

2000

Kelari Mecham, Thomas Keller v. Utah Labor
Commission, Scott's Roustabout Service, Travelers
Insurance Co., Employers Reinsurance Fund :
Reply Brief

Utah Court of Appeals

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may 21, 2010
g. 30am

IN THE UTAH COURT OF APPEALS

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

Petitioner/Appellant,

v.

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

Respondents/Appellees.

Case No. 2000-0328

Labor Commission No.05-0406

REPLY BRIEF OF PETITIONER KALARI MECHAM

PETITION FOR REVIEW FROM ORDER OF THE UTAH LABOR COMMISSION

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UTAH APPELLATE COURTS
MAR 11 2010

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JURISDICTION OF THE COURT

There is no dispute between the parties that this Court has appellate review jurisdiction to hear and adjudicate this matter.

STATEMENT OF ISSUES/STANDARD OF REVIEW

There is no dispute between the parties as to the issues on appeal and the applicable standard of review, as all raised issues are questions of law where appellate review gives no deference to the agency's prior determination.

Preservation for Appeal: There is also no dispute that all of the raised issues were properly preserved for appeal and that the Petition for Review was timely filed with this Court by Petitioner.

DETERMINATIVE STATUTE AND RULE

The parties do not dispute that Utah Code Annotated § 35-1-67 (1975) was the permanent total disability statute in effect at the time of Mr. Keller's death and that Utah Code Ann. § 34A-2-423 (2003) which was enacted after the ruling by Administrative Law Judge Eblen, dismissing the case without prejudice. (10/23/02), but before the Order of Dismissal with prejudice by Administrative Law Judge Sessions (06/16/06) and the Order Affirming ALJ's Decision by the Utah Labor Commission (03/31/09).

STATEMENT OF FACTS

The relevant facts in this matter are simple, straightforward and not really disputed by the parties.

SUMMARY OF REPLY

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

ARGUMENT

I

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

The Administrative Law Judge and the Labor Commission dismissed the Amended Application for Hearing with prejudice, but did not make any Findings of Fact or Conclusions of Law to support that result.

In Nyrehn v. Industrial Commission, 800 P.2d 330, 335 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991), the Utah Court of Appeals has previously informed the Labor Commission that:

In order for us to meaningfully review the findings of the commission, the findings must be 'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factually issue was reached.' [T]he failure of an agency to make adequate findings of fact on material issues renders its findings 'arbitrary and capricious' unless the evidence is 'clear, uncontroverted and capable of only one conclusion.' Id. (Citations omitted).

In Milne Truck Lines, Inc. v. Public Service Commission, 720 P.2d 1373, 1378 (Utah 1986) the Utah Supreme Court clearly articulated the proper standard regarding findings of fact in Orders from Administrative Agencies like the Utah Labor Commission:

The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached. . . . Without such findings, this Court cannot . . . [protect] the parties and the public from arbitrary and capricious administrative action.

The Respondents are unable to cite any Statute or Rule which authorizes the dismissal of an Application for Hearing with prejudice under facts as presented in this case. Respondent Employers' Reinsurance Fund does cite Utah Code Annotated § 34A-2-417(b) as authority, but that Statute only allows the dismissal with prejudice of a claim for compensation which is barred by the twelve year statute of limitation. It is clearly not applicable to this case.

Administrative Law Judge Eblen's 2002 Order dismissing the claim filed by Mr. Keller personally without prejudice was done without request or Motion by any party and while two cases seeking clarification of the central point of law were on appeal. The dismissal without prejudice impliedly recognized that the case could be refilled. The case, was in fact, refilled in 2003 when the Legislature had statutorily clarified the law on this point.

The Respondents misinterpret Petitioner's claim of "continuing jurisdiction" pursuant to Utah Code Annotated, Section 34A-2-420 (1) (a) which specifically provides "The powers and jurisdiction of the commission over each case shall be continuing." Petitioner's claim of continuing jurisdiction arises from his 1978 Compensation Agreement for Permanent Partial Disability which was approved by the Labor Commission. (R. At 1).

The concept of a "dismissal with prejudice," meaning that a case can never again be refilled, is entirely inconsistent with the Commission's statutorily mandated continuing jurisdiction. Petitioner is not attempting to "reopen a workers compensation proceeding to consider legal arguments not previously made" as alleged by Respondent ERF, rather the Petitioner Estate is attempting to obtain resolution of the Permanent Total Disability claim which was filed by Mr. Keller while he was alive and only dismissed because of his untimely death.

II

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

A. Applicable Statutory Provisions.

The Respondents do not claim that there is any statutory provision in the Utah workers' compensation scheme which would provide that a injured worker's compensation claim lapses upon his death. Indeed at the time of Mr. Keller's death the workers compensation act was entirely devoid of any provision addressing that

situation.

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

That Statute was enacted after the ruling by Administrative Law Judge Eblen, dismissing the case without prejudice. (10/23/02), but before the Order of Dismissal with prejudice by Administrative Law Judge Sessions (06/16/06) and the Order Affirming ALJ’s Decision by the Utah Labor Commission (03/31/09).

Petitioner readily agrees with Respondents that Statute was not in effect at the time of Judge Eblen’s Order of dismissal without prejudice and that the Statute is only entitled to prospective application. However, in the absence of any prior relevant statutory provision it stands as powerful evidence of the law at the time of Mr. Kellar’s death. It was certainly in full force and effect at the time of ALJ Sessions Order dismissing the Petitioner’s claim with prejudice and the Utah Labor Commission’s Order Affirming ALJ’s Decision.

B. Existing Utah Case Law.

The parties dispute the interpretation which should be grated to the four Utah

cases which bare of this point: Heiselt Construction Co. v. Industrial Commission of Utah, 197 P. 589 (Utah 1921), Parker v. Industrial Commission, 50 P.2d 278 (Utah 1935), Pacific States Cast Iron Pipe Co. v. Industrial Commission, 218 P.2d 970 (Utah 1950) and Caporoz v. Utah Labor Commission, 945 P.2d 141 (Utah App. 1997).

It is not really necessary to rehash the parties arguments as they are fairly well set out in the respective Briefs. It is important to note however, that an award had been made to Mr. Kellar prior to his death. In 1978 he receipted an Award of Permanent Partial Disability compensation based on a 25% whole body impairment (R. at 1), and that the Estate is not seeking “unaccrued future benefits” but rather only benefits for Permanent Total Disability from the date of his total disability status to the date of his death.

The Claimant in Heiselt had been paid all benefits due up to the time of his death and his Estate was seeking compensation for periods after his death. That is clearly not the case here. Neither the facts nor holding of Heiselt are contrary to Petitioner’s position herein.

Parker is not particularly helpful because it was a case involving a Compensation Order which had been entered while the Claimant was alive but died before all of the ordered payments were made. The Court ordered that payments be made to his Estate. The case is only of particular precedence value to this case in that contrary to Respondents allegation’s, it stands as precedent for an Estate filing

a claim before the Labor Commission seeking payment of benefits.

Any contrary language in Pacific States is explained by the fact that it is an occupational disease case from the 1950's and focused on very specific language contained in the 1943 occupational disease statute unique to a benefits claim for silicosis at that time. It is inapplicable to the present case or even workers compensation cases in general.

Caporoz is readily distinguished because in that case “no claim for total disability benefits was ever filed prior to [the injured workers] death.” Id. at 145. When Mr. Keller died, his industrial claim was unquestionably pending before the Commission. On December 1, 2000, Mr. Keller filed an Application for Hearing seeking Permanent Total Disability benefits on the basis of his injury. His industrial claim for benefits included accrued benefits due and owing from his employer. Mr. Keller died on September 3, 2002 while his case was still pending.

None of the four prior cases is dispositive of this case and at worst their language is ambiguous. In such a case the well established principal that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim, should be applied. Respondents object that Petitioner is asking for the law to be ignored. That is not the case. Petitioner is asking for a resolution in conformance with clear present statutory law and one which does not do violence to prior appellate rulings.

C. Prior Labor Commission Precedent.

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

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

Respondents are correct in asserting that the Smith case is not res judicata in that it involved different parties and does not have binding precedential value. It does, however, serve as compelling evidence of how the Labor Commission handled cases such as this. The Respondents do not cite any other Labor Commission cases which reach a contrary result.

The record is clear that the Labor Commission recognized that the legal theory that industrial claims lapsed upon the death of an injured worker resulted in inequitable results. Smith stands as an example of the Commission stipulating to the payment of such benefits, notwithstanding its prior Order. The Commission was also instrumental in the adoption of Utah Code Annotated § 34A-2-423 (2003) which

specifically provided that such benefits do not lapse.

D. Case Law From Other Jurisdictions.

Given the fact that prior Utah law is somewhat confusing and ambiguous, it is appropriate to look to other States to see how they have handled this situation. In the majority of cases, they hold that workers compensation benefits do not lapse and may be paid to the injured worker's estate.

In Henry v. George Hyman Construction Co., 242 U.S. App. D.C. 43, 749 F.2d 65 (1984) the decedent had received temporary total benefits and died of his injuries. Had he survived, he would have been entitled to a permanent partial award for loss of a leg. His widow was held entitled to both death benefits and the permanent partial benefits that would have been due her husband.

In Snyder Construction Co. v. Thompson, 145 Ind. App. 103, 248 N.E.2d 560 (1969) the dependent of a deceased employee was held entitled to recover benefits for decedent's permanent partial disability, even though no claim for such benefits was pending at the time decedent died from unrelated cases.

Christenson v. Aslesen's Wholesale Food, 345 N.W.2d 769 (Minn. 1984) is a case where the widow of an employee who died three hours after being in a work-related accident sought benefits for his permanent partial disability. The Court held that, under the statute in effect at the time of death, a claim for disability benefits could be maintained even though the employee died before the claim was filed.

Kozielec v. Mack Mfg Corp., 29 N.J. Super 272, 102 A.2d 404 (1953) is

remarkably on point. In that case, the Court held that the surviving wife of an injured employee, either individually as a dependent, or as administratrix of his estate, may file an original claim for permanent disability where the injured workman during his lifetime failed to file such Petition and where his death resulted from a cause wholly unrelated to the industrial accident for which compensation is sought, even though the statute is silent concerning such relief.

Bridges v. McCrary Stone Services Inc., 48 N.C. App. 185, 268 S.E.2d 559 (1980) is a North Carolina case in which temporary total disability compensation had been paid. The Court held that an unreduced award for disfigurement could be made to dependents after the decedent's death from unrelated causes.

In Frederico Granero Co. v. Workmen's Comp. App. Bd., 48 Pa. Commw. 252, 409 A.2d 1187 (1980) the claimant's decedent died approximately two weeks after being hospitalized for a compensable injury. No claim for compensation benefits was filed during the decedent's lifetime. The Court nevertheless held that the widow could receive compensation benefits based on both the decedent's injuries and death, following a liberal construction of the Pennsylvania Compensation Act.

Similar results have been found in New York (Snyder v. Wickwire Spencer Steel Co., 277 A.D. 233, 98 N.Y.S.2d 1006 (1950)) and Virginia (County of Spotsylvania v. Hart, 218 Va. 565, 238 S.E.2d 813 (1977)).

Although there is some contrary authority in other jurisdictions, they are almost always the result of controlling state statutes and none of those cases are cited or

relied upon by Respondents as having any precedential value.

E. Public Policy.

The Respondents position that prior to 2003 and the enactment of Utah Code Annotated § 34A-2-423 that any workers compensation benefits lapsed if the injured worker did not file a claim and reduce it to an Order prior to his or her death is shocking and inequitable.

Such a legal principal would only encourage employers and workers compensation insurance carriers to delay cases, especially where the Claimant is seriously injured and there was a likelihood that he or she might die. Such a principle would force a severely injured worker in the hospital ICU to interrupt lifesaving medical care and rush to the Labor Commission offices to file a claim for benefits. However, the mere filing of a claim would not satisfy the Respondents who seemly believe that the claim would have to be fully adjudicated and reduced to an Order in insure payment to the worker's estate.

This Court should take judicial notice that the present backlog at the Utah Labor Commission between the filling of a Claim for workers' compensation benefits and the entry of an award is approximately two years. If a Motion for Review is filed by either party the average delay between the filing of the Motion for Review and the entry of a dispositive Order by the Commission is just under three years. This is the grim fact facing any Utah workers compensation Claimant.

III

PETITIONER'S BRIEF DID COMPLY WITH THE RULES OF APPELLATE PROCEDURE.

The Respondent Employer/Carrier's argument on this point borders on frivolous and it is not joined in with by the Respondent Employers' Reinsurance Fund.

It is important to note at the outset that Petitioner's Brief was checked in and approved as to form by the Court Clerk using the official Brief checklist approved and mandated by the Appellate Courts to insure that Briefs do comply with the Rules of Appellate Procedure.

Respondent first argue that the Brief did not contain an Addendum including the challenged Findings of Fact and Conclusions of Law. Curiously, Respondent in addressing the applicable Standard of Review in this case states that "This is a question of law where appellate review give no deference to the agency's determination."

Respondent does not cite any Statute, Rule or case law imposing any sanction for this inadvertent omission. Certainly Respondent was not surprised, prejudiced or even inconvenienced by this omission. Respondent had received a copy of the challenged Order Affirming ALJ's Decision directly from the Utah Labor Commission on or about March 31, 2009. A copy was attached to Petitioner's Petition for Review filed with this Court on or about April 29, 2009. A copy was contained in the Agency record which Respondent checked out for purposes of preparing its Response Brief

and Respondent attaches a copy of the decision to its Brief.

Respondent next objects that Petitioner did not file a courtesy brief as directed by the Court on November 17, 2009. Presumably Respondent is referring to Utah Supreme Court Standing Order No. 8 establishing a pilot program of requesting a copy of the Briefs in electronic “searchable Portable Document Format (PDF)”.

The Rule recognizes this is merely a pilot program to determine “... the feasibility and desirability of requiring parties to provide the Utah appellate courts with a courtesy copy on compact disk (CD) of all briefs on the merits.” It expressly provides a mechanism for parties who lack the technological capability to file such a Brief to be excused from doing so. Petitioner filed such a Motion in letter form on November 23, 2009. No sanction is provided in the Standing Order for failure to comply and again Respondent does not allege that it suffered any surprise, prejudice or inconvenience do to this alleged omission.

Respondent never filed an objection to Petitioner’s Brief or moved to strike it, nor does it now. It never states what the consequence of the claimed violations of the Rules of Appellate Procedure should be.

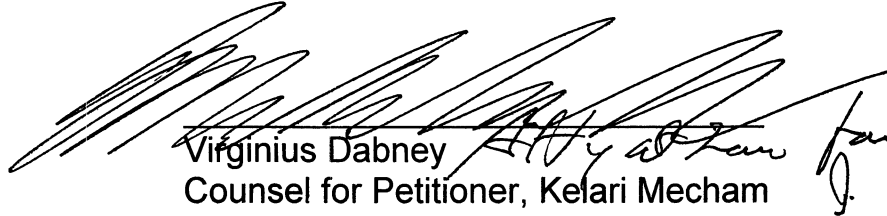
CONCLUSION/STATEMENT OF RELIEF SOUGHT

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

case be reported.

DATED this 11th day of March, 2010.

DABNEY & DABNEY, p.c.


Virginus Dabney
Counsel for Petitioner, Kelari Mecham

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2010, a copy of the foregoing
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Addendum “A”

Utah Code Annotated § 34A-2-423 (2003)

- (i) transfer payment rights under workers' compensation; or
- (ii) accept or take any action to provide for a transfer of payment rights under workers' compensation.

(b) A person may take an action prohibited under Subsection (3)(a) if the commission approves the transfer of payment rights under workers' compensation:

- (i) before the transfer of payment rights under workers' compensation takes effect; and
- (ii) upon a determination by the commission that:
 - (A) the person transferring the payment rights under workers' compensation received before executing an agreement to transfer those payment rights:

(I) adequate notice that the transaction involving the transfer of payment rights under workers' compensation involves the transfer of those payment rights; and

(II) an explanation of the financial consequences of and alternatives to the transfer of payment rights under workers' compensation in sufficient detail that the person transferring the payment rights under workers' compensation made an informed decision to transfer those payment rights; and

(B) the transfer of payment rights under workers' compensation is in the best interest of the person transferring the payment rights under workers' compensation taking into account the welfare and support of that person's dependents.

(c) The approval by the commission of the transfer of a person's payment rights under workers' compensation is a full and final resolution of the person's payment rights under workers' compensation that are transferred:

- (i) if the commission approves the transfer of the payment rights under workers' compensation in accordance with Subsection (3)(b); and
- (ii) once the person no longer has a right to appeal the decision in accordance with this title.

2007

2-423. Survival of claim in case of death.

As used in this section:

- (a) "Estate" is as defined in Section 75-1-201.
- (b) "Personal representative" is as defined in Section 5-1-201.

The personal representative of the estate of an employee adjudicate an employee's claim for compensation under chapter if in accordance with this chapter, the employee claim:

- (a) before the employee dies; and
- (b) for compensation for an industrial accident or occupational disease for which compensation is payable under this chapter or Chapter 3, Utah Occupational Disease Act. If the commission finds that the employee is entitled to compensation under this chapter for the claim described in section (2)(a), the commission shall order that compensation be paid for the period:

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

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

- (i) if the employee has one or more dependents on the day on which the employee dies, to the dependents of the employee; or

(ii) if the employee has no dependents on the day on which the employee dies, to the estate of the employee.

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

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

2003

PART 5

INDUSTRIAL NOISE

34A-2-501. Definitions.

(1) "Harmful industrial noise" means:

(a) sound that results in acoustic trauma such as sudden instantaneous temporary noise or impulsive or impact noise exceeding 140 dB peak sound pressure levels; or

(b) the sound emanating from equipment and machines during employment exceeding the following permissible sound levels, dBA slow response, and corresponding durations per day, in hours:

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

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

1997

34A-2-502. Intensity tests.

(1) The commission may conduct tests to determine the intensity of noise at places of employment.

(2) An administrative law judge may consider tests conducted by the commission, and any other tests taken by authorities in the field of sound engineering, as evidence of harmful industrial noise.

1997

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

(1) Permanent hearing loss caused by exposure to harmful industrial noise or by direct head injury shall be compensated according to the terms and conditions of this chapter or Chapter 3, Utah Occupational Disease Act.

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

1997

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

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

(2) If previous occupational hearing loss or nonoccupational hearing impairment is established by competent evidence, the employer may not be liable for the prior hearing loss so