

1954

New Park Mining Company and Pacific Employers Insurance Company v. Industrial Commission of Utah et al : 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; Peter M. Lowe; Stephens, Brayton & Lowe; Andrew R. Hurley; Attorneys for Respondents;

Recommended Citation

Brief of Respondent, *New Park Ming Co. v. Industrial Comm. Of Utah*, No. 8121 (Utah Supreme Court, 1954).
https://digitalcommons.law.byu.edu/uofu_sc1/2138

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.

RECEIVED

APR 12 195

LAW LIBRARY
U. of U.

In the
Supreme Court of the State of Utah

NEW PARK MINING COMPANY and
PACIFIC EMPLOYERS INSUR-
ANCE COMPANY,

Appellants,

vs.

INDUSTRIAL COMMISSION OF
UTAH and LLOYD REMUND,
Minor son of CHARLES L. RE-
MUND, Deceased,

Respondents.

Case No.
8121

RESPONDENTS' BRIEF

E. R. CALLISTER,
Attorney General,

PETER M. LOWE,
Deputy Attorney General,
Attorneys for Respondent, In-
dustrial Commission of Utah.

STEPHENS, BRAYTON & LOWE,
ANDREW R. HURLEY,
Attorneys for Respondent, Lloyd
Remund, Minor son of CHARLES
L. REMUND, Deceased.

ARROW PRESS, SALT LAKE

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	1, 2
ARGUMENT	2-14
<p style="margin: 0;">WHERE COMPENSATION FOR DEATH WAS AWARDED TO A DEPENDENT WIFE AND CHILD, THE RE-MARRIAGE OF THE WIFE AFTER THE CHILD REACHED EIGHTEEN YEARS DOES NOT DEPRIVE HIM OF THE BALANCE OF COMPENSATION PAYABLE UNDER THE ORIGINAL AWARD, LESS THE LUMP SUM PAYABLE TO THE WIFE.</p>	
CONCLUSION	15

AUTHORITIES CITED

Table of Cases

Davis, et al. vs. Industrial Commission, et al. (1945) 164 P. (2) 740	9
Early, et al. vs. Industrial Commission, et al., 265 P. (2) 390	5
Globe Grain & Milling Company, et al. vs. Industrial Commission of Utah, 193 P. 642	5
Johanson, et ux. vs. Cudahy Packing Company, 120 P. (2) 281, 284	4
Silver-King Coalition Company, et al. vs. The Indus- trial Commission, 116 P. (2) 771	3

TABLE OF CONTENTS—Continued

Page

STATUTES

Utah Code Annotated 1953

35-1-68	8, 12, 13
35-1-71	4, 6
35-2-30	6
35-1-73	7
35-1-74	8
35-1-70	13

Utah Code Annotated 1943

42-1-64	3
42-1-69.10	9
42-1-69	9

Utah Code Annotated 1933

42-1-69	9
---------	---

TEXTS

Larson's THE LAW OF WORKMEN'S COMPEN- SATION	2
-------------------------------------------------	---

In the Supreme Court of the State of Utah

NEW PARK MINING COMPANY and
PACIFIC EMPLOYERS INSUR-
ANCE COMPANY,

Appellants,

vs.

INDUSTRIAL COMMISSION OF
UTAH and LLOYD REMUND,
Minor son of CHARLES L. RE-
MUND, Deceased,

Respondents.

Case No.
8121

RESPONDENTS' BRIEF

Respondents agree to the statement of facts as set forth
in Appellants' Brief.

STATEMENT OF POINTS

WHERE COMPENSATION FOR DEATH WAS
AWARDED TO A DEPENDENT WIFE AND

CHILD, THE RE-MARRIAGE OF THE WIFE AFTER THE CHILD REACHED EIGHTEEN YEARS DOES NOT DEPRIVE HIM OF THE BALANCE OF COMPENSATION PAYABLE UNDER THE ORIGINAL AWARD, LESS THE LUMP SUM PAYABLE TO THE WIFE.

ARGUMENT

Since the Order of the Industrial Commission clearly sets forth the reasoning surrounding the award in this case, we respectfully suggest that the Court consider it as a part of this Brief. The Commission's Order (R. 6, 7 & 8) sets forth the rule that the basic award does not terminate when the last minor reaches the age of eighteen. It is interesting to note that this interpretation by the Industrial Commission has continued without interruption since the passage of the Workmen's Compensation Act. We must assume, therefore, that the Legislature is cognizant of the practice and has chosen not to legislate against it. This is contrary to the rule in approximately twenty jurisdictions throughout the United States, wherein the Legislatures have set by specific statutory enactment an age limit at which compensation lapses. See the compilation of jurisdictions having this rule as set forth in LARSON'S THE LAW OF WORKMEN'S COMPENSATION. Table 15.

The sole question of importance in this case is whether or not compensation having once vested may be divested as the last dependent reaches eighteen, by an inference. Respondents submit that it is patent that the inference

must be clear and convincing and such that reasonable minds cannot differ. Had the Legislature ignored the problem completely, Respondents submit that Appellants' position would have some merit; but where the Legislature has recognized the problem and has dealt with it in a manner other than that desired by Appellants, the case against them becomes increasingly strong.

Respondents have no doubts whatever that an award may be changed or reduced after the original Order, our Legislation is clear on this point. Respondents do, however, contend that the change or reduction must be in strict accordance with our statutes and not a matter of inference, speculation or conjecture.

To accomplish their purpose, Appellants have tortured the plain meaning of the various statutory provisions by selecting those portions of the statutes in accord with their theory and disregarding that portion of the statute which orients the section in the legislative plan. Our Court has dealt with a similar problem in *Silver-King Coalition Company, et al. v. The Industrial Commission*, 116 P. (2d) 771, wherein the section that was then 42-1-64 (2) U. C. A. 1943, and is now 35-1-68(2) U. C. A. 1953, was being attacked on the ground that the statute gave to two minor dependents a larger weekly compensation rate than it would give to a widow and one minor dependent. The Appellants contend that logical interpretation would require the additional 10% be given only where there is an adult dependent in addition to minor children and that where there was no adult dependent, the 10% should commence with the second minor child rather than the first. This Court in

that case rejected the contention upon the plain reading of the statute, or, as was succinctly summarized by Justice Wolfe in his dissenting opinion in *Johanson et ux v. Cudahy Packing Company*, 120 P. (2) 281, 284:

“In *Silver-King Coalition Company vs. Industrial Commission of Utah*, 116 P. (2) 771, it was stated that where there was no ambiguity and it was not necessary to save the constitutionality or prevent absurdity, the language should be construed to mean exactly what it says.”

Section 35-1-71 is set forth as follows:

“35-1-71. DEPENDENTS - PRESUMPTION.

—The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

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

“(2) Children under the age of eighteen years or over such age, if physically or mentally incapacitated, upon the parent, with whom they are living at the time of the death of such parent, or who is legally bound for their support.

“In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee, but no person shall be considered as dependent unless he is a member of the family of the deceased employee, or bears to him the relation of husband or wife, lineal descendant, ancestor, or brother or sister. The word ‘child’ as used in this title shall include a posthumous child, and a child legally adopted prior to the injury. Half brothers

and half sisters shall be included in the words 'brother or sister' as above used."

This section of the Workmen's Compensation Act has been subjected to a great deal of interpretation. The Court most recently spoke on this section in *Early, et al. v. Industrial Commission, et al.*, 265 P. (2) 390, where it was held that the dependency provision set forth in sub-section (2) and inferentially sub-section (1), create a conclusive presumption of dependency, the other factors contained therein being satisfied. Contained within both of these sub-sections are the words with whom she (or they) are living with AT THE TIME OF DEATH. The remainder of the sub-section dealing with non-presumptive dependents determines the question of dependency at the time of the INJURY RESULTING IN DEATH. The reason for the difference in the time of determining dependency, injury or death, is beyond the scope of this case, but needless to say this subject has received the attention of this and other Courts time and time again. Timewise, it is well settled that the question of dependency is determined at the time of death, or, at the time of the injury resulting in death. This is an inherent and necessary interpretation of our statute. See: *Globe Grain & Milling Company, et al., v. Industrial Commission of Utah*, 193 P. 642, cited by Appellants for other purposes.

Appellants now say that we have a re-determination of the question of dependency when the last minor reaches eighteen and as authority for the proposition cite the statute referred to *supra*, which by an inseparable part

thereof refers us back to the date of death or to the date of injury resulting in death. This is somewhat akin to the problem of Renvoi in Conflicts of Law cases. Appellants contend that we are required to redetermine the dependency of Lloyd Remund, yet our statute refers us back to the date of death or to the injury resulting in death. While an analogy to Renvoi is not technically correct, it serves to point out the invalidity of the Appellant's contention. The question of dependency was determined by the Industrial Commission in its Order of October 22, 1951, based upon the circumstances of dependency existing at the time of death. The Appellant conceded in that determination and paid compensation thereunder. Their appeal time has run as to the question of dependency and the Commission's Order determining dependency is *res adjudicata*. Could we transpose the date of death or the date of injury to the time after the alleged dependent reaches eighteen years, we would have a valid application of the statute, but that is not the case before us.

It is not without significance that the dependency provisions of the Occupational Disease Act passed in 1941 and set forth as 35-2-30(b) U. C. A. 1953, is identical with the provisions of 35-1-71(2) with which we are concerned. Had the Legislature intended to incorporate the theory here proposed, they had an excellent opportunity to express themselves. Instead, they adopted the theory and the language of the similar provisions of the Workmen's Compensation Act in the Occupational Disease Act.

A divesting provision is contained in Section 35-1-73, in that portion of the statute which is as follows:

“Should any dependent of a deceased employee die during the period covered by SUCH WEEKLY PAYMENTS, the right of such dependent to compensation under this title shall cease.”

Applying this provision to the case at hand, Lloyd Remund, or any other dependent for that matter, would lose their rights to compensation upon death. The section goes on to deal with the rights of a widow who remarries, making provision for a lump sum cash settlement of one-third of the benefits remaining unpaid at the time of such re-marriage and providing for the remaining two-thirds of such benefits to such persons as the Commission may determine for the use and benefit of other dependents. Appellants infer that the use of the plural “dependents” creates an inference that the single dependent if over eighteen years is to receive no further benefit. It is submitted that the rules of statutory construction require the inclusion of the singular within the plural and that the date of determining dependency is not the date of marriage but the date of death or injury resulting in death.

By arguing inference, Respondents can point out that had the Legislature intended to divest a dependent of compensation upon his reaching the age of eighteen, they might well have at least placed him in the same category as his mother, who on remarriage gets a one-third lump sum cash settlement. Or, had the Legislature intended to place some significance of the dependent reaching the age of eighteen years, they might have required the insurer to

pay the unexpended compensation into the special fund provided for in sub-division 1 of Section 35-1-68.

Under Appellants theory, the lever which destroys the family unit is not the attaining of eighteen years, but the remarriage of the mother. Compensation would continue to the family unit, to which Lloyd Remund belongs, regardless of his age, until the mother re-marries or the six year period runs. The Legislature by this devise intended to encourage a dependent widow to re-marry; it did not intend to make it a device to pauperize her minor son. The bounty of a stepfather may or may not include a stepson. Certainly, a stepfather has no legal duty to support him. His mother deprived of independent income is unable so to do. Lloyd Remund looks to the remainder of the compensation award for his support and education in lieu of that normally furnished in whole or in part by his father.

The Legislature in considering the problem of a dependent reaching eighteen set a definite course of action for the Industrial Commission to follow. Section 35-1-74 U. C. A. 1953, provides:

"35-1-74. INCREASE OF AWARD TO CHILDREN—EFFECT OF DEATH, MARRIAGE, MAJORITY, OR TERMINATION OF DEPENDENCY.
—In all cases where the award of compensation is increased 5 per cent of the amount of such award for each dependent minor child, as provided in this title, such increase in the amount of the award shall cease at the death, marriage, attainment of the age of eighteen years, or termination of dependency of each such child."

Appellants argue in effect that the Industrial Commission should follow the 5% reduction in cases where there are other dependents, but where, as in this case, the sole remaining dependent reaches eighteen, instead of reducing the balance of the award 5% it is reduced 100%. It is further argued, that since this was superimposed upon existing law by the Legislature, this is indicative of a legislative intent to divest compensation completely at the age eighteen. The plain, unmistakable and untortured meaning of the Section is to eliminate the increase in the basic award on the happening of specified events, but to leave the basic award intact. Had the Legislature intended to divest compensation on the attainment of a certain age, here would be a logical place to do it. The Legislature in 1939 when they added the parent section to then 42-1-69 U. C. A. 1933 and again in 1945 when stating it as a separate section 42-1-69.10 U. C. A. 1943, had an opportunity to put the theory of the Appellants into effect, the Legislature did not choose to do so.

This Court in the case of *Davis, et al. v. Industrial Commission, et al.*, (1945) 164 P. (2) 740, in denying an attack on the family unit doctrine, outlines a basic philosophy which we may not disregard:

“Family unit awards are, as a general rule, preferred. Section 42-1-69, U. C. A. 1943, provides that the award shall be paid to one of the dependents for the benefit of all dependents. There are instances when the awards may be apportioned but such cases are the result of special circumstances. In this case the Commission made the usual award to the family as a unit; such an award cannot be considered as an

award in which each dependent has title to a fractional share. Each dependent has the same interest and the same right to an undivided benefit in this unit award. Every member of the family has a right to the privilege of enjoying the standard of living that would be afforded by the entire award. It is apparent that the children have no divisible interest for their marriage, becoming of age, or even death has no effect on the unit award. Section 42-1-64(2), U. C. A. 1943. Certainly the rights of the three children, who are United States citizens, in this indivisible award cannot be affected by any act of their alien mother unless the statute so provides. Therefore her expressing an intention to move, or her actual moving would not affect the award to the children. This gives rise to the question: What acts, if any, of the mother can or may affect or operate to reduce the amount of an award of which each child is entitled to the full benefit? Her death would not affect it; nor would any act she might perform with the exception of marriage. Section 42-1-64(2), *supra*. The widow's interest in the award is intangible and indivisible except upon an event that may or may not happen. Such interest confers on the widow no independent right or interest but instead is rather a contingent claim or right or expectancy. This contingent right is incapable of transfer by grant or conveyance; such an interest is so intangible that it cannot be segregated. It follows that this award should not be apportioned or reduced."

Appellants argue that the situation before us should be treated specially and indicate that they do not attack a situation where there are other dependents. By their theory, lip service is given to the family unit doctrine, but we are

urged to treat the youngest member of the family in a manner different than the older members.

We agree with the Appellants that the Legislature places great importance upon the age of eighteen years. However, the use to which the Appellants put it is entirely out of harmony with the theory of our Act. Those minors under the age of eighteen years have a conclusive presumption of dependency, other conditions being satisfied, their rights to compensation vest. Appellants would have us use the test of eighteen years to divest previously awarded compensation. The whole of Appellants' theory is founded on this faulty premise. It is Respondents' contention that the Legislative policy of our Act is to put these matters at rest and although there are specific instances where the increases of an award may be subject to modification, the basic award is not subject to attack. To hold otherwise would result in constant collateral attack, as in this instance.

If the sole arguments available to the Respondents were mere administrative convenience, we feel that this would be sufficient to overcome a more persuasive inference than Appellants demonstrate to us. Re-determination of a dependency status based upon conditions subsequent to the date of injury or death would be an expensive, cumbersome process, especially to the Applicant. He is in no position to litigate on an equal basis with Insurance Companies or self insurers. Sound legislative policy dictates that once a dependency status has been adjudicated it cannot be terminated except by the occurrence of specified events spelled out by statute, not by an inference.

Re-determination of dependency upon the date of the re-marriage could result in the vesting of compensation benefits to those of a class who were not dependents upon the date of death or the date of injury. The rule contended for by the Appellants could become a two-edged sword, persons not dependent at the date of death could become dependent at a later date. The confusion is eliminated by determining the dependency status at the date of death.

Appellants complain that the results of the Commission's Order are inequitable, slanting the entire argument to the proposition that new rights have vested in Lloyd Remund. By the Order of October 22nd, 1951, the insurer was required to pay the sum of \$8080.44 compensation to the then dependents of the deceased. The obligation to pay that sum has not enlarged. It is the same identical obligation. The inequity of which they complain is an inability to escape it. Should Lloyd Remund die before realizing all the benefits, they will escape it, but until that event occurs there can be no change. The argument that a 17 year and 364 day old only child may come into a sum of money as opposed to an eighteen plus year old child brings up the fundamental inequity of any statute which places a limitation on, or cuts off, rights. We must live with them, they are a part of our law.

It is Respondents' contention that once compensation has vested under our law it runs the statutory length of time between the date of death, and not to exceed six years after the date of injury. See 35-1-68(2) U. C. A. 1953. These facts are determined as of the date of the death. An obligation, definite in time and definite in amount, is as-

sumed by the Insurer, no more no less. When the original award has run its course, the Legislature has made provision for additional benefits in special cases. Section 35-1-70 is as follows:

“35-1-70. ADDITIONAL BENEFITS IN SPECIAL CASES.—If any wholly dependent persons, who have been receiving the benefits of this title, at the termination of such benefits are yet in a DEPENDENT CONDITION, and under all reasonable circumstances should be entitled to additional benefits, the industrial commission may, in its discretion, extend indefinitely such benefits; but the liability of the employer or insurance carrier involved shall not be extended, and the additional benefits allowed shall be paid out of the special fund provided for in subdivision (1) of Section 35-1-68.” (Emphasis ours.)

It is significant to note that the Legislature in setting up this provision chose to use the words “dependent condition” to describe the status of what we have been previously calling dependents. We argue that their choice of words is no accident, but was intentional to distinguish between dependents at the date of death or injury from persons in need at the end of the compensation period. Even though the children of the deceased are in needy circumstances the Insurer is relieved of all further obligation, and the obligation is assumed by the special-fund set up by statute.

It is also interesting to note that even in cases where there are no dependents, the employer and/or the insurer are required under 35-1-68(1) U. C. A. 1953 to pay the sum of \$1800.00 to support the contingent fund referred to

supra. So we see that there can be liability without dependency. Had the Legislature intended to relieve the employer and/or his insurer of their specific obligation they might well have ordered them to pay the unexpended portion into the contingent fund.

The purpose in examining these various facets of our law is not to digress from the problem at hand, but to put the obligation of the Appellants in its proper perspective. The only divesting we find is the termination occurring in the case of the death of a dependent. The reasons for this are historical. It is to prevent the Estate of the deceased dependent from laying claim to the unexpended compensation benefits and destroying the family unit. The theory of the Appellants is an attack upon the family unit doctrine. It is submitted that under our law an amount is established at a specified time, it is increased percentagewise by the number of dependents, it is decreased likewise when the dependents reach the age of eighteen, marry or die. A lump sum may become due to a widow on re-marriage. The last dependent's death may lessen the liability of the Insurer, but this, and only this will cut off the last dependent. When his status as a dependent has once been determined, subsequent events not spelled out by statute have no effect. To hold otherwise creates a special rule. There is no necessity, nor is there any legal basis in the finest technical sense, for a separate rule in this type of case. The Legislature gave compensation to this dependent by positive legislative enactment, we should not divest it by inference.

CONCLUSION

For the foregoing reasons, the Order of the Industrial Commission in favor of Lloyd Remund and against New Park Mining Company and Pacific Employers Insurance Company should be affirmed.

Respectfully submitted,

E. R. CALLISTER,
Attorney General,

PETER M. LOWE,
Deputy Attorney General,
Attorneys for Respondent, Industrial Commission of Utah.

STEPHENS, BRAYTON & LOWE,
ANDREW R. HURLEY,
Attorneys for Respondent, Lloyd Remund, Minor son of CHARLES L. REMUND, Deceased.

