

1947

# Kennecott Copper Corporation vs. Industrial Commission of Utah : Brief of Appellee

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

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

C. C. Parsons; WM. M. McCrea; A. D. Moffat; Calvin A. Behle.

Unknown.

---

## Recommended Citation

Brief of Appellee, *Kennecott Copper Corporation v. Industrial Commission of Utah*, No. 19477127.00 (Utah Supreme Court, 1947).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/6](https://digitalcommons.law.byu.edu/byu_sc1/6)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court 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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
KFU  
45.9  
.S9  
DOCKET NO. 7127 P1

UTAH SUPREME COURT

BRIEF

MS. BEHLE, EVANS & LATIMER

# Supreme Court

OF THE  
STATE OF UTAH

KENNECOTT COPPER CORPORATION,  
(Utah Copper Division), a  
corporation,

*Plaintiff,*

vs.

THE INDUSTRIAL COMMISSION  
OF UTAH,

*Defendant.*

BRIEF OF PLAINTIFF

C. C. PARSONS,  
WM. M. McCREA,  
A. D. MOFFAT,  
CALVIN A. BEHLE,  
*Attorneys for Plaintiff.*

Dated December 3, 1947

# Index

I.	STATEMENT OF FACTS .....	1
	Medical Testimony .....	5
II.	STATEMENT OF ERRORS .....	9
III.	ARGUMENT .....	11
	<i>First:</i> There is no evidence that John Kucher was exposed to harmful quantities of silicon dioxide dust for a total period of not less than five years during the ten years immediately preceding his disablement; there is no evidence that John Kucher was, while employed by plaintiff, exposed to harmful quantities of silicon dioxide dust during a period of sixty days or more, or for any period, after July 1, 1941. The uncontradicted evidence is all to the contrary. ....	11
	<i>Second:</i> The last day of injurious exposure of John Kucher to the hazards of silicosis occurred prior to July 1, 1941 and prior to his employment with Plaintiff; and his employment with plaintiff was not the proximate cause of his disease. ....	11
IV.	CONCLUSION .....	20

# Citations

## UTAH CODE ANNOTATED 1943

42--1a--12 .....	2
42--1a--1 et seq. ....	10
42--1a--13a .....	11
42--1a--14 .....	12
42--1a--27 .....	18

## Uta-Carbon Coal Co. v. Industrial Commission

140 P. 2d 649 .....	9, 13, 14, 15
---------------------	---------------

## Bingamen v. Baldwin Locomotive Works

46 A (2) 512 .....	16
--------------------	----

## Hurtuk v. H. C. Frick Coke Co.

157 Pa. Super. 317, 43 A (2) 559 .....	17
--	----

IN THE  
**Supreme Court**  
OF THE  
**STATE OF UTAH**

---

KENNECOTT COPPER CORPORATION,  
(Utah Copper Division), a  
corporation,

*Plaintiff,*

vs.

THE INDUSTRIAL COMMISSION  
OF UTAH,

*Defendant.*

Case No.  
7127

---

BRIEF OF PLAINTIFF

I.

**Statement of Facts**

This is an original certiorari proceeding by Kennecott Copper Corporation, Utah Copper Division, against the Industrial Commission of Utah to review an award of the Industrial Commission of Utah under the Occupational Disease Disability Compensation Law in favor of John Kucher, wherein the following facts are not disputed:

Kennecott Copper Corporation, Utah Copper Division, plaintiff, is an employer and a self-insurer within the provisions of said law. John Kucher, applicant, was employed by said plaintiff from September 30, 1935 to July 15, 1946, on which latter date he became totally disabled by reason of silicosis complicated by active pulmonary tuberculosis. (Utah Code Annotated 1943, 42-1a-12.)

Prior to such employment by plaintiff, applicant worked in various underground mines: as a mucker from 1917 to 1920 in Butte, Montana; drilling for a little more than one year around 1921 in South Dakota; from 1922 to 1924 at the Smaggler property in Colorado; drilling in 1925 at Chief Consolidated in Bureka, Utah; mucking in 1926 at the Highland Boy in Bingham, Utah; drilling at Utah Apex, Bingham, Utah, from 1927 to 1929; and from 1930 to 1932 at the U. S. Mine at Bingham, Utah. (Tr. 10-14)

While employed by plaintiff, applicant worked as follows:

From September 30, 1935 to April 1, 1937 on the tracks;

From April 1, 1937 to May 20, 1937, as a car repairman in the shops;

From May 20, 1937 to January 5, 1938 as a car repairman outdoors "on the hill";

From January 5, 1938 to about the middle of August, 1938 as a car repairman in the shops;

From August, 1938 to January 21, 1946 as a car repairman outdoors "on the hill";

From January 21, 1946 to June 27, 1947 operations were shut down because of a strike;

From June 27, 1946 to July 15, 1946 as a car repairman outdoors "on the hill."

(Tr. 21, 24, 26, 40, 56, 72).

Applicant's duties while working as a car repairman on the hill consisted of being on the designated spot ready to do such light repair work on the ore or waste cars as they were hauled from the open pit mine along the various levels of the mine. He was not employed near drilling or blasting operations or on the levels when cars were dumped. He worked on the bearings, oiling and re-packing the journal boxes, repairing the brakes, changing the brake shoes, repairing air lines and valves and inspecting the cars. (Tr. 41)

Car repairmen on the hill do not work constantly but only as cars are brought to their stations in need of repair work. After the cars needing repair were fixed they would wait for the next train needing repairs. (Tr. 31, 64, 106.) Car repairers' shacks were furnished where tools, equipment, grease, etc. were kept and where applicant could wait for the next assignment. (Tr. 66, Ex. G) As a rule car repairmen spend very little of their time actually working; they are required to be on hand should occasion arise demanding their services. To illustrate, spot checks made show that actual work consumed, on one occasion, 2 hours 20 minutes; on another, 30 minutes; and on another, 40 minutes. (Tr. 106)

Recent dust counts made in accordance with the standard procedure adopted by the United States Public Health Service show that car repairmen working outdoors on the various levels were exposed to a weighted average of 1.26 million particles of dust per cubic foot of air (m.p.c.f.) with an absolute maximum of 4.5 m.p.c.f. (Tr. 105)

The only evidence as to what concentration of dust would constitute a harmful quantity was that introduced by plaintiff through the witness Pring (Tr. 99 et. seq.):

1. United States Public Health Service Bulletin No. 270, which is a survey of the working environment and health of workers in coal and metal mines and nonferrous metal smelters in Utah.

2. Bulletin No. 269, a survey of the granite industry in Vermont.

3. Bulletin 250, a study of mica and teginite.

4. Bulletin 221, a study of the hard coal industry.

5. New York State Industrial Commission Code.

And by the witness Dr. R. T. Jellison, who testified that "dust is very dangerous in porphyry dust probably 15 m.p.c.f., and in quartzite less, maybe five." (Tr. 55)

Except in the case of men with underground experience no silicosis has been found among the men working in plaintiff's mining operations. (Tr. 104-5; 109-111.)

### **Medical Testimony:**

Dr. R. T. Jellison, a member of plaintiff's medical staff, testified (Tr. 54) that applicant on August 22, 1938 had "an almost third degree silicosis with a complication, no doubt, of tuberculosis;" that he "would call it third stage to be definite," that "it diffused throughout both lungs;" that "I don't think he would get that bad in five years;" that "it could not develop that far in five years."

COMMISSIONER EGAN: Could it develop in ten years?

A. I doubt it very much.

And at page 55: "The pathological picture changes in a lung with silicosis as time goes on, regardless of exposure. It may be a little slower, it could be aggravated by constant irritation from exposure in a certain particle count of dust in the air. There has been so much written on this. I think, as near as I can come to it, that dust is very dangerous in porphyry dust, probably 15 m.p.e.f. and in quartzite less, maybe 5 \* \* \*. That is where silicosis begins from constant exposure." (Tr. 57) "He had tuberculosis and his tuberculosis has increased. But so far as the silicosis is concerned, I don't think it has developed any more than you might expect in just the natural continuity of events. I can't see anything else to say. He is incapacitated now on account of tuberculosis. If he had an uncomplicated silicosis of that type he would probably be working."

Dr. William Ray Runel testified (Tr. 84 et. seq.) that applicant's condition as revealed by the X-Ray of August 22, 1938 was a quite well advanced silicosis with a secondary tubercular infection, classed by the witness as S-3. And, assuming that he knew nothing of applicant's history, that the disease was contracted "certainly prior to 1935 because I think it is generally accepted that even though with your exposure to harmful concentration of dust, that stage has extended over a period of ten to fifteen years before that stage of tuberculosis develops, and this is certainly a far advanced stage. *So I think without question this man was exposed and developed this lung condition before 1935.*

Q. If we assume that the patient had worked for many years prior to 1935 in underground mines, would that alter or influence your previous answer?

A. It would fit into the development of those changes which have taken place over a fairly long number of years rather than a few months time.

Q. Then, Doctor, it is your opinion with the date that photograph was taken, that man had silicosis complicated with tuberculosis?

A. Yes.

Q. In 1938?

A. Yes.

Q. That the picture taken July 18, 1946 shows a definite progress?

A. Yes, it is definite. I don't think it is extremely marked.

Q. If the man in the condition as shown by the previous X-Ray was exposed to no silica dust over that intervening period of some eight years, would such progress as shown by this picture be a normal situation to expect?

A. I think so. I think the majority of the patients with silicosis show gradual progression, usually rather slow increase in the markings, so I think that would be possible without any further dust exposure.

Q. And with just the ordinary dust like everyone on the streets of Salt Lake City would encounter.

A. Yes.

That from July 18, 1946 to April 19, 1947 "there has been a little progress in the disease."

Q. (By Commissioner Egan): I am trying to find out how you can state he contracted that prior to 1935?

A. In the first place, the way the usual case of tuberculosis develops, we know that in the period from 1938 up to 1946 that the changes within the eight year period were relatively small, and with his reaction of the tissues to the disease changed very little in that period of time. So it would be reasonable to assume that the changes would have developed at a slow rate before that time.

\* \* \* \*

- Q. Now you testified a little while ago that the film taken in 1938 indicated that silicosis and tuberculosis was of long standing. What indicated that to you, that his man had tuberculosis of long standing?
- A. It is mainly the pattern of these pathologic changes that are shown on the film. In the first place, silicotic nodules, they are scattered throughout and develop slowly. The fibrosis reaction that occurs and this conglomeration that occurs, it takes a long time to develop. This whole picture is primarily that, the conglomeration and nodulation forming these masses.
- Q. You are forming your opinion on the difference between that picture and the picture of 1946?
- A. No. I am making that statement on this film alone.
- Q. You can determine that by looking at that film how long it has taken to develop the disease at this stage?
- A. Comparatively, yes.
- Q. By nodulation and fibrosis and other things that are shown in the picture?
- A. Yes.
- Q. But you could be mistaken?
- A. That is possible.
- Q. It is always possible to be mistaken?
- A. Yes, but the possibility is very small. When it does develop rapidly within a period of months, the pic-

ture is usually different than this. It has a different characteristic.

On that record defendant, Industrial Commission of Utah, rendered its decision dated August 7, 1947, review of which is here sought. Petition for rehearing was denied by defendant on September 16, 1947.

By its said decision defendant purports to find "that the applicant has been exposed to harmful quantities of silica dust during the past eleven years of his continuous employment at the Utah Copper mine \* \* \*" and "concludes that the applicant, John Kucher, was exposed to harmful quantities of silica dust as defined by the Supreme Court of Utah in Uta-Carbon Coal Company v. Industrial Commission of Utah, 140 P. 2d 649, during the period of his employment at Bingham, Utah, by the Utah Copper Company \* \* \*." Accordingly full benefits were awarded John Kucher.

## II.

### Statement of Errors

1. Said decision and order of defendant, Industrial Commission of Utah, is unlawful, contrary to law, and against the undisputed evidence, is without support in the evidence and is in excess of the jurisdiction of said Industrial Commission.

2. There is no competent evidence that John Kucher

was exposed to harmful quantities of silicon dioxide dust while in the employ of plaintiff and during a period of sixty days or more after July 1, 1941, the effective date of the Occupational Disease Disability Law (Ch. 1A, Title 42, Utah Code Annotated 1943).

3. The evidence is uncontradicted that John Kucher was not exposed to harmful quantities of silicon dioxide dust during a period of sixty days or more after July 1, 1941 or for any other period while employed by plaintiff.

4. The evidence is uncontradicted that John Kucher was not exposed to harmful quantities of silicon dioxide dust for a period of not less than five years during the ten years immediately preceding his disablement on July 15, 1946.

5. That the uncontradicted evidence is that John Kucher had contracted silicosis, complicated with tuberculosis, long prior and more than five years prior to August 22, 1938 and long before the effective date of said Act and long prior to his employment by plaintiff.

6. The evidence is uncontradicted that the disease from which John Kucher suffered, to wit, tubercular silicosis, was not the result of any exposure to silicon dioxide dust while in the employ of plaintiff.

7. That the conclusion of law made by defendant are not sustained by any findings of fact.

### III.

#### Argument

We believe that plaintiff's argument can be best discussed under two general heads:

*First:* There is no evidence that John Kucher was exposed to harmful quantities of silicon dioxide dust for a total period of not less than five years during the ten years immediately preceding his disablement; there is no evidence that John Kucher was, while employed by plaintiff, exposed to harmful quantities of silicon dioxide dust during a period of sixty days or more, or for any period, after July 1, 1941. The uncontradicted evidence is all to the contrary.

*Second:* The last day of injurious exposure of John Kucher to the hazards of silicosis occurred prior to July 1, 1941 and prior to his employment with Plaintiff; and his employment with plaintiff was not the proximate cause of his disease.

#### First

It is provided in Section 13a (3) of Chapter 1a, Title 42, Utah Code Annotated 1943:

No compensation shall be paid in case of silicosis unless during the ten years immediately preceding the disablement the injured employee shall have been exposed to harmful quantities of silicon dioxide ( $\text{SiO}_2$ ) dust for a total period of not less than five years in this state and unless total dis-

ability results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

And in Section 14:

42-1a-14. *Last Employer Liable--Exception.*

Where compensation is payable for an occupational disease the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, *provided* that in the case of silicosis the only employer liable shall be the employer in whose employment the employee was last exposed to harmful quantities of silicon dioxide ( $\text{SiO}_2$ ) dust during a period of sixty days or more after the effective date of **this act**.

Thus it must be established and found as a fact that John Kucher was so exposed for a total of five years between July 15, 1936 and July 15, 1946, the latter being the date of disablement, and for a period of sixty days or more after July 1, 1941. During those ten years applicant was working most of the time outdoors, only a minor fraction of his time spent in actual work, many months of each year when snow was on the ground. (Tr. 16-17.) Such was his employment for the entire period except eight months and twenty-seven days in the shop (April 1, 1937 to May 20, 1937 and January 5, 1938 to August 15, 1938). During the remainder of the period and always after July 1, 1941 he was exposed to a dust concentration of only 1.26 million particles per cubic foot of air weighted average). (Tr. 43.) But the Industrial Commission ignored this average figure and seized upon

the maximum concentration recorded of 4.5 m.p.c.f. Industrial Commission also ignored all the testimony that constant exposure for a period of at least ten years to a dust concentration of at least 5 m.p.c.f. were necessary to induce silicosis.

This court admonished in *Uta-Carbon Coal Co. v. Industrial Commission*, 104 P. 2d 649, that:

"In the absence of legislative or medical standards, in order to give effect to the Act, the Commission must determine what are harmful amounts of silicon dioxide dust from the facts of each individual case."

To aid the defendant to make such determination plaintiff used bulletins published by the United States Public Health Service, to all of which defendant paid no attention. Those bulletins were available to the defendant and for its benefit were summarized by Witness Pring (Tr. 37 et seq.). The United States Public Health Service in Bulletin 270 stated its findings with respect to miners in Utah, to wit, that no silicosis was found where the exposure to dust was less than 6 m.p.c.f.; in Bulletin 269 its findings with respect to the granite industry in Vermont, to wit, that the maximum permissible concentration of granite dust lies between 9 and 20 m.p.c.f.; in Bulletin 250, a study of mica and teginite, where no silicosis was found where the dust concentration was less than 10 m.p.c.f.; Bulletin 221, a study of the hard coal industry, stating that the safe limits of dust concentration where the dust contains 13% free

silica was 10-15 m.p.c.f.; and the New York State Industrial Commission's code establishing an allowable concentration of 10 m.p.c.f. where the silica is 10% or more.

The experience of this plaintiff in its open pit mining operations bears out the above conclusions—out of approximately 2000 employees none were shown to have silicosis unless they had a history of underground employment with one exception, and he worked as a railroad hostler. (Tr. 110)

Dr. Jellison, from his long experience with chest diseases and X-Ray interpretation, and R. T. Pring, Industrial Hygienist, who spent more than thirteen years studying industrial hygiene and seeking to protect health of workers, were each of the opinion that car repairmen were not exposed to harmful quantities of silicon dioxide dust.

All this evidence—competent, uncontradicted and from reliable sources, in some instances from the United States Government—was completely ignored by defendant.

Seeking to obviate the effect of the uncontradicted evidence, the defendant stated that John Kucher was exposed to harmful quantities of silicon dioxide as defined by this court in the Uta-Carbon Coal case supra. The fact is that this court refused to define harmful quantities, holding that it is a matter to be determined in each individual case.

As we understand that case, the applicant therein had been employed for eleven years in underground mines in Utah, seven being in the Uta-Carbon Coal Company's employment. While so employed by that company he contracted silicosis and since some silica dust was present in that mine and the previous employment was under similar conditions, it followed that he must have been at some time exposed to harmful quantities of silica dust. How else could the disease have been contracted? The court said:

"The commission having found that applicant contracted silicosis on April 18, 1942, added to the facts that there was dust in plaintiff's mine and that applicant worked where he breathed this silica dust, we believe there was sufficient grounds for the commission's findings, that he was exposed to harmful quantities of silicon dioxide dust for a period of not less than five years in this state during the ten years immediately preceding his disablement. *The fact that he had contracted silicosis while working in plaintiff's mine was sufficient evidence from which the commission could find that applicant was exposed to harmful quantities of silicon dioxide dust. (Italics ours.)*

\* \* \* \*

Silicosis is not a disease to which workmen would be equally exposed outside the place of employment. It is contracted by the inhaling of silicon dioxide dust over a more or less long period of time. This dust was present in Uta-Carbon Coal Company's mine and *the fact that applicant contracted silicosis while in its employ is sufficient to show that the dust which he inhaled there was the proximate cause of his injury. (Italics ours)*

This court has held that if silicosis is contracted at a particular employment, nothing more appearing, that fact will support a finding that that employment entails an exposure to harmful quantities. But in the case at bar John Kucher did not contract silicosis while employed by plaintiff—the only evidence is that he had it prior to 1935 when he was first employed by plaintiff. Being deprived of that fact, i.e., that he had contracted silicosis while employed by plaintiff, defendant must look to the evidence in this case to determine whether he was exposed to harmful quantities, and in this it failed.

Undisputed evidence, and the only evidence in this case, is to the effect that the only exposure to harmful quantities of silicon dust to which applicant was subjected occurred prior to 1935, the date of his first employment with plaintiff. That he was so exposed prior to that time is an inescapable conclusion.

We agree with the views of the Superior Court of Pennsylvania as stated in *Bingamen v. Baldwin Locomotive Works*, 46 A. (2) 512:

“We fully recognize that the Pennsylvania Occupational Disease Act \* \* \* should receive the same liberal construction that has been given the Workmen’s Compensation Act. \* \* \* But as the court below in its opinion very well stated, where the requirements of the statute are clear, the intention and meaning of the legislature, as expressed therein, may not be ignored. \* \* \*

“We desire to make it clear that in our opinion employment in an occupation having a silica hazard \* \* \* exists only where an employee

is subjected to the hazard of exposure to the dust of silicon dioxide.”

Plaintiff's evidence above set out is the only evidence in this record as to the dust exposure and as to the concentration of dust necessary to induce silicosis. Because there is no evidence that applicant was exposed to quantities of dust sufficient to cause the disease, and all the evidence is to the contrary, the award must be annulled. The case is squarely within the rule announced in *Hurtuk v. H. C. Frick Coke Co.*, 157 Pa. Super. 317, 43 A (2) 559, at 561:

Appellant also assigns as error the referee's fifth finding of fact: “No testimony was offered by the claimant to prove a silica hazard, nor did the defendant adduce any testimony in this case. Therefore this record is barren of any evidence that would warrant a finding that the claimant, over his period of employment with the defendant, was subject to a silica hazard.” The record supports this finding of fact. Although the doctor diagnosed claimant's lung condition as anthracosilicosis, claimant offered no evidence to prove that he was subject to a silica hazard in the defendant's employ. The Occupational Disease Act of 1939, *supra*, §301 (d), 77 P.S. §1401 (d), provides: “Compensation for silicosis or anthracosilicosis, and asbestosis, shall be paid only when it is shown that the employee has had an \* \* \* employment \* \* \* in and occupation having a silica or asbestos hazard.” Proof of the silica hazard, therefore, is an essential part of the claimant's case. “The burden of proof rested on the claimant to show by a preponderance of the evidence all the elements necessary to support an award.” *Ewing v. Alan Wood Steel Co.*, 138 Pa.

Super. 519, 12 A. 2d 121, 123; Connelly v. Bachman et al., 155 Pa. Super. 372, 38 A. 2d 348. Claimant failed to meet this burden. He neither proved that he was totally disabled nor that he was exposed to a silica hazard. Consequently, his claim for compensation must be disallowed.

## Second

No award for disability due to silicosis is permissible unless it shall be established that applicant has been exposed to harmful quantities of silicon dioxide dust during the periods prescribed by the legislature; nor unless it shall be established that the employment is the proximate cause of the disease. No award is permissible unless the last day of exposure to the hazards of silicosis occurred after July 1, 1941.

It is provided in Section 42-1a-27, Utah Code Annotated 1943:

### 42-1a-27. *Occupational Diseases—Proximate Causation.*

The occupational diseases hereinafter defined shall be deemed to arise out of the employment, only if there is a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease must be in-

cidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence.

X-Ray photographs (Exhibits.....) were introduced in evidence, were interpreted by experts, and conclusively establish that John Kueher had silicosis for certainly five, probably ten years, prior to his first employment by plaintiff on September 30, 1935. By 1938 the disease had progressed to third stage, and from 1938 to July, 1946, had progressed only as it would have had there been no exposure. There is therefore no connection between applicant's disease and his employment with plaintiff. No employment since 1935 could be the proximate cause of his disability—the disability was caused by events occurring prior to his employment by plaintiff; and at least six years before the effective date of the Occupational Disease Disability Act. The only testimony presented established that applicant “was exposed to and developed this lung condition before 1935;” and further, the Utah Legislature, recognizing realities, has defined silicosis as being a disease “caused by the *prolonged* inhalation of silicon dioxide dust.” Exposure from September 30, 1935 to August 22, 1938, had there been such, could not, according to medical experience or to the Utah Legislature, have caused the disease shown to be present August 22, 1938.

## CONCLUSION

The award made by defendant should be annulled and set aside because:

1. There is no evidence that applicant, John Kucher, was exposed to harmful quantities of silicon dioxide dust for a total period of not less than five years during the ten years immediately preceding his disablement; all the evidence is to the contrary.

2. There is no evidence that applicant, John Kucher, was exposed to harmful quantities of silicon dioxide dust while employed by plaintiff during a period of sixty days or more after July 1, 1941; all the evidence is to the contrary.

3. The evidence conclusively establishes that the last day of injurious exposure of applicant to the hazards of silicosis occurred prior to July 1, 1941.

4. The disease did not arise out of applicant's employment by plaintiff and was not proximately caused thereby within the meaning of the Occupational Disease Disability Law.

C. C. PARSONS,  
WM. M. McCREA,  
A. D. MOFFAT,  
CALVIN A. BEHLE,  
*Attorneys for Plaintiff.*