

1955

Milan D. Smith v. The Industrial Commission of Utah et al : Plaintiff's Brief

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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MILAN D. SMITH, for and on behalf
of KATHLEEN MAY SMITH and
MICHAEL JAY SMITH, minor
children of Roland B. Smith,
Deceased,

Plaintiff,

— vs. —

THE INDUSTRIAL COMMISSION
OF UTAH, SMITH CANNING
COMPANY, BOX ELDER PACK-
ING CORPORATION, SMITH
FROZEN FOODS, INC., and NA-
TIONAL SURETY COMPANY,

Defendants.

FILED

JAN 20 1955

Clerk, Supreme Court, Utah

Case No. 8455

PLAINTIFF'S BRIEF

REX W. HARDY
Attorney for Plaintiff

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STATEMENT OF FACTS

On April 19, 1954, Mr. and Mrs. Roland B. Smith of Clearfield, Utah, together with Mr. and Mrs. William Robins, were killed in a private airplane crash in Denver, Colorado. Roland B. Smith was at the time of death the president and general manager of Smith Frozen Foods, Inc., and Box Elder Packing Corporation. He left surviving him four children, Roland J. Smith, age 25, Ronald B. Smith, age 20, Kathleen May Smith, age 7, and Michael Jay Smith, age 2. Mr. Milan D. Smith, brother of the deceased, was duly appointed the guardian of the estates and persons of the last two named children, and as such guardian filed claim with the Industrial Commission of Utah for benefits under the Workmen's Compensation Act, naming as defendants, among others, the two corporations in which Roland B. Smith was president and general manager.

On August 31, 1955, the Referee for the Industrial Commission entered his Findings of Fact and Conclusions of Law wherein he found, "that at the time of the fatal accident, Roland D. Smith was engaged in his capacity of a general partner in the Smith Sales Company. The only purpose of the trip was selling." On September 1, 1955, the Commission entered its order adopting these Findings and therefore denying the claim of the minor children of the decedent. A request for rehearing was made but was denied by the commission.

I will attempt to prove in this brief first that there are absolutely *no* facts in the record which will substantiate such a finding, but that the same is based on pure

speculation, conjecture and guesswork in the face of uncontradicted evidence to the effect that the deceased had nothing to do with the partnership “with the exception of being present *occasionally* on consultation meetings in regard to sales policy and determining of sales policies, etc,” (Emphasis added) and second, that a finding that the deceased was representing the partnership does not negative the fact that the deceased was representing the corporations, and therefore the findings of the Commission are fatally defective.

Before going into the evidence which was presented to the Referee at the hearing, I would like to review the organization of the Smith companies which are involved in this controversy.

The Albert T. Smith family of Clearfield, Utah, has for many years been engaged in the business of food processing, canning and freezing. They had at the time of the death of the decedent canning plants at four different locations. One at Clearfield, Utah, known as Smith Canning Company, two at Brigham City, Utah, known as Box Elder Packing Corporation and Smith Frozen Foods, Inc., one at Lewiston, Idaho, known as Smith Frozen Foods of Idaho, and two at Pendleton, Oregon, known as Smith Frozen Foods of Oregon and Smith Canning and Freezing. In addition to this the family had a partnership known as Smith Sales Company, which acted as a sales brokerage in disposing of the products of the six main corporations. This partnership did not have the authority to sell products, but only to take orders for confirmation by the producing company.

Said partnership was composed of the three brothers, Milan D. Smith, Victor R. Smith, the deceased Roland B. Smith, and one sister, Lavora Smith Wood.

Milan D. Smith was in charge of the plants at Lewiston, Idaho, and Pendleton, Oregon, as well as the Idaho and Oregon operations of the partnership, Smith Sales Company. He received a salary from each, including one from the partnership. Victor R. Smith was in charge of the Clearfield plant, and the Utah operation of the Smith Sales Company. He also received a salary from the corporation and from the partnership. No one other than Victor and Milan was authorized to transact business for the partnership, and only then in their particular areas.

The decedent was in charge of the two plants of the corporations at Brigham City, Utah, and received a salary from each, but he did *not* receive any salary, even token salary, from the partnership, and had nothing to do with the partnership.

Although the officers, directors and partners of the various companies were substantially the same, and although they attempted to coordinate their activities, each had its own officers, its own payroll, and its own integrated operations. The responsibility of each brother was very clearly defined, and each would have very little, if anything, to do with the companies operated by the other brothers, except in an advisory capacity on the board of directors. It is very important that this fact be borne in mind.

Box Elder Packing Corporation of Brigham City

had packed a large tomato crop which was still in the company's warehouse as another packing season approached. Sometime prior to April 19, 1954, the date of the fatal accident, it was proposed that a trip be made to the midwest, one of the principal purposes of which would be to attempt to dispose of this tomato pack. In addition to this, it was to be a general business trip, and contacts other than selling were to be made, but no one had discussed with the decedent the exact nature of the business he intended to conduct, except that it was known for sure that he intended to contact P.I.E. in Chicago pertaining to freight rates on frozen Foods from Utah to the Chicago area. Other stops which would be on behalf of the corporations only were for purposes of procurement of equipment and supplies, and a stop in St. Louis if it could be worked in.

Mr. Bill Robins was the sales manager of the Utah part of the partnership brokerage company working directly under Victor Smith and had discussed with Victor in detail the stops which were to be made so far as sales were concerned. He was going on the trip to represent the brokerage company, and his expenses were all being paid by the brokerage company. He was going to be accompanied by the deceased, Roland B. Smith, who, as previously stated, was the president and general manager of the corporations whose products were to be sold. These two men, together with their wives, departed on their trip early on the morning of April 19, 1954. In attempting to take off from the airport at Denver, Colorado, something happened to the plane and it crashed, killing all four occupants. The sole question then becomes, "Was

the deceased Roland B. Smith representing the corporations at the time of the fatal accident?"

POINT I

EVEN IF IT IS ADMITTED THAT THE ONLY PURPOSE OF THE FATAL TRIP WAS TO DISPOSE OF A TOMATO PACK, WHICH WE CONTEND IS NOT THE CASE, IT DOES NOT FOLLOW THAT THE DECEDENT WAS REPRESENTING THE PARTNERSHIP AND THE PARTNERSHIP ONLY AT THE TIME OF THE ACCIDENT.

It came as a complete shock to all of the Smiths and their attorney when the Commission found that the deceased, Roland B. Smith, was representing the partnership at the time of the accident, because in fact he had nothing to do with the actual operation of the partnership and had no authority to transact business on behalf of the partnership, and these facts are clearly shown in the record. In the light of the decision I again read the Transcript to see what facts the Referee relied on in reaching his conclusion. The only two things that he could rely on are (1) That the deceased was a general partner in the Smith Sales Company, and (2) One of the primary purposes of the trip was to dispose of a tomato pack. Neither of these facts speak directly and say what the actual facts were, but only inferences can be drawn therefrom, and inferences should only be used when there is no direct evidence on the question, which is not the case here. True the partnership agreement said that he was to "diligently apply himself or herself in the business of the said partnership," but did he do so? All the testimony in the case clearly says, "No." On the other hand, the partnership agreement stated that Victor R. Smith was to be the general manager, which he was.

Also, the amendments to the partnership agreement show that during the year from April, 1947, to April, 1948, the deceased had only an \$800 investment in the partnership, and his investment fluctuated from time to time. Can it be said affirmatively after reading the articles of co-partnership and without further proof that the decedent was representing only the partnership on this trip?

The fact that one of the principal purposes of the trip was selling is just as inconclusive as the partnership agreement. Let us assume for the sake of argument that the sole purpose of the trip in question was selling. What were they going to sell? The tomato pack of Box Elder Packing Corporation. Mr. Bill Robins, Sales Manager for the Utah part of Smith Sales Company, was going to go and there is no question but that he was to represent the partnership. All of his expenses were paid by the partnership. He had made careful plans for the trip with Victor Smith, whom the record clearly shows was the only member of the partnership in the Utah area who had any actual authority to act for the partnership aside from the authority imposed by law to protect third parties. So far as Robins was concerned, this was a selling trip. One other man was to accompany Mr. Robins. We submit by way of argument that had the product to be sold been that of the Idaho or Oregon corporations, Milan D. Smith would have been the second man. Had the product to be sold been that of Smith Canning Company of Clearfield, Victor R. Smith would have been the second man, and the reasoning is obvious. The fact is, the product was the tomato pack of Box Elder Packing Corporation, and so Roland B. Smith was the second man. We

submit further that in all of these three argumentative examples the second man would have been selected to represent the corporations over which they had supervision and control, and not the partnership. This would be true although Milan and Victor were also the general managers of the partnership in their respective areas. Combine these facts with the fact that the record clearly shows that Roland B. Smith had virtually *nothing* to do with the partnership, and you reach the only logical result that Roland B. Smith was representing the corporations, not the partnership, on this fatal trip.

The record shows the defendant's relationship to the partnership. For example, when the witness, Victor R. Smith, was asked what work the deceased performed in connection with the partnership, Smith Sales Company, he replied:

"A. Well, he had very little to do so far as Smith Sales was concerned, with the exception of being present *occasionally* on consultation meetings in regard to sales policy and determining of sales policies, etc." Transcript page 29, line 28.

Also on line 29, page 62 of the Transcript, we find the following:

"Q. Did Roland have anything to do with the operation of Smith Sales Company?

A. By that you mean with the actual management?

Q. That is right, actual operation of the company.

A. No, except as a consultant, in the consulting capacity, I should say."

And on cross examination by Mr. Christensen the witness stated:

“A. The management of the partnership was *restricted* to my own management in Utah and that of Mr. Milan Smith in Pendleton.

Q. When you say ‘the management’ you mean the detailed supervision, the day to day operation?

A. Yes. That is *there was no one else in the partnership authorized to transact business except the two of us*, and only then in these particular areas.” (Emphasis added) Transcript page 64, line 18.

Also the witness Melvin Stephenson when asked the question, “Did he (Roland B. Smith) actually perform any functions in connection with the partnership, other than in his advisory capacity as a partner,” responded, “Not that I know of.” In the face of this testimony, and nothing in the record to the contrary, how can it be said that the decedent was representing the partnership and the partnership only at the time of death? It appears that the Industrial Commission is placing him in this capacity at the time of the accident for the first time in the history of the partnership, and without one scrap of evidence to warrant their doing so.

In addition to the above testimony we have the further fact in the record that both Milan D. Smith and Victor R. Smith received salaries from the partnership, but the decedent received absolutely *none*. On the other hand, he received a salary of \$190.75 every two weeks from Smith Frozen Foods, Inc., and \$163.50 every two weeks from Box Elder Packing Corporation. These

salaries continued up to and including the date of death, and it is safe to assume that had he not been killed they would have continued through the entire time he was on this trip. It is true that payment of wages alone is not conclusive in establishing the relationship of employment, but it is circumstance which should be considered, and the Commission has not done so. On this point see the case of *Ellegood v. Brashear Freight Lines*, 162 S.W. 2nd 628, 236 Mo. App. 971 and cases cited therein. In the case of *Davis v. Julian*, 107 P. 2nd 745, 152 Kan. 749, the court stated:

“The fact he was paid wages tended to establish the relationship of employer and employee.”
McKinstry v. Guy Coal Co., 116 Kan. 192, 225 P. 743, 38 ALR 837.

And in the case of *Rojeski v. Pennington Dairy Farmers*, 192 A. 746, 118 N.J.L. 335 they indicated that the manner and amount of payment for services rendered are not controlling, but shed light on existence of employer-employee relation which will authorize award under Workmen's Compensation Act.

Another very important factor, and one which has virtually been ignored by the Commission, is that the decedent's expenses were being paid, not by the partnership whom the Commission has found he was alone representing, but by the corporations whose products were to be sold. Victor Smith, who was the only man authorized to write checks on the partnership account, testified unequivocally that the decedent's expenses were *not* being paid by the partnership, but on the contrary, the decedent had drawn \$200.00 from Smith Frozen

Foods, Inc., for “travel expenses” and had taken three additional blank checks which he had authority to execute, one on Smith Frozen Foods, Inc., and two on Box Elder Packing Corporation. If the decedent had been going to represent the partnership his expenses would have been paid by the partnership. The fact they were paid by the corporations is the strongest possible proof that he was going to represent them. In the findings of the Commission the only reference to this strong evidence was made when they said, “Some evidence was introduced that would *tend to show* that Box Elder Packing Corporation underwrote a part of the expense. This was supported by a photostatic copy of a check by the corporation to Roland B. Smith designated “travel expenses.” “Tended to show?” Can there be any doubt? They *were* paying his expenses, and this fact alone should have resolved the issue once and for all. When asked the questions, “There were the two parties going, Who was to pay the expenses of the decedent Roland Smith?”, Victor Smith answered, “His expenses were paid by Box Elder Packing Corporation.” T-60, Line 23. There can be no doubt but that the decedent was going on this trip to represent the corporations. Furthermore there was a cash receipt for gas purchased at Denver found in the wallet of the decedent from which it could be inferred that he had purchased the gas. This is the type of evidence which I would say “tends to show” that the corporations were underwriting part of the expenses of the trip, but not clear unquestionable evidence such as the fact he drew \$200 from the corporation for “travel expenses,” which would do more than just “tend to show.”

There are still other factors which would show that the deceased was representing the corporations which have been ignored by the Commission. For example, the packing season of a canning company is comparatively short, but still the decedent devoted over two-thirds of his time throughout the year to the two corporations in Brigham City. The record shows that he went to the plants almost daily the year round. On cross examination by Mr. Christensen Mr. Victor Smith testified:

“A. Well, during the balance of the year there are three excellent operations. That is *disposing of the product packed*, repairing machinery and equipment preparatory for the next season’s pack, and making necessary contacts with growers *and with suppliers* to provide for the product and the material for subsequent years’ pack.” (Emphasis added.)

Also in the testimony of Mr. Melvin Stephenson, controller for the Smith companies, we find the following. The witness stated:

“A. His (Bill Robins) purpose was to make contacts in connection with sales of merchandise for the Smith Sales Company.” Then I asked the question:

“Q. Now, in connection with the transaction of business for Smith Sales Company, would the other companies be interested in the same contacts so far as that business is concerned? Now for example, say they were going to contact a prospective purchaser in New York, would Smith Canning Company and Box Elder Packing Corporation be interested in that operation?”

A. Very definitely.

Q. And why?

A. Well, the welfare of the company depends upon the movement of merchandise out of the warehouse.

Q. In other words, not only would the Smith Sales Company be interested, but the individual corporations from whom the products were to be delivered would be interested in the transaction also.

A. That is correct."

And still another important point is that Smith Sales Company did not have the authority to bind the individual companies, but only acted as a brokerage for the taking of orders which were not binding upon the company whose products were being sold until accepted by the company itself. This is born out by the testimony of Victor R. Smith on cross examination by Mr. Christensen when he stated, starting at line 8, page 57 of the Transcript:

"A. Well, let me put it this way. A contact might be made, but a sale couldn't be made without being confirmed by the producing plant."

Where sales had to be confirmed by the producing company before a binding sale could be made it is only natural that the president and general manager of the producing companies would go along in order that the sale might be completed at the very time of contact, and in affirming the order and making a binding sale the decedent would be representing the producing company and not the partnership because only the producing companies had the authority to complete the sale. Would the Industrial Commission have us believe that the de-

cedent was representing only the partnership during the time they were flying from place to place, but when they were making sales he stepped from that employment to represent the producing company in confirming the sale? Therefore, even assuming that the sole purpose of the trip was to make sales, the facts will not substantiate a finding that the decedent was representing only the partnership and not the corporations at the time of death, but at best could only warrant a holding that he was representing both.

POINT II

ALTHOUGH THE FINDINGS OF THE REFEREE WERE THAT "THE ONLY PURPOSE OF THE TRIP WAS SELLING" THE RECORD SHOWS BY CLEAR, UNANBIGUOUS, AND UNCONTRADICTED FACTS THAT THE ONLY PURPOSE OF THE TRIP WAS *NOT* SELLING.

At various places throughout the testimony there were references to other things which were to be accomplished on this trip other than selling. I would like to review some of them, starting on line 7, page 34 of the Transcript. Victor Smith testified:

"A. Well, as I have stated, it was in the *nature of a general business trip*. There were sales contacts to be made, as well as contacts to be made, as I mentioned this one on freight rates, other possibly on equipment, procurement. *It was just a general business trip.*"

On cross examination by Mr. Christensen starting with line 7, page 50 of the Transcript we find the following:

"Q. So that to the best of your knowledge, the entire trip was for the purpose of sales with the exception of one contact in Chicago with P.I.E., is that right?"

A. Well now, that is as far as the Smith Sales' relationship to this thing is concerned. That is, in other words—Let me put it this way. *Roland intended to make a number of calls in connection with his part of the activities but I didn't review those calls with him in detail. I have no knowledge of them.*

Q. You don't know what those calls were?

A. No. I had no occasion to review those with him, St. Louis, for instance, was mentioned as a possible call if they could work it in, and I don't know what Roland's business would have been in St. Louis. As I say, I didn't discuss with Roland the details of his business."

In order to sustain their decision that the decedent was representing the partnership and the partnership only, they would have to find that the sole purpose of the trip was selling, which finding they have made. In order to do so, however, they have had to ignore the uncontradicted evidence, which they do not have the right to do in the absence of conflicting evidence. If other business was to be done which did not concern the partnership, then it would follow that the decedent was representing the corporations. No one except the deceased knew all of the business which he contemplated transacting. Suffice it to say, however, it was a "general business trip." A stop was contemplated in St. Louis, and a "number of calls in connection with his part of the activities," including the stop at P.I.E. in Chicago. These facts have been completely ignored by the Commission, and had they not been so ignored, the award could not have been denied. In the face of the above uncontradicted evidence, the finding of the Referee as adopted by the

Commission that the only purpose of the trip was selling should not be allowed to stand.

POINT III

THE COMMISSION'S FINDING OF FACT THAT THE DECEDENT WAS REPRESENTING THE PARTNERSHIP DOES NOT RESOLVE THE ISSUE AS TO WHETHER HE WAS REPRESENTING THE CORPORATIONS AND THE FINDINGS ARE, THEREFORE, FATALLY DEFECTIVE. LIABILITY FOR COMPENSATION IN THE CASE OF JOINT OR CONCURRENT EMPLOYMENT BY TWO EMPLOYERS IS JOINT AND SEVERAL AND LIABILITY LIES WITH THE CORPORATIONS ALTHOUGH HE MAY, AT THE SAME TIME, HAVE BEEN REPRESENTING THE PARTNERSHIP.

Here again for the sake of argument I would like to assume a set of facts, which I strongly insist did not exist; namely, that the deceased *was* representing the partnership at the time of the accident. As early as 1929 in the case of *Murray v. Wasatch Grading Company*, 73 U. 430, 274 P. 940, this court held that,

“The mere fact that the plaintiff may have been an employee of the railroad company at the time he was injured did not necessarily preclude him from also being an employee of the defendant.”

In the findings of the Commission in the case at hand they correctly stated the question and ultimate fact to be, “Whether or not the deceased was an employee (of the corporations) in the course of his employment at the time of the fatal injury.” The Findings and Conclusions then go on to hold that he was working for the partnership. But this does not answer the very issue which they themselves pose. Before the Findings of Fact and Conclusions of law will support a denial of the claim they must find

affirmatively and not by inference that the decedent was *not* working for the companies who are being sued, and it is not sufficient to find that he was working for someone else.

Generally speaking a positive finding which is inconsistent with the ultimate fact which is to be determined will support the decision. For example, if the ultimate fact to be proven or found is, "Did the decedent die from a heart attack," this could be supported by a finding that he died of cancer without an express finding that he did not die from a heart attack. Where this method is used, however, to support the finding of the ultimate fact the two facts must be incompatible. That is, if one is so, the other cannot be. This is not the case at hand. The finding that the deceased was engaged in his capacity as a general partner in the Smith Sales Company and that the only purpose of this trip was selling does not negative the fact that he was also representing and was the employee of the corporations, which is the ultimate fact which must be determined. For this reason the Findings and Conclusions of the Commission are not sufficient to support the order denying compensation.

In the case of *Rice v. Keystone View Co.*, 297 N.W. 841, 843, 210 Minn. 227, they held that where a traveling salesman was employed by two different companies to represent them and sell their products, and on morning of fatal accident he was on his way in his automobile to demonstrate products of both companies, first the products of the one company at one city, and then the products of the other company at a different city, the em-

ployment was "concurrent employment," and joint award of compensation against both companies was correct. Then in the case of *Pacific Employer's Insurance Co. v. Industrial Accident Commission*, 136 P 2nd 633, 58 Cal. App. 2nd 262 at page 637 we find the following:

"Where the facts support the finding of a joint hiring of a workman by two or more employers, *each* employer becomes liable for compensation."

N. Y. Indemnity Co. v. I.A.C., 126 Cal. App. 37, 14 P 2nd 160;

Standard Acc. Ins. Co. v. I.A.C., 127 Cal. App. 443, 11 P. 2nd 401;

Ragos v. I.A.C., 83 Cal. App. 313, 256 P. 487. And again in *Ocean Accident and Guarantee Corp. v. U. S. Fidelity & Guaranty Co.*, (Ariz., 1945) 162 P. 2nd 609, page 614 we find the following:

"Where two or more persons are employers of the same employee engaged, as here, for the common benefit of both, and so found and determined by the proper tribunal, their liability is joint and common."

Frederick A. Stresenreuter, Inc., v. I.A.C., 322 Ill. 187, 152 N.E. 548;

Sargent v. A. B. Knowlson Co., 224 Mich. 686, 195 N.W. 810, 30 ALR 993;

Standard Accident Insurance Co. v. Industrial Accident Commission, 123 Cal. App. 443, 11 P. 2nd 401.

In *Sgattone v. Mulholland & Gotwals*, 138 A. 855, 290 Pa. 341, 58 ALR 1463, they say:

“Before a recovery can be had by the claimants, it must appear that the deceased was an employee. In determining this fact, it is immaterial that he may also have been employed by a second person.”

Atherholt v. William Stoddard Co., 286 Pa. 278, 133 Atl. 504;

Garman v. Cambria Title Savings & Trust Co., 88 Pa. Sup. Ct. 525.

In the case of *Freedman v. Industrial Accident Commission, et al*, (Calif.) 154 P. 2nd 922, page 925, in dissenting opinion it is stated:

“Since Freedman was found by the Commission to be an employer of Ross, and a separate award was rendered against him, it is immaterial whether Freedman was the sole employer or merely a co-employer of the workman. In either event he would be liable for the full amount of the award.”

Pacific Employers Ins. Co. v. I.A.C., 58 Cal. App. 2nd 262, 136 P 2nd 633;

Standard Accident Ins. Co. v. I.A.C., 123 Cal. App. 443, 11 P 2nd 401;

N. Y. Ind Co. v. Industrial Accident Commission, 126 Cal. App. 37, 14 P 2nd 160.

Also in *Schaefer v. Industrial Commission*, 185 Wis. 317, 201 N.W. 396, the court expressed the opinion that anyone of the employers at the time workman became incapacitated by the occupational disease would be liable for the whole amount of the award. So we see the law appears very clear that where employee was acting within scope of employment with two employers at time of death, dependents are entitled to proceed under Compen-

sation Act against either or both. Because of this it is imperative that the Commission's Findings determine the question "Was he representing the corporations at the time of the accident," and it is not sufficient merely to find that he was also representing some one else.

POINT IV

THE COMMISSION IN FINDING THE DECEDENT WAS REPRESENTING THE PARTNERSHIP AND THE PARTNERSHIP ONLY AT THE TIME OF INJURY HAS DONE SO WITHOUT ANY SUBSTANTIAL EVIDENCE AND HAS WITHOUT ANY REASON OR CAUSE, ARBITRARILY AND CAPRICIOUSLY REFUSED TO BELIEVE AND ACT UPON THE CREDIBLE AND UNCONTRADICTED EVIDENCE IN THE RECORD.

I would venture to say that there is no other field of law in which this court has spoken more often than in regard to Workmen's Compensation. To review all of the cases would be impractical. Suffice to say that the rule has been stated over and over again, that the Supreme Court will not reverse a finding of fact made by the Industrial Commission if there is a conflict in the evidence and if there is substantial evidence which will support the finding which they have made. I am keenly aware of the extreme burden which this places upon a claimant who is attempting to have a question of fact set aside.

In the case of *Kavalinakis v. Industrial Commission, et al.*, 67 U. 174, 246 P. 698, decided in 1926, after making a long argument on why the decisions of the Commission pertaining to question of fact should not be disturbed this court had this to say:

“By what has been said we do not wish to be understood as holding that there is no limit to the Commission’s power or authority in disregarding or in refusing to give effect to uncontradicted evidence. The Commission may not, without any reason or cause, arbitrarily or capriciously refuse to believe and to act upon credible evidence which is unquestioned and undisputed.”

This cost has been cited approvingly in over twenty-four Utah cases alone and has never been modified or changed. It is the strongest possible case for the argument that their decisions are final but still the court recognized the fact that the Commission can not disregard or refuse to give effect to uncontradicted evidence or arbitrarily or capriciously refused to believe and to act upon credible evidence. This we maintain and Commission has done in this case.

In the case of *Rukavina et al. v. Industrial Commission of Utah, et al.*, 68 U. 1, 248 P. 1103 decided in 1926 shortly after the Kavalinakis case we find the following:

“Still, like a court or jury, the commission is required to take as true undisputed or uncontradicted testimony or evidence, if not opposed to probabilities or common knowledge, or not contrary to natural or physical law, or inherently improbable or inconsistent with facts and circumstances in evidence, or uncontradictory in itself, ***. In other words, the commission may not, any more than a court or jury, arbitrarily or capriciously disbelieve or disregard testimony or evidence.”

In the case of *Harness et al. vs. Industrial Commission of Utah, et al.*, 81 U. 276, 17 P. 2nd 277 the court makes the following statement:

“The testimony of the witnesses is remarkably free from conflict and has all of the characteristics of being truthful. Counsel for the defendants have not pointed out and are unable to find anything in the testimony offered in behalf of the applicants to justify disbelieving the same. It is the established law in this jurisdiction that under our Industrial Act dependency and its extent are questions of fact for the determination of the Industrial Commission. This court may not disturb the findings of fact made by the commission unless it appears that the commission has applied an illegal standard, *or has found a fact without evidence to support it, or has made a finding against uncontradicted credible evidence.* On an application to this court the question of whether there is any evidence to support a finding of the commission, or whether there is any justifiable reason for making a finding against uncontradicted credible evidence, is one of law.

“ *** *In the absence of some reasonable basis for disbelieving the uncontradicted evidence offered in support of an application for compensation, the commission may not disregard such evidence.*” (Emphasis added)

This court went on to annul the order denying compensation.

Once again in the case of *Batchelor v. Industrial Commission of Utah*, 86 U. 261, 42 P. 2nd 996 this court reiterated the above rule when it stated:

“Where the commission has made its findings and conclusions and denied compensation, it

is not for the court to disturb them unless it appears from the record that the commission has disregarded competent evidence, substantial in character and uncontradicted, without reasonable basis therefor."

Kavalinakis v. I. C., 67 U. 174, 246 P. 698;

Hauser v. I. C., 77 U. 419, 296 P. 780;

Ostler v. I. C., 84 U. 428, 36 P. 2nd 95.

Before a finding of the Commission can be allowed to stand it must be based upon substantial evidence. Just what is meant by "substantial evidence" was decided in the case of *Milford Copper Co. of Utah, et al., v. Industrial Commission of Utah, et al.*, 61 U. 37, 210 P. 993 where they stated:

"As to what may or may not be regarded as substantial evidence within the meaning of our Industrial Commission act, and the procedure under it, we think the meaning of that expression is aptly defined in 4 Wards and Phrases, Second, p. 751, which reads:

"By "substantial evidence" is not meant that which goes beyond a mere "scintilla of evidence," since evidence may go beyond a mere scintilla, and yet not be substantial evidence. must possess something of substance and relevant consequence and not consist of vague, uncertain, or irrelevant matter, not carrying the quality of proof or having fitness to induce conviction. Substantial evidence is such that reasonable men may fairly differ as to whether it establishes plaintiffs case, and, if all reasonable men must conclude that it does not establish such case, then it is not substantial evidence."

Jenkins & Reynolds Co. v. Alphena Portland

Cement Co., 147 Fed. 641, 643, 77 C.C.A. 625.

POINT V

WHETHER OR NOT THE DECEDENT WAS REPRESENTING THE CORPORATIONS AT THE TIME OF DEATH IS A JURISDICTIONAL QUESTION TO BE DECIDED UPON A PREPONDERANCE OF THE EVIDENCE.

Generally speaking, questions of fact will be allowed to stand if there is any substantial evidence to support them as the term is defined under Point IV. I strongly contend that there is no substantial evidence in this case, and it is even more clear that a preponderance of the evidence could or would not support the finding.

In the case of *Miller v. Industrial Commission*, 97 U. 226, 92 P. 2nd 342, this court stated:

“Whether Miller was employed by Farmington City and was therefore entitled to workmen’s compensation or was employed by Griffith is a jurisdictional question which we must decide on a preponderance of the evidence.”

Weber Co.—Ogden City Relief Commission v. I.C., 93 U. 85, 71 P. 2nd 177, *Holt v. I.C.*, 96 U. 484, 87 P. 2nd 686.

Justice Wolfe dissented on this point in a special concurring opinion, but the same proposition was reiterated in the case of *Stover Bedding Co., et al., v. Industrial Commission*, 99 U. 423, 107 P. 2nd, 1027, when this court stated:

“The first question to be determined is whether Knudsen was an employee of Stover Bedding Co., or whether his relationship with plaintiff was that of independent contractor. We

have on several occasions held that such is a jurisdictional question, which we must decide upon a preponderance of the evidence.”

Angel v. Industrial Commission, 64 U. 105, 228 P. 509;

Luker Sand & Gravel Co. v. Industrial Commission, 82 U. 188, 23 P. 2nd 225;

Norris v. Industrial Commission, 96 U. 484, 87 P. 2nd 686;

Miller v. Industrial Commission 97 U. 226, 92 P. 2nd 342.

Justice Wolfe again dissented.

A preponderance of the evidence shows without a doubt that the decedent was representing the corporations at the time of the fatal accident and the dependants should be allowed benefits under the Act.

CONCLUSION

Roland B. Smith at the time of death was president and general manager of Smith Frozen Foods, Inc., and Box Elder Packing Corporation, both of Brigham City, Utah. He went to the plants daily the year around and devoted over two-thirds of all his time to the two corporations. He was charged with conducting the plant operations, disposing the pack and procuring new equipment and supplies. He received a salary from both corporations. At the time of death he was making a trip to the Midwest to dispose of a tomato pack of these corporations, as well as to conduct other general business regarding procurement of equipment and supplies and discussion of freight rates in Chicago. All of his expenses

for the trip were being paid by these corporations.

The Commission in reaching a decision that at the time of death he was representing the partnership has completely ignored all of these facts and has reached its conclusion arbitrarily and capriciously without any substantial evidence to support its findings. For this reason and for the other reasons as ennumerated in this brief, the order of the Commission denying the claim of the two minor children should be set aside.

Respectfully submitted,

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