

1992

Hales v. Industrial Commission of Utah : Brief of Petitioner

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

Legal Brief, *Hales v. Industrial Commission of Utah*, No. 920319 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3249

This Legal Brief 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

UTAH
DOCUMENT

K F U

50

.A10

DOCKET NO. 920319

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,

vs.

INDUSTRIAL COMMISSION OF UTAH,
EMERY MINING CORPORATION and
ENERGY MUTUAL INSURANCE COMPANY,

Respondents.

Case No. 920319

Priority No. 7

BRIEF OF PETITIONERS

PETITION FOR REVIEW OF

DENIAL OF PETITIONERS' MOTION FOR REVIEW OF FINAL AGENCY

ACTION OF THE INDUSTRIAL COMMISSION OF UTAH

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

FILED

SEP - 2 1992

COURT OF APPEALS

T A B L E O F C O N T E N T S

	<u>Page</u>
Table of Authorities	ii
Jurisdiction of the Court	1
Statement of the Issue(s)/Standard of Appellate Review	1
Determinative Statute/Rule	2
Statement of the Case	2
A. Nature of the Case	2
B. Course of Proceedings	2
C. Disposition Below	3
D. Statement of the Facts	4
Summary of Argument(s)	5
Argument	
I. THE STANDARD OF REVIEW IN THIS CASE IS CORRECTION OF ERROR WITH NO DEFERENCE TO THE COMMISSION'S VIEW OF THE LAW.	7
II. THE STATUTE OF REPOSE CONTAINED IN UTAH CODE ANNOTATED, SECTION 35-1-68 (2) (1979) IS UNCONSTITUTIONAL AS VIOLATING THE "OPEN COURTS" PROVISION OF THE UTAH CONSTITUTION.	8
III. THE STATUTE OF REPOSE CONTAINED IN UTAH CODE ANNOTATED SECTION 35-1-68 (2) (1979) IS UNCONSTITUTIONAL AS VIOLATING THE "EQUAL PROTECTION" PROVISION OF THE UTAH CONSTITUTION.	13
Conclusion/Statement of Relief Sought	15
Addendum	17

TABLE OF AUTHORITIES

CASES:

	<u>Page</u>
<u>Baker v. Industrial Commission of Utah,</u> 405 P.2d 613 (Utah 1965)	12
<u>Berry v. Beech Aircraft Corp.,</u> 717 P.2d 670 (Utah 1985)	7, 9, 11
<u>Bevans v. Industrial Commission of Utah,</u> 790 P.2d 573 (Utah Ct. App. 1990)	6
<u>Grace Drilling Co. v. Board of Review,</u> 776 P.2d 63 (Utah Ct. App. 1989)	7
<u>McPhie v. Industrial Commission of Utah,</u> 567 P.2d 153 (Utah 1977)	8
<u>Malan v. Lewis,</u> 693 P.2d 661 (Utah 1984)	14
<u>Mor-Flo Industries v. Board of Review,</u> 817 P.2d 328 (Utah 1991)	2
<u>Morton International, Inc. v. Auditing Div. of the Utah</u> <u>State Tax Commission,</u> 814 P.2d 581 (Utah 1991)	2
<u>Nyrehn v. Industrial Commission of Utah,</u> 800 P.2d 330 (Utah App. 1990)	12
<u>Produce v. Industrial Commission of Utah,</u> 562 P.2d 1354 (Utah 1983)	12
<u>State Tax Commission v. Industrial Commission of Utah,</u> 685 P.2d 1051 (Utah 1984)	8
<u>Sun Valley Water Beds v. Hughes & Son,</u> 782 P.2d 188 (Utah 1989)	12
<u>Velarde v. Board of Review,</u> Case No. 910484-CA, (Decided April 14, 1992)	4, 6, 11, 13, 14
<u>Wrolstad v. Industrial Commission of Utah,</u> 786 P.2d 243 (Utah App. 1990), <u>cert. den.</u> , 795 P.2d 1138 (Utah 1990)	3, 4, 6, 8, 9

STATUTES

Utah Code Annotated, Section 35-1-68 (2) (1979)	1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 15
Utah Code Annotated, Section 35-1-81 (1988) 3
Utah Code Annotated, Section 35-1-82.53 (2) (1988) 1
Utah Code Annotated, Section 35-1-86 (1988) 1
Utah Code Annotated, Section 35-2-108 (3) (1991) 15
Utah Code Annotated, Section 63-46b-1 (1989) 7
Utah Code Annotated, Section 63-46b-16 (4) (d) (1988)	. . 1, 2, 8
Utah Code Annotated, Section 78-2a-3 (2) (a) (1988) 1

RULES

Rule 14 of the Utah Rules of Appellate Procedure 1
--	-------------

OTHER AUTHORITIES

Utah Constitution, Article I, Section 11 (1896)	. . . 2, 7, 8, 11
Utah Constitution, Article I, Section 24 (1896) 2, 14
2B Larson, <u>Workmen's Compensation Law</u> , Section 78.42(a), page 15-262 (1989) 10
2B Larson, <u>Workmen's Compensation Law</u> , Section 78.42(e), page 15-272.5 (1989) 10

JURISDICTION OF THE COURT

This is 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. A Petition for Review of that Order was timely filed with this Court on May 20, 1992.

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

STATEMENT OF THE ISSUE(S)/STANDARD OF APPELLATE REVIEW

There are two substantive issues presented for review:

(1) whether the statute of repose contained in Utah Code Annotated, Section 35-1-68 (2) (1979) is unconstitutional as contrary to the "Open Courts" provision of the Utah Constitution; and

(2) whether the statute of repose contained in Utah Code Annotated, Section 35-1-68 (2) (1979) is unconstitutional as depriving Petitioners of their 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 they 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) (d) (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

The Utah Constitution, Article I, Section 11 (1896) [Courts open - Redress of injuries] and Article I, Section 24 (1896) [Uniform operation of laws], along with Utah Code Annotated, Section 35-1-68 (1979) are the applicable determinative constitutional and statutory provisions. See Addendum Exhibit A.

STATEMENT OF THE CASE

Nature of the Case

Petitioners seek review of the Industrial Commission Order denying their Motion for Review wherein they sought dependents' benefits due to the death of David K. Hales, who was injured in an industrial accident on May 24, 1982 and died over 6 years later on November 25, 1988, allegedly as a result of his industrial accident.

Course of Proceedings

On March 23, 1989 and March 31, 1989, as required by Utah Code Annotated, Section 35-1-68 (2) (a) (1979), Petitioners, as Mr. Hales' dependents, filed dependents' death claims within one year of his demise alleging that Mr. Hales' demise was occasioned by his 1982 industrial accident. Emery Mining Corporation, Mr. Hales' Employer, and its workers compensation insurance carrier, Energy

Mutual Insurance Company, denied responsibility for death benefits based on the limitation found in Utah Code Annotated, Section 35-1-68 (2) (1979) which provides in relevant part that "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 as provided in Section 35-1-81 ..." and other compensation as provided in Section 68.

Disposition Below

On April 3, 1992 the Administrative Law Judge held that Petitioners' claims were barred by the six-year statute of limitations found in Section 68. Because Mr. Hales was injured in an industrial accident on May 24, 1982 and died over six years later on November 25, 1988, allegedly as a result of his industrial accident, Petitioners' claims were held to be forever barred. The Administrative Law Judge did note, however, that the reasoning of a prior decision of this Court (Wrolstad v. Industrial Commission, 786 P.2d 243 (Utah App. 1990), cert. den., 795 P.2d 1138 (Utah 1990) "... might be said to be analogous ...", but he declined to rule on Petitioners' constitutional challenge of Section 68. (R. at 103-110; and See Addendum Exhibit B.)

On April 17, 1992 Petitioners filed a Motion for Review with the Industrial Commission of Utah alleging, inter alia, that the statutory provision contained in Section 68 violated the Utah Constitution's "Open Courts" and "Equal Protection" provisions by extinguishing their constitutional right to litigate a valid claim before their right to file their claim arose, and treating

dependents of injured workers who die before six years from the date of the industrial accident differently than those of injured workers who die after six years from the date of the industrial accident. (R. at 108-111).

On May 6, 1992 the Industrial Commission affirmed the Administrative Law Judge's Order; however, the Industrial Commission noted in denying Petitioners' Motion for Review that "In view of Wrolstad v. Industrial Commission, 786 P.2d 243 [(Utah App.) 1990 [,cert. den., 795 P.2d 1138 (Utah 1990)] and the Velarde [v. Industrial Commission], 184 Ut. Adv. Rep. 79 (Utah Ct. App., filed, April 14, 1992)] case which was decided after the instant case, it is apparent that Section 35-1-68 (2) [1979] is likely to be declared unconstitutional." (R. at 118-120; and See Addendum Exhibit C). Nevertheless, and like the Administrative Law Judge, the Industrial Commission declined to rule on the constitutional question raised by Petitioners' Motion for Review indicating that such questions were beyond the agency's limited jurisdiction and that it would have to be addressed to this Court.

Statement of the Facts

The facts in this matter are not in dispute or at issue.

On May 24, 1982 the deceased, David K. Hales, sustained a compensable accident while employed by Emery Mining Corporation. (R. at 103). On that date, Mr. Hales was involved in an underground coal mine cave-in from which he suffered severe and unrelenting medical problems for the remainder of his life. (R. at 103).

He was initially paid temporary, total disability compensation, and was awarded 32% permanent, partial disability compensation for orthopedic and internal medical problems, and for anxiety, depression and intractable pain. (R. at 103). He continued to suffer from his industrial injuries which eventually culminated in his being awarded permanent, total disability compensation. (R. at 58-62).

On November 25, 1988, Mr. Hales was found dead at his home by his wife. (R. at 79). Petitioners subsequently filed dependents' death claims alleging that Mr. Hales' demise was occasioned by his 1982 industrial accident. (R. at 78). Those claims were denied as detailed above. Petitioners filed a Motion for Review with the Industrial Commission on April 17, 1992 (R. at 115), but it was denied on May 6, 1992 (R. at 118-120).

SUMMARY OF ARGUMENT(S)

Petitioners allege that Utah Code Annotated, Section 35-1-68 (2) (1979) violates the Utah Constitution's "Open Courts" provision. Petitioners' submit that the statute which permits an industrial death claim by dependents only in cases where the deceased dies within six years form the date of the industrial accident is an unconstitutional statute of repose because it deprives them of a cause of action before their claim for death benefits ever arose, i.e., when Mr. Hales died.

The deceased was injured in an industrial accident on May 24, 1982 and died on November 25, 1988, over six years after the

occurrence of his industrial injury. Petitioners allege that the industrial injury was the underlying cause of his death and filed their dependents' claims based thereon. Because the cause of action did not arise until Mr. Hales' death, Petitioners' claim could not have been filed until he died - if at all - which in this case was after the six year statute of limitation period provided for in Section 68 had expired. Petitioners should not now be penalized by being denied death benefits based upon Mr. Hales' failure to die before the expiration of the six year period of time following his industrial accident as provided for by Section 68.

Petitioners submit that Utah Code Annotated, Section 35-1-68 (2) (1979) is contrary to the "Open Courts" provision of the Utah Constitution. See Wrolstad, supra and Velarde, supra. It is difficult to distinguish this case from these two prior rulings of this Court involving statutes of repose in industrial compensation matters. Interestingly enough, even Respondent Industrial Commission of Utah acknowledges that the challenged statute in this case is "likely to be declared unconstitutional. (R. at 118). In addition, in response to the Petitioner's Motion for Summary Disposition essentially raising this argument, Respondents Emery Mining Corporation and Energy Mutual Insurance Company on July 10, 1992 conceded that the analysis and ruling in the Velarde, supra, case applies to Section 68 in this case.

And finally, the Petitioners further submit that the "Equal Protection" provision of the Utah Constitution requirement that all laws have uniform operation which has been interpreted as requiring

that "persons similarly situated should be treated similarly" further underscores the inequitable treatment of dependents whose deceased dies before as distinguished from those whose deceased dies after six years from the date of their respective industrial accidents, and who desire to file a claim for death benefits under Section 68. There can be no rational justification for the disparity which results since they have no control over the event which determines timeliness of the filing of a claim, i.e., the date of the injured worker's demise.

ARGUMENT

I

THE STANDARD OF REVIEW IN THIS CASE IS CORRECTION OF ERROR WITH NO DEFERENCE TO THE COMMISSION'S VIEW OF THE LAW.

This case was commenced after the effective date of the Utah Administrative Procedures Act (UAPA), Utah Code Annotated, Section 63-46b-1 et. seq. (1989), and is thus subject to the standard of review set forth in that act. Grace Drilling Co. v. Board of Review, 776 P.2d 63,66 (Utah Ct. App. 1989).

As under prior law, the determination of the appropriate standard of review turns on whether the issue presented is one of law, fact, or a question of mixed law and fact. There is no question that this dispute involves a pure question of law and such was recognized by the Industrial Commission in its Denial of Motion for Review. (R. at 118-120).

The central and essential issues presented on appeal deals with the constitutionality of a legislative enactment. Such issues are questions of law, which under Section 63-46b-16(4)(d) (1988) of the UAPA are reviewed pursuant to the "correction-of error" standard with no deference to the agency's view of the law being required. Bevans v. Industrial Commission of Utah, 790 P.2d 573 (Utah Ct. App. 1989).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of Petitioners' claims. State Tax Commission v. Industrial Commission of Utah, 685 P.2d 1051, 1053 (Utah 1984). McPhie v. Industrial Commission of Utah, 567 P.2d 153, 155 (Utah 1977).

II

THE STATUTE OF REPOSE CONTAINED IN UTAH CODE ANNOTATED, SECTION 35-1-68 (2) (1981) IS UNCONSTITUTIONAL AS VIOLATING THE "OPEN COURTS" PROVISION OF THE UTAH CONSTITUTION.

The so called "Open Courts" provision of the Utah Constitution, Article I, Section 11 (1896) provides in material part that "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law...." This constitutional provision has been construed to impose limitations on a legislature when it passes laws which modify the rights of those persons who have been injured in their person, property or reputation.

The proper analysis for determining whether a statute of repose unconstitutionally violates the "Open Courts" provision of the Utah Constitution was clearly delineated by the Utah Supreme Court in Berry v. Beech Aircraft Corp. 717 P.2d 670 (Utah 1985). Berry sets forth a two-pronged approach: (1) the law must provide the injured person an effective and reasonable alternative remedy; and (2) if there is no substantial and alternative remedy there must be a clear social or economic evil to be eliminated and the means selected must not be arbitrary or unreasonable.

A careful examination of those two prongs reveals that neither can be satisfied under Utah Code Annotated, Section 35-1-68 (2) (1979).

A. EFFECTIVE AND REASONABLE ALTERNATIVE REMEDY.

Petitioners did not have an effective and reasonable alternative remedy in this case for the simple reason that they could not file for dependents' benefits in a death claim until the injured worker died. The dependents of an injured worker who manages to survive for six years or more after his industrial injury and then succumbs are left wholly without remedy, if the six year statute of repose is constitutional.

There is no provision in the Workers' Compensation Act or other law which would allow one to file for speculative loss or impairment which does not presently exist, but which could conceivably come into existence in the future.

The Court in Wrolstad, supra at 245, acknowledged that "a person can't file an occupational disease claim for a disease he

does not know he has." Likewise, Petitioners could not file their dependents' death claims within six years of the date of the accident as required by the statute because they did not know, nor could anyone have known, that Mr. Hales was going to subsequently die from the injuries he suffered from the industrial accident. It is precisely that fact which makes the statute one of repose and not limitation.

Professor Larson cites the clear problems and fundamental unfairness that such a repose statute creates:

The classic illustration is that of the apparently trivial accident that matures into a disabling injury after the claim period has expired. A workman is struck in the eye by a metal chip, but both he and the company doctors dismiss the accident as a petty one, and of course no claim is made, since there is no present injury or disability. Eighteen months later a cataract develops as the direct result of the accident. If the statute bars claims filed more than one year after the 'accident,' and if the court applies the statutory language with medieval literalism, the workman can never collect for the injury no matter how diligent he is: he cannot claim during the year because no compensable injury exists; he cannot claim after the year, because the statute runs from the accident. 2B Larson, Workmen's Compensation Law, Section 78.42(a), page 15-262 (1989).

* * *

Limitations periods are of course constitutional in general, but is such a period valid when it begins to run before a claim exists and assumes to destroy it before it is born? Is it not elementary that the running of the period must be related to the time of acquisition of the enforceable right, rather than of some event which may or may not coincide with that acquisition? Suppose a statute were passed which said that, in the event of any highway collision, suit must be commenced within two years of the last presidential election. This is in no way any sillier or more oppressive than a statute which says that a man who gets a bit of grime in his eye in 1960 which causes only slight irritation must bring a claim for blindness within one year of that time--blindness that does not develop until 1962. 2B Larson,

Workmen's Compensation Law, Section 78.42(e), page 15-272.5 (1989).

Since the filing of a claim against the employer and/or its workers compensation insurance carrier must be filed with the Industrial Commission of Utah because of the exclusive remedy doctrine, Petitioners' inability to file their claims in this case through the industrial system because of the six year statute of limitation found in Section 68 does not provide them with any alternative, equal legal remedy for redressing their loss.

Thus, since Petitioners had no substitute equal alternative remedy to the one barred by the six year statute of repose, the statute can only be upheld if it passes the second prong of the Berry analysis.

B. EXISTENCE OF CLEAR SOCIAL OR ECONOMIC EVIL.

Under the Berry second prong, the purpose of the six year statute of repose must be to eliminate a clear social or economic evil. In addition, the statutes's extermination of Petitioners' remedy must not be an arbitrary or unreasonable means for achieving the objective. Berry at 680. To determine whether there is a clear social or economic evil, a due process type "balancing analysis" is to be applied which weighs the particular infringement on the Article I, Section 11 interest against the justifications offered for the restriction. Id. at 679-80.

Under the rule announced in Velarde, if the first prong of Berry is found violated, as is argued above, then the burden shifts to the Respondents to demonstrate the statute's constitutionality under the Berry second prong. Id. at 9. The Respondents below

utterly fail to carry this burden forward and in fact conceded that the statute is unconstitutional. (R. at 118).

The public policy of the Utah Workers Compensation Act is to alleviate hardship upon workers and their families when disabling, work-related injuries occur, and the statute is to be construed liberally to afford coverage to an injured worker during a time of need. Produce v. Industrial Commission of Utah, 562 P.2d 1354 (Utah 1983); Baker v. Industrial Commission of Utah, 405 P.2d 613 (Utah 1965). "Furthermore, to facilitate the purposes of the legislation, the Workers' Compensation Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the applicant." Nyrehn v. Industrial Commission of Utah, 800 P.2d 330, 333 (Utah App. 1990), and cases cited therein.

Against this interest the Respondents must demonstrate that there is a clear social or economic evil to be eliminated. The Legislature in enacting the six year statute of repose did not make legislative findings as the purpose the statute of repose was to serve. The social or economic evil argument simply does not apply to the facts of this case.

Mr. Hales' accident was promptly reported to his employers and Respondents have had the benefit of medical records over a considerable period of time. The existence of his industrial accident was established and he was awarded benefits accordingly. (R. at 228 and 258-62). Respondents can point to no difficulty and certainly no impossibility in defending the causation or existence of injuries in this matter. As the Court in Sun Valley Water Beds

v. Hughes & Son, 782 P.2d 118, 193 (Utah 1989) remarked in rejecting the same argument: "While the passage of time causes inherent difficulty in defending any lawsuit, it also causes equal, if not greater, difficulty in initiating just legal action."

Additionally, the same economic evil argument was made unsuccessfully by the Respondents in Velarde. In that case this Court held as follows:

We are not persuaded that easing an employer's burden in proving causation is an economic interest that rises to the level of a clear economic evil. Moreover, Kennecott makes no showing that the statute actually achieves the stated legislative purpose of reducing claims in which silicosis is actually caused by other sources.

* * *

This statutory scheme, which includes in its sweep the class of people for whom timing, rather than causation, is a problem, is overbroad in its application and thus unreasonable and arbitrary... Kennecott has thus failed to show that there is a clear social or economic evil to be eliminated by this statute of repose, and that the means of achieving the statute's purported economic objectives are not just 'an arbitrary and impermissible shifting of collective burdens to individual citizens.' (citations omitted) Id. at 11.

Respondents here suffer from the same failure. Not only is there no showing that the statute actually accomplishes any beneficent purposes, even if it did, such a purpose would not outweigh Petitioner's constitutional right to a remedy.

III

THE STATUTE OF REPOSE CONTAINED IN UTAH CODE ANNOTATED, SECTION 35-1-68 (2) (1981) IS UNCONSTITUTIONAL AS VIOLATING THE "EQUAL PROTECTION" PROVISION OF THE UTAH CONSTITUTION.

The principle of equal protection is set forth in the Utah Constitution, Article I, Section 24 (1896) as follows: "All laws of a general nature shall have uniform operation." The Utah Supreme Court has held that although dissimilar, this language embodies the same principal as the Fourteenth Amendment of the United States Constitution. It embraces the notion that "persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984).

In assessing whether a statute meets equal protection standards, a court must consider the objectives of the statute and whether the classifications contained therein provide a reasonable basis for promoting these objectives:

When persons are similarly situated, it is unconstitutional to single out one person or group of persons from among a larger class on the basis of a tenuous justification that has little or no merit. Id. at 671.

In Velarde, supra at 12, this Court held that "Because the open courts provision is dispositive, we need not reach the equal protection question." This Court in the interest of clarity and brevity should adopt the same analysis and dispose of this matter on the "open courts" analysis provided above.

Petitioner's argument under this point, however, is that the statute of repose at issue here impermissibly restricts dependents of an injured worker from bringing claims for dependents' benefits beyond an arbitrary time frame unlawfully discriminates against

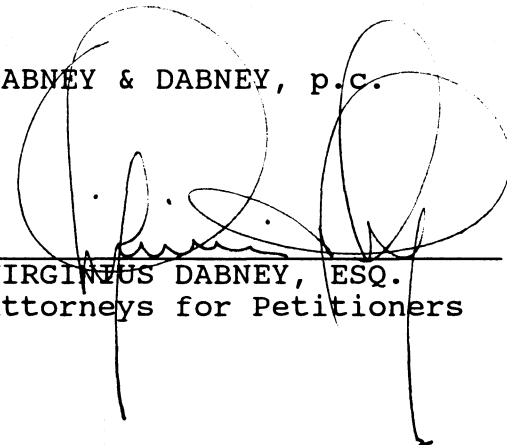
those dependents of injured workers who somehow manage to survive for six years following their industrial accident and then die due to causes directly related to the industrial injury.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

Petitioners respectfully request that this Court hold that the statute of repose for dependents of injured workers who die more than six years after the industrial accident found in Utah Code Annotated Section 35-1-68 (2) (1979)¹ is unconstitutional and remand to the Industrial Commission of Utah for a hearing on the merits.

DATED this 1st day of September, 1992.

DABNEY & DABNEY, p.c.



VIRGINIUS DABNEY, ESQ.
Attorneys for Petitioners

¹A similar provision in the Utah Occupational Disease Code, i.e., Utah Code Annotated, Section 35-2-108 (3) (1991), for similar reasons is constitutionally defective, and even though it is not directly involved in this case, should also be addressed in any decision issued by this Court.

PROOF OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of Petitioners were mailed, postage prepaid, on this 1st day of September, 1992 to the following:

Utah Court of Appeals (1 original & 4 copies)
400 Midtown Plaza
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

Benjamin A. Sims, Esq. (4 copies)
Industrial Commission of Utah
160 South 300 East
Post Office Box 510250
Salt Lake City, Utah 84151-0250

Rinehart I. Peshell, Esq. (4 copies)
FAIRBOURN & PESHELL
7321 South State
Midvale, Utah 84047

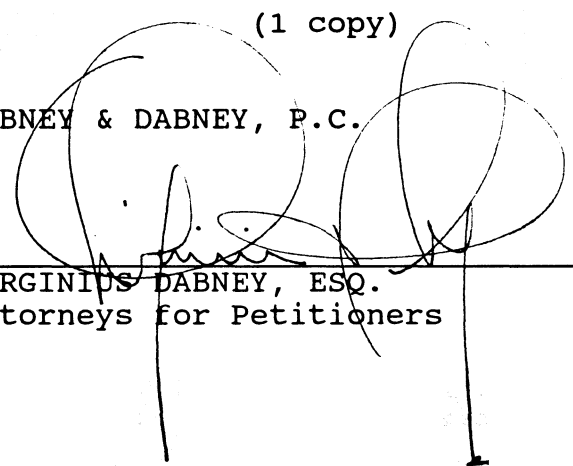
Dexter L. Anderson, Esq. (1 copy)
DEPUTY MILLARD COUNTY ATTORNEY
Star Route Box 52
FILLMORE, UTAH 84631

Mrs. Marilyn B. Hales (1 copy)
P.O. Box 93
Goshen, Utah 84633

Mrs. Robyn L. Chambers (1 copy)
3502 West 4305 South
West Valley City, Utah 84119

File (1 copy)

DABNEY & DABNEY, P.C.



VIRGINIUS DABNEY, ESQ.
Attorneys for Petitioners

ADDENDUM

EXHIBIT A: Utah Constitution, Article I, Section 11 (1896).
 Utah Constitution, Article I, Section 24 (1896).
 Utah Code Annotated, Section 35-1-68 (2) (1979).

EXHIBIT B: Order of April 3, 1992.

EXHIBIT C: Denial of Motion for Review of May 6, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Constitution, Article I, Section 11 (1896). [Courts open - Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Constitution, Article I, Section 24 (1896). [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

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 dependency 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 before any further claim may be asserted against 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 \$5 for each dependent minor child under the age of 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 not 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 dependency 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 dependency 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 by the commission in keeping with the circumstances and conditions of dependency 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 person 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).

THE INDUSTRIAL COMMISSION OF UTAH

CASE NO. 82002549, B87000882, C88000810
D89000288, E89000289

MARILYN R. HALES, Widow of, and *
DELBERT HALES, MONICA HALES, and *
CRISTAL HALES, Minor Dependent *
Children of DAVID K. HALES, *
Deceased, *

Applicants, *

vs. *

UTAH POWER & LIGHT (EMERY MINING) *
and/or ENERGY MUTUAL INSURANCE, *

Defendants. *

ORDER

* * * * *

Pursuant to a telephonic attorneys' conference on April 2, 1992, the parties stipulated that since this matter involves a threshold legal issue, no evidentiary hearing would be necessary. Rather, the parties and the Administrative Law Judge concurred that the proper forum for applicant's challenge to the constitutionality of Section 35-1-68 (as amended May 12, 1981) would be the Court of Appeals. The factual background prompting that challenge follows.

The deceased herein, David K. Hales sustained a compensable industrial accident on May 24, 1982 while employed by Emery Mining. On that date Mr. Hales was involved in a mine cave-in which he suffered a "crushed pelvis and right leg". In addition to receiving medical care for his injuries, the injured worker was paid temporary total disability for the period May 25, 1982 through March 15, 1983. Thereafter, Mr. Hales returned to work and on December 27, 1983 the Commission approved a Compensation Agreement whereby the employer agreed to pay the Mr. Hales a 32% combined permanent partial impairment for orthopedic residual problems and "anxiety, depression and intractable pain".

Unfortunately, Mr. Hales continued to have problems and in a visit to Dr. Hood on March 24, 1986, the Doctor noted that "[h]e continues to suffer periods of severe pain requiring Percodan, two tablets every four hours as well as use of a back brace and muscle relaxant." Dr. Hood concluded that Mr. Hales was not a surgical candidate and that "...I am very concerned about his long-term use of medications.

DAVID K. HALES, DECEASED
ORDER
PAGE TWO

On or about May 31, 1988 the parties, by and through counsel, entered a written stipulation that Mr. Hales was permanently and totally disabled as the result of his industrial accident and pre-existing conditions. Mr. Hales was placed on the Second Injury Fund(nka Employers Reinsurance Fund) permanent total disability payroll effective June 2, 1988 with lifetime benefits of\$218 per week.

On November 25, 1988 Mr. Hales was found dead of a multiple drug overdose, as the result of ingestion of codeine, meprobamate, diazepam, and carisoprodol.

The Commission received Claims for Dependents Benefits on March 31, 1989 from the surviving spouse, Marilyn R. Hales, and from Robyn L. Chambers on behalf of her minor children, Delbert, Monica, and Cristal Hales. In reviewing the claim filed by Robyn Chambers I note that she has listed herself also as a dependent of the deceased. However, in reviewing the file I can find no evidence that the deceased was providing any support to Ms. Chambers. The divorce decree appended to her Claim indicates that she was awarded the nominal sum of \$1 per year in alimony, hardly an amount sufficient to be deemed support for purposes of the Workers Compensation Act. Therefore, the dependency claim of Robyn Chambers must fail, and the same is hereby dismissed.

However, the minor children of the deceased are entitled to the statutory presumption of dependency since the deceased had a legal obligation of support for them pursuant to the divorce decree. The surviving spouse, Marilyn Hales, is also entitled to a presumption of dependency since she was married to the deceased and living with him at the time of his death.

The employer has denied liability for death benefits in this matter based on Section 35-1-68 (2) (as amended May 12, 1981). The relevant portion of that statute provides:

* * *

(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, ...

DAVID K. HALES, DECEASED
ORDER
PAGE THREE

The employer argues that since the death of Mr. Hales on November 25, 1988 did not result within six years of the industrial accident of May 24, 1982, the Claims of the applicants are barred by the statute of limitations contained in Section 68(2), supra. The applicants contend that the statute of limitations provision being invoked by the defendants is unconstitutional, and cite as support Wrolstad v. Industrial Commission, 786 P.2d 243 (1990). With the issue so framed, I would note that the Wrolstad decision case involved an asbestosis death claim, which had been barred by the one year statute of repose of Section 35-2-13(a)(2) of the Occupational Disease Act, while this case involves Section 35-1-68(2) of the Workers Compensation Act. While the reasoning might be said to be analogous, since a different statute was interpreted by the Court of Appeals in Wrolstad, that decision cannot be applied by the Commission to the instant case in dispute. Rather, as stated in the prefatory remarks, the appropriate forum for applicants' constitutional challenge of Section 68 (2) must be the Court of Appeals. The Commission has been granted limited jurisdiction, and does not possess the necessary general jurisdiction to rule on questions of constitutionality.


In view of the foregoing, I must dismiss the Claims for failure to comply with Section 35-1-68(2), Utah Code Annotated.

ORDER:


IT IS THEREFORE ORDERED that the Claims of the applicants for death benefits should be and the same are hereby dismissed with prejudice for failure to comply with 35-1-68(2), Utah Code Annotated, as amended May 12, 1981.

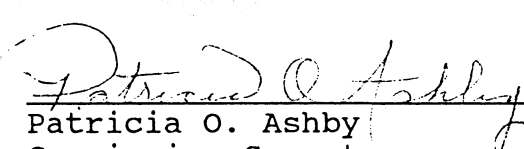
DAVID K. HALES, DECEASED
ORDER
PAGE FOUR

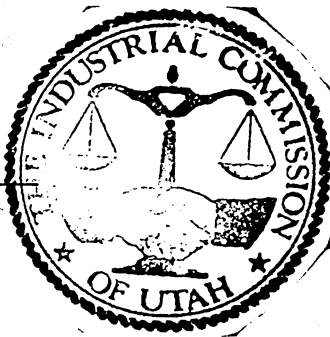
IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and , unless so filed, this Order shall be final and not subject to review or appeal.


Timothy C. Allen
Presiding Law Judge

Certified this 3rd day of
April, 1992.

ATTEST: 


Patricia O. Ashby
Commission Secretary



CERTIFICATE OF MAILING

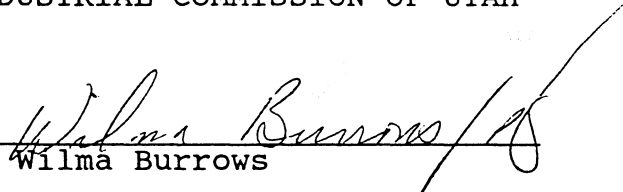
I certify that on April 3, 1992, a copy of the attached Order in the case of David K. Hales, Deceased was mailed to the following persons at the following addresses, postage paid:

Virginus Dabney, Esq.
350 South 400 East, #202
SLC, Utah 84111

Rinehart Peshell, Esq.
7321 South State
Midvale, Utah 84047

INDUSTRIAL COMMISSION OF UTAH

BY


Wilma Burrows

THE INDUSTRIAL COMMISSION OF UTAH
SALT LAKE CITY UT 84114-6615

MARILYN R. HALES, Widow of, and *
DELBERT HALES, MONICA HALES, and*
CRISTAL HALES, Minor Dependent *
Children of DAVID K. HALES, *
Deceased, *

Applicants, *

vs. *

DENIAL OF MOTION
FOR REVIEW

UTAH POWER & LIGHT (EMERY *
MINING) and/or ENERGY MUTUAL *
Insurance Companies, *

Case No. 82002549,
B87000882, C88000810,
D89000288, E89000289

Respondents. *

The Industrial Commission of Utah reviews the Motion for Review of applicant in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

This case involves a Motion for Review made by the applicants challenging the decision by the administrative law judge (ALJ) which held that U.C.A. Section 35-1-68(2) (as amended May 12, 1981) barred the claims of the applicants. The parties and the ALJ concurred, after a telephonic attorneys' conference, that the proper forum for applicants' challenge to the constitutionality of this section would be the Utah Court of Appeals.

Notwithstanding the concurrence of the parties, the Commission is not sure whether the District Court or the Court of Appeals is the proper forum to decide the issue presented. Alumbaugh v. White, 800 P.2d 825 (Ut. App. 1990) indicated that cases governed by the Utah Administrative Procedures Act (UAPA) (U.C.A. Sections 63-46b-1 et seq.) in which hearings were not held were properly appealed to the District Court, and not to the Court of Appeals. However, in Velarde v. Bd of Review, 184 Utah Adv. Rep. 70 (1992), another case governed by UAPA, the Court of Appeals accepted jurisdiction over the case, and issued its decision even though the Court recognized that no formal hearing had been conducted. See id. fn 2. These cases were issued by two different panels of the Court of Appeals, but each contained one judge in common. Since the Velarde case is closer in terms of issue to the instant case, we will advise the parties that their appeal, if any, from our decision is to the Court of Appeals.

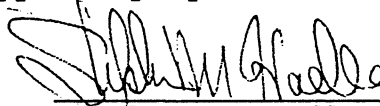
In view of Wrolstad v. Industrial Commission, 786 P.2d 243 (1990), and the Velarde case which was decided after the instant case, it is apparent that Section 35-1-68(2) is likely to be declared unconstitutional. Since the Commission has only limited jurisdiction, the Commission affirms the decision of the ALJ.

DAVID K. HALES, DECEASED
ORDER
PAGE TWO

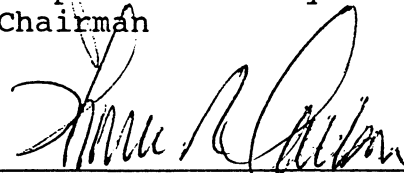
ORDER:

IT IS ORDERED that the order of the administrative law judge dated April 3, 1992 is affirmed.

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.



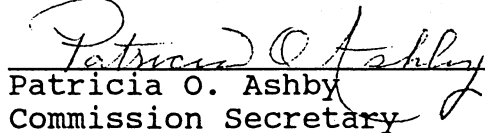
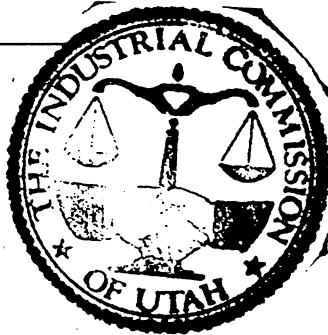
Stephen M. Hadley
Chairman



Thomas R. Carlson
Commissioner

Certified this 6th day of May 1992.

ATTEST:

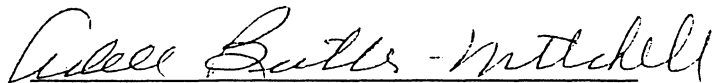

Patricia O. Ashby
Commission Secretary

CERTIFICATE OF MAILING

I certify that on May 6, 1992, a copy of the attached DENIAL OF MOTION FOR REVIEW in the case of MARILYN R. HALES widow of DELBERT HALES was mailed to the following persons at the following addresses, postage paid:

Rinehart L. Peshell
Fairbourn & Peshell
7321 South State Street
Midvale, UT 84047

Virginus Dabney
Dabney & Dabney
350 South 400 East Suite 202
Salt Lake City, Utah 84111


Adell Butler-Mitchell
Legal Assistant