITED

35-2-13 (b) (3) UCA 1953.....	10, 11, 14
35-2-48 (c) UCA 1953.....	14
35-2-28 UCA 1953.....	19, 20, 21
42-la-13 (b) (3) UCA 1943.....	10, 11

IN THE SUPREME COURT
of the
STATE OF UTAH

SILVER KING COALITION MINES
COMPANY, a corporation, and CONTIN-
ENTAL CASUALTY COMPANY, a cor-
poration,

Plaintiffs and Appellants,

vs.

INDUSTRIAL COMMISSION OF UTAH
and LORNA MITCHELL, Widow of
Glade Mitchell, Deceased,

Defendants and Respondents,

Case No.
8029

RESPONDENTS' BRIEF

STATEMENT OF FACTS

Respondents agree with the statement of facts set forth by appellants concerning events leading up to the filing of the action and the procedure involved before the Industrial Commission. However, Respondents controvert the statement of facts pertaining to the medical evidence and testimony. Respondents believe them to be incompletely and inaccurately stated and will therefore restate that portion of the facts plus one or two omissions which Respondents feel are pertinent to their theory of the case.

This action arose upon a claim by the widow and four minor dependents for the death of Glade Mitchell, due to an

occupational disease, to-wit: silicosis complicated by active tuberculosis. Decedent had filed a claim (R.86) for disability due to silicosis on the 16th day of February, 1950, which it must be conceded was within the statute of limitations as it applied to him. This claim was in the process of adjudication when decedent died. The widow's claim for death due to silico-tuberculosis was filed the 20th day of August, 1952, less than one month after the date of death. It is the widow's claim that is before this court.

RESTATEMENT OF MEDICAL FACTS

Glade Mitchell entered the State Tuberculosis Sanatorium for the first time on July 7, 1950. Prior to this an X-ray report of Drs. Kirby and Wilson, dated June 15, 1950 (R.82) showed evidence of bilateral symmetrical nodulation, throughout both lung fields, etc. The report is quoted in part as follows, "IMPRESSION: — Findings are indicative of silicosis." In addition it is pointed out, contrary to Appellants contention that prior to autopsy there was never any X-ray evidence of silicosis, that silicosis was diagnosed upon the decedent's entry into the State Tuberculosis Sanatorium. A report to the Industrial Commission dated August 9, 1950 by Dr. D. O. M. Lindberg, M. D. states. "A—There is roentgenographic (X-ray) evidences of co-existing tuberculosis and silicotic infiltration." (R. 79).

The next report of Dr. Lindberg dated September 26, 1950, contains this statement, "Diagnosis on admission: Far Advanced Active Pulmonary Tuberculosis. X-ray & Laboratory: corroborates diagnosis." (R.78)

Dr. Elmer M. Kilpatrick of the medical panel noted this inconsistency on October 10, 1950, and stated, "Have checked the file again — am a little confused." (R.77) The Doctor wanted to recheck all films and wondered whether or not the

panel had seen all films. (R.77)

Apparently Dr. Kilpatrick examined the decedent in Ogden on October 14, 1950 and sent his notes to the Industrial Commission. His comment at this time, "Looks more like TB and *not* Silicosis. Don't know yet." (R.76) He accompanied this report with a longhand letter in which he indicated that "Dr. Walker and myself are in doubt *still*, regarding Glade Mitchell. — Here are added notes as to his progress. It looks still highly probable that he has *no silicosis* but does have active Tuberculosis, far advanced." (R.75)

The opinion Dr. Elmer Kilpatrick stated in a letter dated October 28, 1950 and quoted in part by the Appellant's Brief at page 4 should be put in its proper light by addition to two paragraphs omitted by them:

"We would like to reserve a dogmatic diagnosis for the present to allow for this added observation period and we feel that we can speak for the other members of the Panel in making the above decisions.

"We are hopeful that additional observation will clarify the *diagnostic dilemma* involved in this man's case." (Emphasis added) (R. 73, 74)

The Panel on November 18, 1950 (R.69) indicates that "Condition not diagnosed to date — Re-examine 3 to 6 mo for re-evaluation."

It appears that Glade Mitchell left the Sanatorium against medical advice of October 28, 1950. (R.68) On January 20, 1951 the medical panel determined that he had, "Tuberculosis, pulmonary, far advanced, all lobes, with cavitation right lung, active". (R. 67, 66)

The review of the films in this case by Dr. Riddell of Canada (R.64,65) confirms this and suggests the case be hospitalized and carefully investigated.

Glade Mitchell was re-admitted to the Sanitorium on May 16, 1951. (R.62) In a letter dated March 29, 1952, Dr. Lindberg indicates there is still doubt as to a positive diagnosis. However, contrary to the Appellant's statement, the letter shows that there was a positive sputum test.

Glade Mitchell died in the Sanitorium on July 21, 1952 and an autopsy was performed on his body by Dr. Robert W. Ogilvie, M.D. that evening. After completion of necessary bacteriological and chemical analysis an autopsy report dated August 13, 1952 was submitted by Dr. Ogilvie. (R.53,59) Three portions of this exhaustive report are quoted:

PATHOLOGICAL DIAGNOSES

"A. Respiratory System:

1. Pneumonitis, caseous and fibrocaseous, nodose, chronic, all lobes, both lungs, with multiple cavitation, probably tuberculous.
2. Silicosis, chronic, linear and nodular, all lobes, both lungs. (emphasis not added)
3. Anthracosis, mild.
4. Laryngitis, chronic, with focal ulceration, moderate." etc. (R.53)

CAUSE OF DEATH

"The cause of death is believed to be due to a severe, chronic, firocaseocavernous pneumonitis, probably tuberculous, involving all lobes of both lungs and complicated by a mild to moderate nodular silicosis." (R.54)

SUMMARY OF COMMENTS

"At autopsy, both linear (peribronchial and perivascular) and nodular pulmonary fibroses and fibrotic lymph node foci were encountered. These changes were compatible with silicosis from an histopathological standpoint, and numerous doubly refractile particles, compatible with silica, were evident under polarized light. For further confirmation, microincineration studies of

suspected lesions were performed; these were markedly positive for silica particles. In addition, chemical examinations of a lung segment and a hilar node revealed quantities of silica (3.76 mgm/gm of dried lung; 12.84 mgm/gm of dried lymph node) in excess of that normally present. According to McNalley (J.A.M.A. 101:584-87, 1933), the average normal lung contains only about 1.13 mgm of silica/gm of dried lung, and any lung which contains in excess of 2 mgm of silica/gm of dried lung has been exposed over a period of time to an unduly dusty atmosphere. *A combination of all the above findings are considered as conclusive evidence of silicosis.* (emphasis added)

"The pneumonitis was of considerable severity and involved all lobes in varying degrees. The lesions were predominantly caseous or fibracaseous; however, multiple cavities were present. Although these lesions were neither typically exudative nor typically proliferative tuberculous lesions, they were compatible with this etiology. Acid fast stains of numerous lung, prostate, and node sections revealed only a single acidfast bacillus; this does not, however, preclude a diagnosis of tuberculosis since the bacilli are often extremely difficult to locate. Additional support for this etiology was obtained by the finding of one Gaffky II sputum smear and one questionable sputum (four acid-fast bacilli) smear during the patient's hospitalization. Special stains for fungi, etc. revealed no such etiological agents. No evidence of malignancy or Boeck's sarcoid were seen. *In summation, therefore, based on the available evidence, one can only logically conclude that this pneumonitis was probably tuberculous.*

"The chronic inflammation of the laryngotracheobronchial tree, the obliterative pleuritis, and the prostatitis are thought to be secondary to the severe pulmonary disease. The etiology of the fibrinous pericarditis remains unknown; however, it might have been secondary to the severe, adjacent pleuritis. The cardiac changes may be considered as being caused by a combination of primary cardiac disease and cardiac change secondary

to hypertension in the pulmonary circuit due to the obstructive phenomena of the pulmonary disease. The evidence suggests that the patient developed a mild degree of cardiac decompensation, terminally."

Appellant's brief sets forth a part of the second paragraph and all of the fifth paragraph of the letter of Dr. Kilpatrick, dated August 26, 1953. (R.3) Taken thus, and especially without the last paragraph in which the Doctor states his conclusions and which I have underlined, an erroneous impression would be created. The complete letter less the salutation is as follows:

"The autopsy performed by Dr. Robert W. Ogilvie on the body of Mr. Glade Mitchell was observed by me and I gave Dr. Ogilvie technical assistance during the autopsy procedure for the gross examination of the body.

"At the time of the autopsy it was felt that Mr. Glade's pulmonary disease was entirely due to ulcero-caseous tuberculosis and from the gross inspection of the lung an impression of silicosis was not gained. It was obviously present at the autopsy table that a clinical diagnosis from x-ray nodulation could not be made in this patient and it was both of our feelings that clinical silicosis did not exist.

"In addition to the bilateral ulcerative and caseous lesions in the lungs other foci highly suggestive of tuberculosis was present, namely the paricardial sac, the prostate, and tracheobronchial lymphnodes.

"The present report has been withheld pending the receipt of a copy of the autopsy report from Dr. Ogilvie.

"From study of the completed autopsy report, microscopic analysis of the tissues, and chemical analysis of the tissues for silica it can be concluded that Mr. Mitchell did have silicosis in comparatively minor degree which seemingly has been a complication of his tuberculosis.

"In view of the added information obtained at autopsy the final conclusion seems to be evident in that Mr. Mitchell did die from the effects of silico-tuberculosis,

and I feel the Chest Disease Panel will necessarily have to eventually change its opinion regarding the industrial implications in this case."

As was indicated by the last paragraph of Dr. Kilpatrick's letter, the Medical Panel did change its opinion as to the industrial implications in this case. Over the signatures of Drs. Elmer M. Kilpatrick, Jas. Z. Davis and W. C. Walker, the Medical Panel found that the death was due to Silico-tuberculosis, according to their report dated November 1, 1952. (R.4)

At the hearing of the matter held on January 28, 1953, Dr. Robert W. Ogilvie, who performed the autopsy, was called to testify by the applicant. Dr. Ogilvie indicated that the cause of death was the same as stated in the autopsy report. (R.21) That the lung sections taken revealed areas of fibrosis, which was histologically identical to those of silicosis. (R.22) The Doctor testified as to the difficulty and the inconclusiveness of locating acid fast tubercule bacilli on autopsy, and that it is the usual picture not to find them. (R. 22, 23) The Doctor explained his use of the term probable as his inability to demonstrate the organism in quantity. (R. 23) He having found only one acid fast bacillus. (R. 22) Again on cross examination (R. 30, 31, 32) the Doctor points out that "probable tuberculosis" must be considered a term which he uses to indicate that he was unable to demonstrate the tubercule bacillus in quantity, and not the absence of the disease when compared with the other medical factors to be considered.

As to the silicosis found in the decedent the Doctor testified that sections of the lung tissue were incinerated or burned in an oven to produce an ash or residue. That this residue was silica. (R. 24) He further had lung and lymph node specimens chemically analyzed as to the quantity of silica present. (R. 60, 61) and (R. 59.) The chemical analysis showed that

there was 3.76 mgm of silica in each 1 gm of lung tissue and 12.84 mgm of silica in the Hilar Lymph Node tissue.

On cross examination the witness testified that silicosis in itself can be fatal depending upon the quantity and the individual case. (R. 32) In response to questions directed towards determining the primary cause of death the witness showed that it is impossible to separate the effect of silicosis from the effect of tuberculosis and it is the combination of the two that killed the decedent. (R. 33) The witness further testified that the nodulation were distributed extensively through all lobes of both lungs with the left more involved than the right. (R. 33).

Dr. Paul S. Richards was called as a witness by Appellants and testifying *from the X-rays alone* declared that they disclosed no characteristic silicotic pattern. (R. 38) This was his only testimony on direct examination; except his view that uncomplicated silicosis is never fatal, which has no application here.

On cross examination Dr. Richards testified that the X-rays revealed an abnormal condition of the lung and that condition was typical of tuberculosis. (R. 39) The Doctor further testified:

“Q. Now, in the examination of these X-ray plates, what significant differentiation can you point out between the tuberculosis pattern and the silicosis pattern or a combination of the two?”

“A. Well, where you have an extensive pattern which is typical of infection, if there is a silicotic pattern present, why its so masked that you frequently can never detect it.” (R. 39).

Dr. Richards further testified that the X-ray is not infallible, unless guided by additional laboratory analysis. (R. 41) That further the amount of silica present by laboratory analysis

was an excessive amount. (R. 41) But being held to the X-ray alone he couldn't tell whether it was harmful.

The witness was then made the Respondent's witness and testified on the basis of the *X-ray and Autopsy report*. With the additional evidence the Doctor testified that the quantity of Silicon dioxide in the lungs of the decedent 3.76 miligrams was an abnormal quantity and was a definitely harmful quantity. When asked:

"Q. Do you think that the technique of analyzing the lung content used, as testified by Dr. Ogilvie, is a more accurate and positive measure of the quantity of silicon present in the lungs than the X-ray?

"A. Well, that's the only—in this type of case, that's the only process you have, because an X-ray can be masked by so many different things." (R. 43)

The remainder of Dr. Richards' testimony is set forth verbatim:

"Q. Would you say, then, Doctor, that the laboratory analysis is the most accurate guide as to the amount of silicon dioxide present in the lung tissue?

"A. Definitely.

"Q. And would you then say now, in light of the laboratory report, that the congestion and nodulation and diffusion through these lungs could be attributable to the presence of silicosis in addition to tuberculosis? Does that assist you?

"A. Well, now, what do you want me to do, look at this both from the angle of the report and the angle of the X-ray both in one type of thinking?

"Q. Yes. I would like you—

"A. Now, then, you're not holding me wholly to this? (Indicating X-rays)

"Q. No, I mean in conjunction with the report.

"A. You want me to put these two reports together?

"Q. Yes sir.

"A. I would say, then, with this autopsy report,

plus this evidence here, that we will have to broaden our viewpoint and say we are dealing with a case of silicosis and tuberculosis, or tuberculosis and silicosis.

"Q. And as I have asked you before, do you have any opinion as to which is the contributing cause of the death, silicosis, tuberculosis, or is it a combination of factors?

"A. Well, from any evidence I have at hand, I'd have to say it's a combination of these two."

No further questions.

STATEMENT OF POINTS

POINT I.

THE COMMISSION WAS CORRECT IN HOLDING THAT SECTION 42-la-13 (b) (3) UCA 1943, HAD NO APPLICATION, BUT THAT THE AMENDMENT OF 1951, NOW 35-2-13 (b) (3) UCA 1953 WAS APPLICABLE.

POINT II.

THE COMMISSION WAS CORRECT IN HOLDING THAT THE EVIDENCE DISCLOSES THAT THE DECEASED DIED AS A RESULT OF SILICOSIS AS DEFINED BY THE LAWS OF UTAH.

ARGUMENT

POINT I.

THE COMMISSION WAS CORRECT IN HOLDING THAT SECTION 42-la-13 (b) (3) UCA 1943, HAD NO APPLICATION, BUT THAT THE AMENDMENT OF 1951 NOW 35-2-13 (b) (3) UCA 1953 WAS APPLICABLE.

Decedent left the employ of Silver King Coalition Mines Company on the 15th day of June 1949. On the 16th day of February 1950 decedent filed his application before the Industrial Commission of the State of Utah claiming disability be-

cause of the occupational disease known as silicosis. Subsequent to the filing of the application by decedent numerous clinical tests to determine the extent of his disability were made. On February 26, 1951, the Legislature passed Chapter 51 Sec. 1 amending Title 42-1a-13 b) (3). The relevant Section became effective May 8, 1951, and is known as 35-2-13 (b) (3) UCA 1953 and is as follows:

“(b) There is imposed upon every employer a liability for the payment of compensation to the dependents of every employee in cases where death results from an occupational disease, subject to the following conditions:

“(3) No compensation shall be paid for death from silicosis unless the death results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except: (a) in those cases where death results during a period of continuous total disability from silicosis for which compensation has been paid or awarded, or (b) in those cases where death results from silicosis complicated by active tuberculosis and such silico-tuberculosis is evidenced by positive laboratory sputum tests and Xrays and other clinical findings, and in such cases compensation shall be paid if such death results within five years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.”

While the applicant's claim was pending before the Industrial Commission, he died on July 21, 1952, with his claim unadjudicated. On August 20, 1952, his wife, Lorna Mitchell, filed a claim before the Industrial Commission of the State of Utah on behalf of herself and four minor children for compensation due for the death of Glade Mitchell of silicosis complicated by active pulmonary tuberculosis. The matter was heard on January 28, 1953, and the Industrial Commission made and entered its Order based upon recommendations and

Findings of Fact and Conclusions of Law by the Referee under date of March 14, 1953. The Commission applied the law in effect on the date of the death of the decedent. The correctness of this application is challenged by the Appellant in this proceeding.

The correctness of the Commission's application of the amended Section which became effective May 8, 1951, is clearly demonstrated by reference to decisions on the point originating in the State of Ohio.

Your attention is directed to the following four cases which develop the law applicable in the case at bar:

State of Ohio Industrial Commission vs. Kamrath
(Ohio 1928) 160 NE 470;

State ex rel Efford vs. Industrial Commission (Ohio
1949) 84 NE 2d 493;

State ex rel Venys vs. Industrial Commission (Ohio
1950) 91 NE 2d 7;

State ex rel Bessler vs. Industrial Commission (Ohio
1952) 105 NE 2d 264.

For comparative purposes the Respondent will state the fact situations in each case.

Industrial Commission vs. Kamrath, the deceased received injuries on September 5, 1918 from which he died February 24, 1923. It was conceded that he did not receive compensation continuously to the time of his death. Reversing an award, the Court held that an award of death benefits was not authorized by the statute for the reason that the death had not occurred within two years of the injury (the element of continuous compensation being absent.) The Court then considered the effect of an amendment to Sec. 1465-82, General Code, which became effective on April 6, 1923, several weeks after the death of the decedent. By that amendment continuous disability to the time of death was made sufficient to

qualify a death benefit claim. In the opinion, Judge Robinson rejected any claim of right of the dependent to benefits of that amendment, even though decedent has been continuously disabled to the time of his death. The Court said, page 472:

“But the defendant in error’s cause of action had then accrued, her injured decedent was already dead. Her rights were already fixed, and the subsequent legislation did not and could not add to or substract therefrom.”

This case laid down the following rules.

“The provisions of the General Code relating to compensation of injured employees or the dependents of killed employees in force at the time the cause of action accrues are the measure of right of such employee and dependents to participate in the State Insurance Fund.”

“The cause of action of dependents of a killed employee accrues at the time the employee dies from an injury received in the course of his employment.”

The court had occasion to consider the Kamrath case in a case arising over the amendment of a provision of the occupational disease law of Ohio similar in all respects to the amendment we have before us in the case at bar.

State ex rel Efford vs. Industrial Commission et al. The significant facts are as follows: From 1934 to February 13, 1943, Andrew Efford was employed by Jones and Laughlin Steel Corporation and was exposed to silica dust. On February 13, 1943, he quit his job with Jones and Laughlin Steel Corporation and took other employment until 1945 where he was not subject to such exposure. In July 1945, he entered a Hospital because of then being inflicted with silicosis. On October 12, 1945, Sec. 1465-68(a) was amended by substituting 8 years for 2 years, having the same effect as the amendment

contained in 35-2-13 (b) (3) U.C.A. 1953. On January 2, 1946, Efford died. On February 25, 1946, the widow filed her preliminary application for death benefits naming Park Drop Forge Company, the last employer, but she failed to serve notice upon or file a claim against Jones and Laughlin Steel Corporation within six months after the death of the husband as required by Sec. 1465-72 (b) which is the same as 35-2-48 (c) U.C.A. 1953. The Court in denying the award upon two grounds discussed the Kamrath case and distinguished it from occupational disease cases. The Court did not clearly place the decision upon either the failure to comply with the six year statute of limitations or the other ground hereinafter discussed. It was said in the opinion that

“Where a statute creates a right in dependents of a workman to compensation for death from silicosis only in the event of such death resulting within two years after the last injurious exposure, 118 Ohio Laws 422, may a statute enacted subsequent to the expiration of the two years from the last injurious exposure and death of the workman create a new right in the dependents for compensation for such original occupational disease-death? Specifically may the amendment of Sec. 1465-68 (a), General Code, effective October 12, 1945, 121 Ohio Laws, 561, relate back and create a liability against an employer where no liability existed after February 13, 1945?”

After posing this problem the Court did not clearly dispose of the same and placed the grounds for its decision on the failure to comply with the six months statute of limitations for filing the claim. However, the Court in a later case to be discussed infra, clears this point.

The effect of the amendment was next discussed by the Ohio Court in the case of *State ex rel Venys vs. Industrial Commission*. In this case Venys left the employment in which

he had been exposed to Silica on September 19, 1944. The act extending the disability time from two years to eight years went into effect on October 12, 1945. He became totally disabled from Silicosis on December 27, 1946, and died from the effects of the disease on August 3, 1947. His widow filed an application for the death award within the six months prescribed by the Ohio statute and her claim was denied by the Industrial Commission. The Supreme Court of Ohio, in a unanimous opinion, reversed the Industrial Commission. The Commission having relied upon the Efford case. The Court distinguished the Efford case on its facts. The basis of the distinction is as follows: In the Efford case he was last exposed on February 13, 1943. The law then in effect gave him two years to become disabled or die. At the end of two years he was neither disabled or dead. The amendment extending the two years to eight years took effect on October 12, 1945, or more than two years after the date of his last exposure. In the Venys case the decedent's last exposure was on September 19, 1944(with the two year statute of limitations in effect. However, the two years would not have run until September 19, 1946. The statute as amended on October 12, 1945, within the two years, thus allowing the widow to recover under the amendment. The Court is quoted as follows:

"Before the two year limitation period, during which decedent's last injurious exposure took place, had expired the 8 year limitation became effective, and logically it became applicable to any claim which decedent or his dependents might legally then have had. *There is a real and vital difference between workman's compensation rights which became barred by the expiration of a limitation period before the extension of such period and such rights which were not so barred when such extension became effective.*"

The Court in *State ex rel Bessler vs. Industrial Commission* held:

“Where an employee was last exposed to silicon dioxide dust on October 6, 1942, and died on December 11, 1948, as the result of silicosis and his total disability did not begin within 2 years following October 6, 1942, the dependents of such employee are not entitled to death benefits from Workman’s Compensation Fund by virtue of the amendment of Sec. 1465-68 (a), General Code, which became effective October 12, 1945, and by which amendment 8 years was substituted for 2 years as the period following the last exposure during which death must occur or continuous disability begin.”

The Court again discussed the Kamrath case, the Efford case and the Venys case and indicated it declined to extend the Kamrath doctrine any further than it had extended the same in the Venys case. Judge Taft, dissented in this opinion for the same grounds he stated in the Efford case.

In the case at bar, Glade Mitchell left the employ of the Silver King Coalition Mines Company on June 15, 1949. He filed with the Industrial Commission, on the 16th day of February 1950. On February 26, 1951 the amendment in question was passed extending the time of death from 2 years to 5 years. This section became effective May 8, 1951, within two years of the date of his last exposure. He died on July 21, 1952, and his wife filed the death claim on August 20, 1952, within six months of the date of death.

Applicant submits that the case at bar is identical on all material points with the Venys case and the ruling of the Ohio Court in that case should apply. It might also be noted that in the case at bar decedent made application during his lifetime, which does not appear in the Venys case.

As to the separate and distinct nature of the widow’s and dependents’ claim, our Court in *Pacific States Cast Iron Pipe*

Company vs. Industrial Commission, (Utah 1950) 218 Pac. 2d 970, at page 971, held *unequivocally*:

“There were therefore two separate and distinct claims pending before the Commission as we have held that the death claim of dependents is a separate and distinct cause of action from the one running to deceased for his injuries. *Halling vs. Industrial Commission*, 71 Utah 122, 263 P. 78.”

This is important in putting into its proper light the authorities cited by the Appellants. Nearly all the cases cited by Appellants on pages 12 and 13 of their brief will be found collected in the annotation found in 82 ALR 1244. Commencing at page 1247, bottom of page, 82 ALR, will be found cases applying in jurisdictions where the Statutes or the Courts have held that the right of action of the widow or dependents of a deceased employee is a separate and distinct cause of action in their own right. The diametrically opposed views can be reconciled on the basis of the type of the cause of action. The validity of this statement can be demonstrated by taking the case of *Georgianna Cote, Admrx. of Zephirin Cote, Deceased vs. Bachelder-Worcester Company*, (New Hampshire 1932) 82 ALR 1239, 160 Atl. 101, and comparing it with the later New Hampshire case of *Hirsch vs. Hirsch Bros. Inc.* (New Hampshire 1952) 92 A2 402. The Cote case is discussed in the Annotation in 82 ALR 1244, though not cited by appellants. It holds that the workmen's compensation act in force at the time of injury to an employee, and not that in force at the time of his resulting death, determines the compensation recoverable by dependent where the statute imposes upon employers liability for compensation only to employees and provides that, if an injured workman dies, the amount of compensation due under the act shall be payable to his legal representative for the bene-

fit of such dependents or other persons as are entitled thereto. The Hirsch case on identical facts held that the rights of the dependents are to be determined according to the law in force at the time the rights arose, namely, upon the death of the employee. The reason for the complete shift was a change in the statute which created a separate right of action in the dependent, or as was stated by the court:

"The following language originating with Laws 1947, c. 266, sec. 20 contrasts with those of the former act: 'If death results from the injury, the employer shall pay to, or for the dependent or dependents of the deceased employee * * * a weekly compensation * * *.' These provisions are followed by others which indicate that the compensation is 'payable to a widow * * * for the benefit of herself * * * and dependent child or children,' and further provide that the labor commissioner may 'determine in his discretion what portion * * * shall be applied for the benefit of any such child * * * and may order the same paid to a guardian.' Sec. 20, subd. I. The section indicates a legislative purpose to create in a dependent widow or child 'a separate right of action for the loss resulting.' *Cote vs. Bachelder-Worcester Company, supra; and in our judgment the petition to enforce such rights is properly brought by the dependents rather than by a representative of the decedent employee. It follows that the rights of the dependents are to be determined according to the law in force at the time the rights arose, namely, upon the death of the employee.*

For text discussion of the problem and the distinction pointed out by respondents, see 71 CJS sec. 63, and notes and cases cited therein. See also 58 Am. Jur. sec. 73, and notes and cases cited therein.

An interesting series of cases involving death benefits under amendatory provision of Longshoremen's and Harbor Workers' Compensation Act which increased benefits payable and which

stipulated that increase should be applicable only to injuries or death occurring on or after effective date of amendment, *were payable for death of employee which occurred after effective date but which resulted from injury which happened prior to effective date of the act.* *Travelers Ins. Co. vs. Toner*, (USCA-DC 1951) 190 F2 30. The court in a note to the case collects the cases cited by appellants and makes this comment, "We do not, however, regard cases arising under state statutes providing for contractual liability of employers as being controlling in respect of legislation of the type here involved, which is compulsory." Respondent submits that the Utah law is compulsory. See also *Hampton Roads Stevedoring Corp. vs. O'Hearne*, (USCA Fourth Circuit 1950) 184 F2 76 and *Penn Jersey Welding Co. vs. Lowe*, (USCA Third Circuit 1950) 183 F2 936.

POINT II.

THE COMMISSION WAS CORRECT IN HOLDING THAT THE EVIDENCE DISCLOSES THAT THE DECEASED DIED AS A RESULT OF SILICOSIS AS DEFINED BY THE LAWS OF UTAH.

The Legislature defines silicosis in the following manner:

"35-2-28. 'SILICOSIS' defined. —For the purpose of this act 'silicosis' is defined as a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide dust (SiO-2) ..*characterized..* by small discrete nodules of fibrous tissues similarly disseminated throughout both lungs, causing a characteristic X-ray pattern, and by variable clinical manifestations." (Italics added).

The definition of silicosis up to the italicized word "characterized" causes little trouble, but appellants contend that the words following so modify the definition that there can be no recovery for a disability due to silicosis in the absence of a

characteristic X-ray pattern. This position is tenaciously held in spite of an overwhelming demonstration of the presence of the disease by what respondents contend are variable clinical manifestations. The presence of the disease of silicosis in the decedent was demonstrated by incineration of the lung tissue and examination of the residue which proved to be silica. A section of the lung and the hilar lymph node was analyzed chemically on a quantitative basis. The analysis shows 3.76 mgm of silica per each gram of tissue of the lung specimen; the hilar lymph node segment contained 12.84 mgm of silica for each gram of tissue. The amount of silicon dioxide present in the normal unexposed lung is infinitesimal when compared to the quantity found in the lung of the decedent. Tests of lung specimen by polarized light corroborates the presence of silica. The Record in this Proceeding contains two diagnoses by X-ray of the presence of silicosis. It was the final opinion of five medical witnesses, including three Medical Panel members, that Glade Mitchell died of the effect of silico-tuberculosis.

Dr. Paul S. Richards, called by the appellants, on cross and direct examination by respondents, presented the key to the medical problem. Both silicosis and tuberculosis have a characteristic fibrous pattern; that of tuberculosis is more densely granular and nodular. However, when silicosis and tuberculosis are developing simultaneously, as was the case here, the more dense pattern of tuberculosis masks the lighter pattern of silicosis so as to make an X-ray diagnosis difficult and sometimes impossible. Dr. Richards indicates this so clearly, not only in the reported testimony (R. 39, lines 22 to 30) and (R. 41, line 1 through 4) but in the complete reversal of his testimony when he was allowed to testify on the basis of the X-rays and the other clinical evidence available. Confronted only

with the X-ray, Dr. Richards could see only a pattern of tuberculosis, but with the autopsy report he then concluded, by putting them both together, that we were dealing with a case of "silicosis and tuberculosis" or "tuberculosis and silicosis."

The statute doesn't say characterized by a characteristic X-ray pattern. It says, "*characterized by small discrete nodules of fibrous tissue which produce a characteristic X-ray pattern*, etc. 35-2-28 (emphasis added) The small discrete nodules were there but were masked by the denser nodules of the tuberculosis, otherwise you couldn't produce the inert silica from the lung itself.

By placing a strained, narrow construction upon this section as is urged by the appellants, great mischief will result as is indicated by the case at bar. Respondents feel that it is unnecessary to cite cases setting forth the proposition that Workmen's Compensation and Occupational Disease statutes are to be construed liberally so as to give effect to their purpose. However, it is respondents' contention that the Legislature here did not set down the elements of a cause of action. They defined silicosis as a disease of the lungs and gave *one* of its characteristics. Had they decided the characteristic X-ray pattern to be exclusive of all others, respondents submit that the Legislature would have avoided the use of the word "characterized." To characterize is "to indicate or delineate the character of; to describe" (Webster's New International Dictionary). To allow the characteristic X-ray pattern to control other variable clinical manifestations would be to ignore what this Court indicates to be the best evidence. In the case of *Silver King Coalition Mines Company vs. Industrial Commission*, two cases reported, at 205 P. 2d 811 and 205 P 2d 817, this same appellant presented to this Court the proposition that the failure to permit an autopsy deprived them of the best evi-

dence of the cause of death. To hold now that the best evidence, i.e. the autopsy report, is controlled by the lack of a characteristic X-ray pattern would be contradictory to say the least. It is respondents contention that this statute should be so construed as to give reasonable effect to all parts thereof. If the other variable clinical manifestations rebutt or explain the lack of one of the characteristics the X-ray pattern, the other variable clinical manifestation should control.

The same argument applies to the section amended in 1951 although respondent contends that it is satisfied by the evidence regardless of the interpretation placed thereon. The disease of silico-tuberculosis was diagnosed by X-rays by appellants' own witness. There was a positive sputum test as is shown by the record (R. 62). There were other clinical findings consisting of the autopsy report which respondents urge is the best evidence. The opinion of the medical experts testifying in this case is uniform on the basis of the complete medical record. The medical panel had the intellectual honesty to completely reverse itself when the autopsy report became available to them. It is further submitted that there is not one scintilla of evidence to show that Glade Mitchell died from any other cause than the effects of silico-tuberculosis.

CONCLUSION:

For the foregoing reasons the award of the Industrial Commission against the Silver King Coalition Mines Company and Continental Casualty Company should be affirmed.

Respectfully submitted,

E. R. CALLISTER,
Attorney General
ANDREW R. HURLEY,
Attorneys for the Defendants
and Respondents.