

1992

Hales v. Industrial Commission of Utah : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Benjamin A. Sims; Utah Industrial Commission; Rinehart L. Peshell; Fairbourn & Peshell; Attorneys for Respondent.

Virginus Dabney; Dabney & Dabney; Attorneys for Petitioners.

Recommended Citation

Brief of Respondent, *Hales v. Industrial Commission of Utah*, No. 920319 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3248

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 Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UT
D
K
50
.A1
DOCK

920319 BEFORE THE UTAH COURT OF APPEALS

MARILYN R. HALES, Widow;	:	
DELBERT R. HALES, MONICA M.	:	
HALES, and CRISTAL E. HALES,	:	
Minor Dependent Children; and	:	COURT OF APPEALS
ROBYN L. CHAMBERS, Former Wife,	:	
of DAVID K. HALES, deceased,	:	
	:	
Petitioners,	:	CASE NO. 920319
	:	
vs.	:	
	:	
INDUSTRIAL COMMISSION OF UTAH,	:	PRIORITY NO. 7
EMERY MINING CORPORATION and	:	
ENERGY MUTUAL INSURANCE COMPANY,	:	
	:	
Respondents.	:	

BRIEF OF RESPONDENTS ENERGY MUTUAL INSURANCE COMPANY
AND EMERY MINING CORPORATION

PETITION FOR REVIEW OF
DENIAL OF PETITIONERS' MOTION FOR REVIEW OF FINAL AGENCY
ACTION OF THE INDUSTRIAL COMMISSION OF UTAH

Virginus Dabney, Esq.
DABNEY & DABNEY, p.c.
350 South 400 East, Suite 202
Salt Lake City, Utah 84111
Attorneys for Petitioners

Rinehart L. Peshell
FAIRBOURN & PESHELL
7321 South State
Midvale, Utah 84047
Attorney for Emery Mining
Corporation and Energy
Mutual Insurance Company

Benjamin A. Sims, Esq.
UTAH INDUSTRIAL COMMISSION
P.O. Box 510250
Salt Lake City, Utah 84151-0250
Attorney for Industrial
Commission of Utah

FILED

OCT 8 1992

Marv T. Noonan
Clerk
Utah

BEFORE THE UTAH COURT OF APPEALS

MARILYN R. HALES, Widow;	:	
DELBERT R. HALES, MONICA M.	:	
HALES, and CRISTAL E. HALES,	:	
Minor Dependent Children; and	:	COURT OF APPEALS
ROBYN L. CHAMBERS, Former Wife,	:	
of DAVID K. HALES, deceased,	:	
	:	
Petitioners,	:	CASE NO. 920319
	:	
vs.	:	
	:	
INDUSTRIAL COMMISSION OF UTAH,	:	PRIORITY NO. 7
EMERY MINING CORPORATION and	:	
ENERGY MUTUAL INSURANCE COMPANY,	:	
	:	
Respondents.	:	
	:	

BRIEF OF RESPONDENTS ENERGY MUTUAL INSURANCE COMPANY
AND EMERY MINING CORPORATION

PETITION FOR REVIEW OF
DENIAL OF PETITIONERS' MOTION FOR REVIEW OF FINAL AGENCY
ACTION OF THE INDUSTRIAL COMMISSION OF UTAH

Virginus Dabney, Esq.
DABNEY & DABNEY, p.c.
350 South 400 East, Suite 202
Salt Lake City, Utah 84111
Attorneys for Petitioners

Rinehart L. Peshell
FAIRBOURN & PESHELL
7321 South State
Midvale, Utah 84047
Attorney for Emery Mining
Corporation and Energy
Mutual Insurance Company

Benjamin A. Sims, Esq.
UTAH INDUSTRIAL COMMISSION
P.O. Box 510250
Salt Lake City, Utah 84151-0250
Attorney for Industrial
Commission of Utah

Table of Contents

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES PRESENTED ON APPEAL	1
STATEMENT OF THE CASE	2
JURISDICTION OF THE COURT	2
STATEMENT OF ISSUES AND STANDARD OF APPELLATE REVIEW	2
DETERMINATIVE STATUTE/RULE	3
DISPOSITION BY THE INDUSTRIAL COMMISSION	3
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT(S)	4
ARGUMENT	5
POINT I	5
SECTION 35-1-68 UTAH CODE ANNOTATED (1981)	
IS NOT AN UNCONSTITUTIONAL STATUTE OF REPOSE AND	
DOES NOT VIOLATE THE "EQUAL PROTECTION" CLAUSE OF	
THE UTAH CONSTITUTION	
CONCLUSION	8
ADDENDUM	10

TABLE OF AUTHORITIES

CASES

	PAGE
<u>Banyan v. AIR Production Co.</u> , 189 Pad 343, (1991)	6
<u>Mor-Flo Industries v. Board of Review</u> , 817 P.2d 328 (Utah 1991)	3
<u>Morton International, Inc. v. Auditing Div. of Utah State Tax Commission</u> , 814 P.2d 581 (Utah 1991).	3

STATUTES

Utah Code Annotated, Section 35-1-67 (1981)	6,7
Utah Code Annotated, Section 35-1-68 (1981)	1,2,3,4,5,6,7,8
Utah Code Annotated, Section 35-1-70 (1981)	3,6,7,8
Utah Code Annotated, Section 35-1-73 (1981)	5
Utah Code Annotated, Section 35-1-82.53(2) (1981)	2
Utah Code Annotated, Section 35-1-86 (1988)	2
Utah Code Annotated, Section 35-1-99 (1991)	3,5
Utah Code Annotated, Section 63-46(b)-16(4) (1988)	2,3
Utah Code Annotated, Section 72-2a-3(2) (1988)	2

RULES

Rule 14, Utah Rules of Appellate Procedure	2
--	---

BEFORE THE UTAH COURT OF APPEALS

MARILYN R. HALES, Widow;	:	
DELBERT R. HALES, MONICA M.	:	
HALES, and CRISTAL E. HALES,	:	
Minor Dependent Children; and	:	
ROBYN L. CHAMBERS, Former Wife,	:	
of DAVID K. HALES, deceased,	:	
	:	
Petitioners,	:	CASE NO. 920319
	:	
vs.	:	
	:	
INDUSTRIAL COMMISSION OF UTAH,	:	PRIORITY NO. 7
EMERY MINING CORPORATION and	:	
ENERGY MUTUAL INSURANCE COMPANY,	:	
	:	
Respondents.	:	
	:	

BRIEF OF RESPONDENT ENERGY MUTUAL INSURANCE COMPANY

APPEAL FROM DENIAL OF PETITIONERS'
MOTION FOR REVIEW OF FINAL AGENCY ACTION
OF THE INDUSTRIAL COMMISSION OF UTAH

STATEMENT OF ISSUES PRESENTED ON APPEAL

Whether Section 35-1-68, Utah Code Annotated (1981) is an unconstitutional Statute of Repose which violates the "Open Courts" provision and the "Equal Protection" provision of the Utah Constitution.

STATEMENT OF THE CASE

The appeal in this matter is to seek review of the Industrial Commission's Order denying the dependents of an injured employee, David K. Hales, death benefits on the basis that said employee died on November 25, 1988, more than six (6) years after his industrial injury, from causes which allegedly were the result of his industrial accident.

JURISDICTION OF THE COURT

Petitioners filed a Petition For Review of the Industrial Commission's May 6, 1992 Order denying Petitioners' Motion for Review alleging entitlement to dependents' benefits for the death of an injured worker. On May 20, 1992, a Petition For Review was timely filed with the Court.

The Court of Appeals has jurisdiction to hear Petitioners' Petition For Review pursuant to Utah Code Annotated, Sections 35-1-82.53(2)(1988), 35-1-86(1988), 63-46b-16(4)(1988) and 78-2a-3(2)(1988); and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES AND STANDARD OF APPELLATE REVIEW

There are two substantive issues presented for review:

(1) Whether Section 35-1-68(2)(1981) is an unconstitutional statute of repose and therefore a violation of the "Open Courts" provision of the Utah Constitution; and

(2) Whether said Section 35-1-68(2)(1981) violates

Petitioners right to "Equal Protection" of the law under the Utah Constitution?

The standard of appellate review which is to be applied to the resolution of each of the above issues is "correction of error", since the issues herein presented involve questions of law, and no deference to the agency's view of the law is necessary or required. Utah Administrative Procedures Act, Utah Code Annotated, Section 63-46b-16(4)(1988). Mor-Flo Industries v. Board of Review, 817 P.2d 328 (Utah 1991). Morton International, Inc. v. Auditing Division of the Utah State Tax commission, 814, P.2d 581 (Utah 1991).

DETERMINATIVE STATUTE/RULE

Utah Code Annotated, Sections 35-1-68(1981), Section 35-1-70(1981), and Section 35-1-99(1981) are the applicable and determinative statutory provisions. See Addendum Exhibit "B".

DISPOSITION BY THE INDUSTRIAL COMMISSION

On April 3, 1992, petitioners' claims were dismissed by the Administrative Law Judge, pursuant to Section 35-1-68, Utah Code Annotated (1981), on the basis that Mr. Hales was injured on May 24, 1982 in an industrial accident, and died on November 25, 1988, more than six (6) years after said accident, from causes allegedly related to his industrial accident.

On April 17, 1992, Petitioners filed a Motion for Review with the Industrial Commission claiming Section 35-1-68, Utah Code

Annotated, violated the "Open Courts" and "Equal Protection" provisions of the Utah Constitution.

On May 6, 1992, the Industrial Commission affirmed the Administrative Law Judge's Order.

On September 2, 1992, Petitioners filed their appeal with the above entitled Court.

STATEMENT OF FACTS

1. On May 24, 1992, David K. Hales injured in a compensable accident while employed by Emery Mining Corporation (R. at 103).

2. Mr. Hales was awarded a 32% permanent, partial disability rating. (R. at 103). Thereafter, Mr. Hales was found to be entitled to a permanent, total disability award. (R. at 58-62)

3. On November 25, 1988, Mr. Hales died as a result of "acute intoxication with a combination of codeine, Meproamate, Diazepam, and Carisoprodol." (See Exhibit "A" attached hereto.)

SUMMARY OF ARGUMENT(S)

Section 35-1-68, Utah Code Annotated (1981) does not violate the "Open Courts" or "Equal Protection" provisions of the Utah Constitution because Petitioners can still pursue their claims against the Employers Reinsurance Fund.

ARGUMENT

POINT I

SECTION 35-1-68, UTAH CODE ANNOTATED (1981) IS NOT AN UNCONSTITUTIONAL STATUTE OF REPOSE AND DOES NOT VIOLATE THE "EQUAL PROTECTION" CLAUSE OF THE UTAH CONSTITUTION

Section 35-1-73, Utah Code Annotated (1981) provides as follows:

The benefits in case of death shall be paid to such one or more of the dependents of the decedent for the benefit of all the dependents, as may be determined by the Commission, which may apportion the benefits among the dependents in such manner as it deems just and equitable.

Petitioners' claims are founded upon the above quoted statute.

Said death claims are limited by Section 35-1-99(4), Utah Code Annotated (1981) which provides:

A claim for death benefits is wholly barred, unless an application for hearing is filed within one year of the date of the death of the employee.

The above quoted statute is the only provision that affects Petitioner's right to make a claim. Section 35-1-68(2), Utah Code Annotated (1981) provides:

If injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in Section 35-1-81, and further benefits in the amounts and to the persons as follows . . .

The above statute does not cut off the claim of the dependents of the deceased; but merely limits the liability of the employer or insurance carrier to paying certain benefits only if death occurs within six (6) years from the date of the employee's injury.

Petitioners argue that Section 35-1-68(2) is unconstitutional because if they cannot pursue the employer or the insurance carrier, they have no alternative remedy.

This conclusion is not true.

Section 35-1-67, Utah Code Annotated, (1981) provides:

In cases of permanent disability, the employee shall receive 66 2/3% of his average weekly wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years ...

Although the employee is receiving the check, from the language above, it would appear that dependents are included in the calculations in determining benefits and are therefore receiving benefits through the injured employee.

Section 35-1-70, Utah Code Annotated (1981) states:

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.

Section 35-1-70, Utah Code Annotated (1981) can only apply to a situation where an employee dies from an industrial injury more than six (6) years from the date of his injury.

If an employee dies from an industrial injury within the six (6) year period set forth in Section 35-1-68, Utah Code Annotated (1981), the employer or insurance carrier has liability for wholly dependent persons, subject to a social security set off, for as long as that person remains wholly or partially dependent. Therefore, Section 35-1-70, Utah Code Annotated (1981) cannot apply to a situation where the employee dies within six (6) years.

Likewise, Section 35-1-67, Utah Code Annotated (1981) which sets out the formulas for an employee who has been permanently totally disabled, provides that the employer or its insurance carrier is liable for benefits for the first 312 weeks, and thereafter, if the employee is certified as being totally disabled.

. . . the commission shall order. . . out of the second injury fund provided for by Subsection 35-1-68(1), for such period of time beginning with the time that the payments, as in this section provided, to be made by the employer or its insurance carrier terminate and ending with the death of the employee. Section 35-1-67, Utah Code Annotated (1981).

Based upon the language of the above statute, Section 35-1-70, Utah Code Annotated (1981) has no bearing as long as the employee is alive. Upon the employee's death, the wholly dependent persons, assuming the death was industrially related, could make application for benefits under Section 35-1-68 if the death occurred within six (6) years from the date of the injury and under Sections 35-1-68 and 35-1-70 Utah Code Annotated (1981) if the death occurred beyond six (6) years from the date of injury.

Finally in making a determination as to whether Section 35-1-68 Utah Code Annotated, is an unconstitutional statute of repose

or is a violation of the "Equal Protection" provision of the Utah Constitution the Court must consider:

When legislative enactments are attacked on constitutional grounds, we apply a presumption of validity "so long as there is a reasonable basis upon which both provisions of the statute and the mandate of the constitution may be reconciled." Banyan v. AIR Production Co., 189 P.2d 343, 347 (1991).

CONCLUSION

The reading of Sections 35-1-68 and 35-1-70, Utah Code Annotated (1981) as suggested herein, certainly provides a reasonable basis to uphold the provisions of Section 35-1-68, Utah Code Annotated (1981) and the mandate of the Utah Constitution to provide for "Open Courts" and "Equal Protection" under the law.

Section 35-1-68, Utah Code Annotated (1981) is not an unconstitutional statute of repose and does not violate the "Equal Protection" provisions of the Utah Constitution as petitioners may still, even though David K. Hales' death occurred more than six (6) years after the date of his industrial injury, pursue their claim against the Employer's Reinsurance Fund.

Respectfully submitted this 7th day of October, 1992.

FAIRBOURN & PESHELL


RINEHART L. PESHELL

PROOF OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of Respondent were mailed, postage prepaid, on this 7th day of October, 1992, to the following:

UTAH COURT OF APPEALS
400 MIDTOWN PLAZA
230 SOUTH 500 EAST, SUITE 400
Salt Lake City, UT 84102

(1 Original plus 7 copies)

BENJAMIN A. SIMS, ESQ.
INDUSTRIAL COMMISSION OF UTAH
160 SOUTH 300 EAST
P.O. BOX 510250
Salt Lake City, UT 84151-0250

(2 copies)

VIRGINIUS DABNEY, ESQ.
DABNEY & DABNEY, P.C.
350 SOUTH 400 EAST
Salt Lake City, UT 84111

(2 copies)

FAIRBOURN & PESHELL


RINEHART L. PESHELL

ADDENDUM

EXHIBIT "A":

Autopsy Report

EXHIBIT "B":

Utah Code Annotated, Section 35-1-68 (1988)

Utah Code Annotated, Section 35-1-70 (1988)

Utah Code Annotated, Section 35-1-99 (1991)

OFFICE OF THE MEDICAL EXAMINER
AUTOPSY REPORT

Case No: 88-1256

Name: HALES, David K.

Age: 39 Race: White Sex: Male

Date and time of death: 11/25/88 - 1300

Date and time of autopsy: 11/26/88 - 0930

An autopsy is performed on the body of David K. Hales, at the Office of the Medical Examiner, State of Utah, on the 26th day of November, 1988.

EXTERNAL EXAMINATION

The body is that of a well developed, moderately obese adult white male; he is clad in an undershirt and undershorts which have been cut off and is wearing a watch on the left wrist. The body weighs 98 kg, is 1.77 meters in height, and appears compatible with the stated age of 39 years. The body is cold with 2+ rigor mortis present to an equal degree in all extremities. Lividity is present and fixed on the posterior surfaces of the body, except in areas exposed to pressure. The scalp hair is red with frontal balding. A red beard and moustache are present. The irides are blue and the sclerae are congested. The cornea are cloudy. No petechiae are noted of the conjunctivae. The ears, nose, and lips are unremarkable. Upper and lower teeth are natural and in good condition. Examination of the neck and chest reveals no evidence of external injury. The abdomen is moderately obese with a 9 cm vertical midline suprapubic scar, a 16 cm horizontal right costal scar, and bilateral small old scars of the flanks measuring 1 to 2 cm in diameter. The left anterior shoulder shows a 4 cm scar. The dorsum of the left forearm shows a 6 cm scar on the dorsum of the left wrist and 8 cm scar. The posterior midline of the lumbar spine shows a 15 cm vertical scar. The posterior right elbow shows two superficial recent pink abrasions measuring 1 cm in diameter each. The extremities are free of fracture, deformity, edema, or clubbing. There is no evidence of needle puncture wounds, needle tracks, or ventral wrist scars present. The external genitalia are those of a normally developed adult male and the testes are bilaterally descended.

INTERNAL EXAMINATION

BODY CAVITIES: The body is opened by the usual thoraco-abdominal, Y-shaped incision and the chest plate is removed. No adhesions or abnormal collections of fluid are present in any of the body cavities. All body organs are present in normal and anatomical position. The subcutaneous fat layer of the abdominal wall is 6 cm thick.

HEAD: (Central Nervous System). The scalp is reflected. The calvarium of the skull is partially removed. The dura mater and falx cerebri are intact. There are no epidural or subdural hemorrhages present. The leptomeninges are thin and delicate. The cerebral hemispheres are symmetrical. The structures at the base of the brain, including cranial nerves and blood vessels are intact. There is moderate cerebellar-tonsillar herniation and moderate flattening of the gyri and narrowing of the sulci throughout indicating moderately severe cerebral edema. The brain is submitted for formalin fixation to be cut at a later date. The fresh brain weighs 1740 grams.

Description of the fixed brain: The fixed brain weighs 1720 grams and shows a moderate

EXHIBIT "A"

Name: HALES, David K.

Case No. 88-1255

fullness over the cerebral convexities with moderately full gyri and narrowed sulci. There is no evidence of subarachnoid hemorrhage. The leptomeninges are thin and translucent without local fibrosis. There is no evidence of subarachnoid hemorrhage. There is minimal cerebellar tonsillar herniation. The brain stem and cerebellum are normally disposed. Multiple serial sections of brain, brain stem, and cerebellum demonstrate a normal amount of gray and white matter with no evidence of preexisting pathology, trauma, tumor, or hemorrhage. The ventricles are bilaterally symmetrical and without distortion. Cut surface of the pons medulla, and cerebellum are unremarkable with normal anatomic landmark. Impression: Normal adult brain.

NECK: Examination of the soft tissues of the neck, including strap muscles, thyroid gland and large vessels, reveal no abnormalities. The hyoid bone and larynx are intact.

CARDIOVASCULAR SYSTEM: The heart weighs 420 grams. The pericardial surfaces are smooth, glistening and unremarkable; the pericardial sac is free of significant fluid or adhesions. The coronary arteries arise normally, follow the usual distribution, and are widely patent, without evidence of significant atherosclerosis or thrombosis. The aorta and its major branches arise normally, follow the usual course and are widely patent, free of significant atherosclerosis and other abnormality. The vena cava and its major tributaries return to the heart in the usual distribution and are free of thrombi. There is moderate biventricular hypertrophy; the left ventricular myocardium measures 1.6 cm in thickness. The myocardium is gray-pink and pale and slightly flabby; the atrial and ventricular septa are intact; no recent myocardial infarction or fibrotic scars are noted. There are mural thrombi. The valves have their normal circumference and an unremarkable gross appearance.

RESPIRATORY SYSTEM: The lungs weigh 625 and 600 grams, right and left, respectively. There is a moderate amount of aspirated food particles in the esophagus and hypopharynx. Otherwise, the upper airway is clear of foreign material and the mucosal surfaces are smooth and yellow-tan. The upper airway is clear of debris and foreign material; the mucosal surfaces are smooth, yellow-tan and unremarkable. The pleural surfaces are smooth, glistening and unremarkable bilaterally, except as otherwise noted. The pulmonary parenchyma is dark red-purple exuding slight to moderate amounts of blood and frothy fluid; no focal lesions are noted. The pulmonary arteries are normally developed, patent and without thrombus or embolus.

LIVER AND BILIARY SYSTEM: The liver weighs 2800 grams. The hepatic capsule is smooth, glistening, and intact covering dark red-pink-tan slightly congested parenchyma with diffuse fatty change. The gallbladder is surgically absent. Cut surface of the liver shows no focal lesions.

ALIMENTARY TRACT: The appendix is surgically absent (remote). The esophagus is lined by grey-white, smooth mucosa. The gastric mucosa is arranged in the usual rugal folds and the lumen contains 280 cc of partially digested food particles which are dark green and tan-yellow in color. The small and large bowel are unremarkable. The pancreas has a normal grey-white lobulated appearance and the ducts are clear.

GENITOURINARY TRACT: The kidneys weigh 240 and 260 grams, right and left, respectively. The renal capsules are smooth and thin, semitransparent, and strip with ease from the underlying smooth, red-brown, slightly and superficially lobulated cortical surface. The cortex is slightly congested, measure to 1 cm in thickness, and is sharply delineated from the medullary pyramids, which are red-purple to tan, and unremarkable. The calyces, pelves and ureters are unremarkable. The urinary bladder contains 300 cc of clear yellow urine; the mucosa is grey-tan and smooth. The testes,

prostate and seminal vesicles are unremarkable.

RETICULOENDOTHELIAL SYSTEM: The spleen weighs 350 grams. The spleen has a smooth, intact capsule covering red-purple, moderately firm parenchyma; the lymphoid follicles are unremarkable. Cut surface of the spleen shows three separate focal gray-tan finely slightly nodular discrete lesions; microscopic sections are obtained; each lesion measures approximately .7 cm in diameter. The regional lymph nodes appear normal. The bone marrow is red-purple, homogeneous, without evidence of focal abnormality.

ENDOCRINE SYSTEM: The pituitary, thyroid and adrenal glands are unremarkable.

MICROSCOPIC DESCRIPTION

SPLEEN: There is acute congestion of the red pulp; a focal nodule is present which is ill-defined and non-encapsulated. It is comprised of multiple irregularly-shaped lymphoid follicles of varying sizes; several of the germinal centers show karyornexis and there is interstitial fibrosis.

LIVER: Acute congestion of the sinusoids.

HEART: Slight myocardial fiber hypertrophy.

PATHOLOGIC DIAGNOSES:

- I. Acute multiple drug intoxication due to administration of combined overdose.
 - A. Blood carisoprodol 24 ug/ml, meprobamate 4.8 ug/ml, N-desmethyldiazepam 0.4 ug/ml, codeine 1.4 ug/ml.
 - B. Pulmonary edema and congestion.
 - C. Acute passive congestion of the viscera.
- II. Mild cerebral edema.
- III. Hypertension and diabetes mellitus, clinical.
 - A. Left ventricular hypertrophy of the heart.
- IV. Mild to moderate fatty change of the liver.
- V. Status-post appendectomy and cholecystectomy, remote.

OPINION: This 39-year-old male, David K. Hales, died from acute intoxication with a combination of codeine, meprobamate, diazepam, and carisoprodol; these were prescription drugs which he had been prescribed over the past several years for chronic back pain and anxiety/depression disorder.

MANNER OF DEATH: Accident.


Sharon I. Schnittker, M.D.
Assistant Medical Examiner

SIS/pgs

1/18/89

EXHIBIT "A"

Utah State Health Department
Toxicology Report

Case No. 88-1256

Date Received: 11/29/88
Date Reported: 12/21/88

Name: HALES, DAVID K.

Specimens Analyzed: Blood

Ethyl Alcohol: Bld Vit Subd Hosp

Amount (%): Neg

Drug Screen Positive for:	Blood <u>ug/ml</u>	Gastric <u>mg tot</u>	Liver <u>ug/g</u>	Urine <u>ug/ml</u>	Bile <u>ug/ml</u>	Other <u>see below</u>
CARISOPRODAL	24					
MEPROBAMATE	4.8					
N-DESMETHYLDIAZEPAM	0.4					
CODEINE	1.4					

Comments:

Received by: [Signature] Date: 11/29/88

Toxicologist: [Signature] Date: 12/21/88

RECEIVED

DEC 23 1988

UTAH STATE HEALTH DEPARTMENT
TOXICOLOGY EXAMINER

 Final Report

 Amended Report

EXHIBIT "A"

CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Annotated, Section 35-1-68 (1979).

(1) There is created a second injury fund for the purpose of making payments in accordance with the provisions of chapters 1 and 2 of this title. This fund shall succeed to all monies heretofore held in that fund designated as the "special fund" or the "combined injury fund" and whenever reference is made elsewhere in this code to the "special fund" or the "combined injury fund" that reference shall be deemed to be to the second injury fund. The state treasurer shall be the custodian of the second injury fund and the commission shall direct its distribution. Reasonable administration assistance may be paid from the proceeds of that fund. The attorney general shall appoint a member of his staff to represent the second injury fund in all proceedings brought to enforce claims against it.

(2) In case injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in section 35-1-81, and further benefits in the amounts and to the persons as follows:

(a) If the commission has made a determination that there are no dependents of the deceased, it may, prior to a lapse of one year from the date of death of a deceased employee, issue a temporary order for the employer or insurance carrier to pay into the second injury fund the sum of \$18,720. The 18,720 shall be reduced by the amount of any weekly compensation payments paid to or due the deceased between the date of the accident and death. Should a dependency claim be filed subsequent to the issuance of such an order and, thereafter, a determination of dependence is made by the commission, the award shall first be paid out of the sum deposited for credit to the second injury fund by the employer or insurance carrier. In the event no dependency claim is filed within one year from the date of death, the commission's temporary order shall become permanent and final. If no temporary order has been issued and no claim for dependency has been filed within one year from the date of death, the commission may issue a permanent order at any time requiring the carrier or employer to pay \$18,720 into the second injury fund. Any claim for compensation by a dependent must be filed with the commission within one year from the date of death of the deceased.

(b) (i) If there are wholly dependent persons at the time of the death, the payment by the employer or insurance carrier shall be $66\frac{2}{3}\%$ of the decedent's average weekly wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and

EXHIBIT "B"

\$5 for each dependent minor child under the age of the eighteen years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week, to continue during dependency for the remainder of the period between the date of the death and not to exceed six years or 312 weeks after the date of the injury.

(ii) The weekly payment to wholly dependent persons during dependency following the expiration of the first six-year period described in subsection (2) (b) (i) shall be an amount equal to the weekly benefits paid to those wholly dependent persons during that initial six-year period, reduced by 50% of any weekly federal social security death benefits paid to those wholly dependent persons.

(iii) The issue of dependency shall be subject to review by the commission at the end of the initial six-year period and annually thereafter. If in any such review it is determined that, under the facts and circumstances existing at that time, the applicant is no longer a wholly dependent person, the applicant may be considered a partly dependent or non-dependent person and shall be paid such benefits as the commission may determine pursuant to subsection (2) (c) (ii).

(iv) For purposes of any dependency determination, a surviving spouse of a deceased employee shall be conclusively presumed to be wholly dependent for a six-year period from the date of death of the employee. This presumption shall not apply after the initial six-year period and, in determining the then existing annual income of the surviving spouse, the commission shall exclude 50% of any federal social security death benefits received by that surviving spouse.

(c) (i) If there are partly dependent persons at the time of the death, the payment shall be $66 \frac{2}{3}\%$ of the decedent's average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week, to continue during the dependence for the remainder of the period between the date of death and not to exceed six years or 312 weeks after the date of injury as the commission in each case may determine and shall not amount to more than a maximum of \$18,720. The benefits provided for in this subsection shall be in keeping with the circumstances and conditions of dependence existing at the date of injury, and any amount awarded by the commission under this subsection must be consistent with the general provisions of this title.

(ii) Benefits to persons determined to be partly dependent pursuant to subsection (2) (b) (iii) shall be determined

EXHIBIT "B"

by the commission in keeping with the circumstances and conditions of dependence existing at the time of the dependency review and may be paid in a weekly amount not exceeding the maximum weekly rate that partly dependent persons would receive if wholly dependent.

(iii) Payments under this section shall be paid to such persons during their dependency by the employer or insurance carrier.

(d) If there are wholly dependent persons and also partly dependent persons at the time of death, the commission may apportion the benefits as it deems just and equitable; provided, that the total benefits awarded to all parties concerned shall not exceed the maximum provided for by law.

(e) If there are wholly or partly dependent persons at the time of death and the total amount of the awards paid by the employer or its insurance carrier to said dependents, prior to the termination of dependency, including any remarriage settlement, does not exceed \$18,720, the employer or its insurance carrier shall pay the difference between the amount paid and the sum of \$18,720 into the second injury fund provided for in subsection (1).

Utah Code Annotated, Section 35-1-70 (1981).

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.

Utah Code Annotated, Section 35-1-99 (1991).

(1) If an employee claiming to have suffered an industrial accident in the service of his employer fails to give written notice within 180 calendar days to his employer or the commission of the time and place where the accident and injury occurred, and of the nature of the accident and injury, the employee's claim for benefits under this chapter is wholly barred. If, for any reason, an employee is himself unable to provide this written notice, the employee's next-of-kin or attorney may file it within the required 180-day period. Receipt of written notice is presumed if the employer complies with the terms of Section 35-1-97 by filing with the commission an accident report, or if the employer or its insurance carrier pays disability or medical benefits to or on behalf of the injured employee.

EXHIBIT "B"

(2) In nonpermanent total disability cases, an employee's medical benefit entitlement, except with respect to prosthetic devices, ceases if the employee does not incur, and submit to his employer or insurance carrier for payment, for a period of three consecutive years, medical expenses reasonably related to the industrial accident.

(3) A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is wholly barred, unless an application for hearing is filed with the industrial commission within six years after the date of the accident.

(4) A claim for death benefits is wholly barred, unless an application for hearing is filed within one year of the date of death of the employee.

EXHIBIT "B"