

1992

Hales v. Industrial Commission of Utah : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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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 CO.,

Respondents.

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Case No. 920319

Priority No. 7

REPLY BRIEF OF PETITIONERS

PETITION FOR REVIEW OF

DENIAL OF PETITIONER'S MOTION FOR REVIEW OF

ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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FILED

NOV 9 1992

Mary T. Noonan
Clerk of the Court

11

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

	<u>Page</u>
Table of Authorities	ii
Determinative Statute/Rule	1
Reply to Respondents' Statement of Facts	2
Argument	
I. PETITIONERS HAVE NO CLAIM AGAINST THE EMPLOYERS REINSURANCE FUND.	3
Conclusion	6

T A B L E O F A U T H O R I T I E S

CASES

	<u>Page</u>
<u>Martinez v. Industrial Commission</u> , 720 P.2d 416 (Utah 1986)	5
<u>State Industrial Insurance System v. Lodge</u> , 822 P.2d 664 (Nevada 1991)	5
<u>Velarde v. Board of Review</u> , 831 P.2d 123 (Utah App. 1992) .	3, 5

STATUTES

Utah Code Annotated, Section 35-1-67 (2) (1981)	1, 4
Utah Code Annotated, Section 35-1-68 (2) (1979)	1, 2, 3, 6
Utah Code Annotated, Section 35-1-70 (1981)	1, 3, 4, 7

DETERMINATIVE STATE/RULE

The applicable determinative statutory provisions are Utah Code Annotated, Section 35-1-67 (1979), Section 35-1-68 (1979) and Section 25-1-70 (1980). They are set forth in applicable part as follows:

Utah Code Annotated, Section 35-1-67 (2) (1981)

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66 $\frac{2}{3}$ % of the employee's average weekly wage at the time of the injury, limited as follows:

(a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.

(b) Compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the maximum established in Subsection (a) nor exceeding the average weekly wage of the employee at the time of the injury.

(c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

Utah Code Annotated, Section 35-1-68 (2) 1979)

(2) If injury causes death within a 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:
...

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.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Although Reply Briefs are not required to respond to Respondent's Statement of Facts, Respondent's Brief contains an alleged Statement of Facts which is potentially prejudicial so it should not go unchallenged.

In their Statement of Facts, Respondents allege that Mr. Hales died as a result of "acute intoxication" from a combination of drugs and they attach, without citation to the Record, a copy of his Autopsy Report. Respondents' statement has the appearance of indicating fault on the part of the deceased worker which could be construed as an improper attempt to prejudice this Court on a non-issue before it. Petitioners submit that it is their position that the drugs which caused Mr. Hales' death were lawfully prescribed for him, and that there is medical evidence establishing that his overdose was directly and causally related to his industrial accident. However, this is an issue, perhaps, for another day.

This case as always been treated as one of pure law, i.e., the constitutionality of Utah Code Annotated, Section 35-1-68 (2) (1979), and this Court should not be distracted by unsubstantiated allegations of fault on the part of the deceased worker. Such allegations involve an issue of liability which is not presented in the present Petition for Review.

ARGUMENT

I

PETITIONERS HAVE NO CLAIM AGAINST THE EMPLOYERS REINSURANCE FUND.

Respondents have chosen not to defend the rationale and decision of the Administrative Law Judge or the Industrial Commission in issuing their respective Orders denying Petitioners' claims. In fact, Respondents Emery Mining Corporation and Energy Mutual Insurance Company, responded to the Petitioners' Motion for Summary Disposition on July 10, 1992 essentially conceding that the challenged statute constitutes an unconstitutional statute of repose in violation of the Utah State Constitution as interpreted by this Court in Velarde v. Board of Review, 831 P.2d 123 (Utah App. 1992). In addition, Respondent Industrial Commission indicated in its Denial of Motion for Review of May 6, 1992, that it was "...apparent that Section 35-1-68 (2) is likely to be declared unconstitutional."

Instead, Respondents, Emery Mining Corporation and Energy Mutual Insurance Company, have alleged an entirely novel argument raised for the first time in their Brief on Appeal to sustain the patently unconstitutional statute of repose contained in Utah Code Annotated, Section 35-1-68 (2) (1979). The sole argument of Respondents now is that the challenged statute is constitutional because Petitioners have an alternative industrial claim for death benefits, namely, a claim against the Employers Reinsurance Fund under the provisions of Utah Code Annotated, Section 35-1-70 (1981).

However, Utah Code Annotated, Section 35-1-70 (1981) provides as follows:

If any wholly dependent persons, who have been receiving the benefits of this title, at the termination of such benefits are yet in a dependent condition, and under all reasonable circumstances should be entitled to additional benefits, the Industrial Commission may, in its discretion, extend indefinitely such benefits; but the liability of the employer or insurance carrier involved shall not be extended, and the additional benefits allowed shall be paid out of the special fund provided for in subdivision (1) of Section 35-1-68. (Emphasis added).

This is a novel and entirely unprecedented argument. The primary problem with Respondents argument is that Section 35-1-70 (1979) by it's own terms is limited to "wholly dependent persons, who have been receiving the benefits of this title...." [Emphasis added] Petitioners as allegedly dependent survivors have neither directly nor indirectly received any benefits under the Utah workers compensation scheme. Respondents claim that the fact that since the deceased worker was receiving when he was alive an additional \$5 per week for his permanent, total disability compensation check for his dependent spouse and each dependent minor child, pursuant to Utah Code Annotated, Section 35-1-67 (1981), that his spouse and minor children were receiving the "benefits of the act". However, this argument fails for at least two reasons:

First, there is no evidence that any portion of Mr. Hales' weekly permanent, total disability check sent to him while he was alive included an additional dependents' allowance. In fact, Petitioners submit that his check did not include additional

dependents' allowance because he was earning well in excess of the state average weekly wage at the time of his industrial accident; and, therefore, he was entitled to the maximum weekly rate without the additional dependents' allowance being considered.

Second, it was clearly Mr. Hales who was receiving the "benefits of the act" on his claim - not his dependents. Even if Mr. Hales received an additional amount on his weekly compensation check because he had dependents, this does not mean that Petitioners were receiving the "benefits of the act" as dependents of a deceased worker - an entirely separate claim. See Velarde, supra. See also Martinez v. Industrial Commission, 720 P.2d 416 (Utah 1986) and State Industrial Insurance System v. Lodge, 822 P.2d 664 (Nevada 1991). Petitioners had no individual or independent claim to Mr. Hales' benefits while he was alive, and there is no evidence that they have received any workers compensation benefits occasioned by his demise. In fact, such benefits have been denied on the basis of the six year statute of limitations which is being challenged on constitutional grounds in this appeal.

Under the Respondents' rationale any dependent receives "benefits of the Act" when their provider - when living - receives benefits in his or her own right. There is absolutely no authority either by Rule, case law or practice and procedure which would support this interpretation and Respondents cite none. The plain fact is that Petitioners have no claim against the Employers' Reinsurance Fund and will receive no compensation at all unless

this Court declares the six (6) year statute of repose contained in Utah Code Annotated, Section 35-1-68 (1979) unconstitutional.

The Employers' Reinsurance Fund is not a party to this action and the Respondents have taken no action, either at the Industrial Commission level or on Appeal, to join it as a party Defendant/Respondent. The argument of the Respondents, if accepted by this Court, would increase the liability of the Employers' Reinsurance Fund and change existing policy and procedure, all without the opportunity of the Employers' Reinsurance Fund to appear and argue against such a new proposed liability.

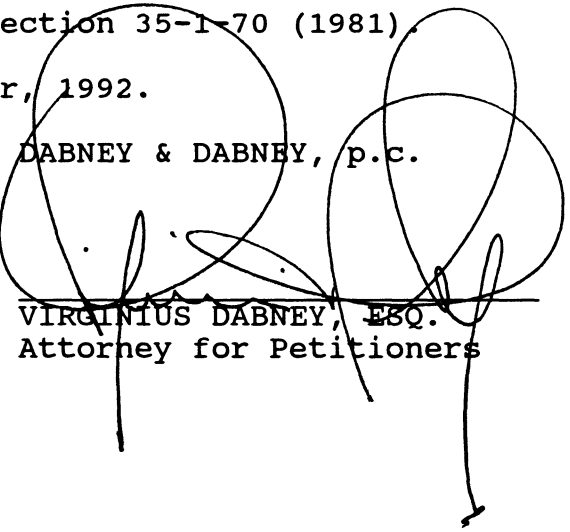
CONCLUSION

This case presents a question of pure law; i.e., whether Utah Code Annotated, Section 35-1-68 (1979) providing for a six year statute of limitations constitutes an unconstitutional statute of repose when applied to dependents of injured workers who die more than six years after the industrial accident allegedly causing death. For the reasons stated above and contained in their original Brief, Petitioners urge this Court to find the statute unconstitutional and remand for further adjudication of their claims.

In the alternative, and assuming that this Court is of the opinion that the constitutional challenge to Section 68 may be defective for the reason that the Employers' Reinsurance Fund may be separately liability for death benefits, this Court should remand this case to the Industrial Commission for the purpose of

joining the Employers' Reinsurance Fund to allow it to respond to Respondents' argument regarding liability on behalf of the Fund pursuant to Utah Code Annotated, Section 35-1-70 (1981).

DATED this 9th day of November, 1992.



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PROOF OF SERVICE

I hereby certify that true and correct copies of the foregoing Reply Brief of Petitioners were mailed, postage prepaid, on this 9th day of November, 1992 to the following:

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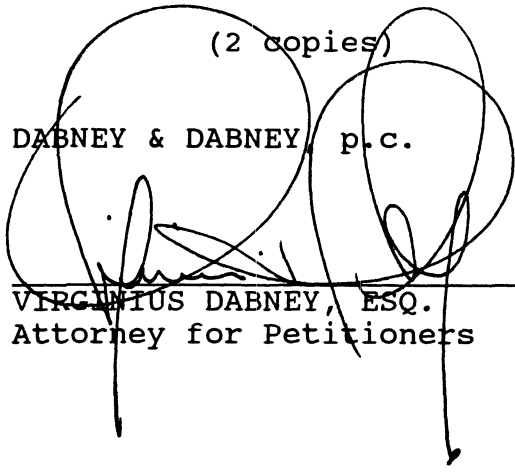
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