

1975

# Kennecot Copper Corporation v. Industrial Commission of Utah and Irene W. Peay, Widow of Justin W. Peay, Deceased : Unknown

Utah Supreme Court

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## Recommended Citation

Legal Brief, *Copper Corp v. Industrial Commission of Utah*, No. 13676.00 (Utah Supreme Court, 1975).  
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# IN THE SUPREME COURT OF THE STATE OF UTAH

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KENNECOTT COPPER  
CORPORATION,

vs.

THE INDUSTRIAL  
COMMISSION OF UTAH and  
IRENE W. PEAY, Widow of  
JUSTIN W. PEAY, Deceased,

*Defendants.*

*Plaintiff,*  
BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

DEC 9 1975

Case No.  
13676

## PLAINTIFF'S BRIEF

Original Proceeding to Review an Award  
of the Industrial Commission of Utah

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FILED

JUL 5 1974

THAT NO COMPENSATION, INCLUDING BURIAL EXPENSES, CAN BE RECOVERED UNLESS THE RE-  
QUIREMENTS OF SECTION 35-2-13 HAVE BEEN SATISFIED

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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KENNECOTT COPPER  
CORPORATION,

*Plaintiff,*

vs.

THE INDUSTRIAL  
COMMISSION OF UTAH and  
IRENE W. PEAY, Widow of  
JUSTIN W. PEAY, Deceased,

*Defendants.*

Case No.  
13676

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## PLAINTIFF'S BRIEF

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### STATEMENT OF NATURE OF CASE

This is an original proceeding before the Supreme Court of Utah for the purpose of having the lawfulness of an Amended Order dated February 22, 1974 and finalized on April 15, 1974 by the Industrial Commission of Utah in proceedings entitled *Irene W. Peay, Widow of Justin W. Peay, deceased, applicant v. Kennecott Copper Corporation, defendant*, File No. 2U5-OD-148, inquired into and determined as provided by §35-2-37, Utah Code Annotated 1953, as amended.

## DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH

On January 8, 1974, the Industrial Commission of Utah in Claim No. 2U5-OD-148 issued Findings of Fact, Conclusions of Law and Order in favor of Kennecott Copper Corporation and against applicant, Irene W. Peay, Widow of Justin W. Peay, deceased. Irene W. Peay, on January 10, 1974, filed with the Commission a Motion for Review and on February 22, 1974, the Industrial Commission of Utah issued an Amended Order in favor of Irene W. Peay and against Kennecott Copper Corporation allowing burial benefits to applicant Irene W. Peay as widow of Justin W. Peay, deceased. Kennecott Copper Corporation, plaintiff herein, on March 13, 1974, filed with the Industrial Commission of Utah a Motion for Review of the February 22, 1974 Amended Order. The Motion for Review was denied by Order entered by the Industrial Commission of Utah on April 15, 1974. Plaintiff filed this action with the Supreme Court of Utah on April 25, 1974.

## RELIEF SOUGHT ON REVIEW

Plaintiff, Kennecott Copper Corporation, upon this review seeks to have the Amended Order issued by the Industrial Commission on February 22, 1974 set aside in its entirety.

## STATEMENT OF FACTS

The essential facts pertinent to this controversy are not in dispute and may be summarized as follows:

Justin W. Peay worked at the Arthur Plant of plaintiff from March 1913 until June 30, 1956 at which time he was retired under the pension plan for hourly employees for permanent and total disability. On June 21, 1956, the Industrial Commission entered a tentative Order of total permanent disability due to third degree silicosis with inactive tuberculosis and plaintiff was ordered to pay weekly compensation benefits to said Justin W. Peay, beginning July 1, 1956 and continuing for five (5) years thereafter or until further order of the Commission, but in no event to exceed the then statutory maximum of \$12,100.00 (R. 5). On December 20, 1961, a final Order of permanent total disability was entered by the Commission based upon the certification from the Division of Vocational Rehabilitation that Justin W. Peay could not be vocationally rehabilitated (R. 9). Plaintiff in said Order was directed to continue weekly compensation payments until the statutory maximum of \$12,100.00 was paid in full after which Mr. Peay was placed upon the Combined Injury Benefit Fund for the remainder of his life.

Justin W. Peay died at the age of 84 on January 11, 1973, almost seventeen (17) years after he last worked for plaintiff, Kennecott Copper Corporation, and this claim was filed with the Industrial Commission of Utah by his widow, Irene W. Peay, on February 21, 1973 seeking payment of burial bonefits pur-

suant to §35-2-15(e), Utah Code Annotated 1953, as amended. Plaintiff contended that as a matter of law, the provisions of §35-2-13(b)(3), Utah Code Annotated 1953, as amended, barred the recovery by applicant of any death compensation benefits, including burial expenses, where, as here, the death of the employee occurred more than five (5) years from the last day upon which the employee actually worked for the employer against whom compensation was claimed. The hearing examiner agreed with plaintiff herein and on January 8, 1974 issued Findings of Fact, Conclusions of Law and Order dismissing the claim for burial benefits (R. 77). Mrs. Peay's Motion for Review was filed on January 10, 1974 and the Industrial Commission on February 22, 1974 entered an Amended Order (Commissioner Stephen Hadley dissenting) in favor of Irene W. Peay for burial expenses in the amount of \$450.00, said sum being the statutory amount at the time the employee was determined to be totally and permanently disabled (R. 82). Plaintiff filed a Motion for Review on March 13, 1974 (R. 85); and a further Motion was filed in behalf of the applicant on March 14, 1974 (R. 87) claiming that burial benefits should be allowed in the amount specified by law at the time of death. The Industrial Commission by Order dated April 15, 1974 affirmed the Amended Order of February 22, 1974 and denied both Motions for Review (R. 88). Plaintiff filed this action on April 25, 1974 requesting the Supreme Court of Utah to set aside the Amended Order of February 22, 1974 issued by the Industrial Commission of Utah (R. 89).

## STATEMENT OF POINTS

### POINT I

SECTION 35-2-13(b) (3), UTAH CODE ANNOTATED 1953, AS AMENDED, BARS RECOVERY BY DEFENDANT OF THE BURIAL EXPENSES AWARDED TO HER IN THE AMENDED ORDER ENTERED ON FEBRUARY 22, 1974 BY THE INDUSTRIAL COMMISSION OF UTAH.

### ARGUMENT

*A. THE CLEAR LANGUAGE AND INTENT OF §35-2-13(b) (3) BAR RECOVERY FOR ALL COMPENSATION, INCLUDING BURIAL EXPENSES, UNLESS DEATH FROM SILICOSIS RESULTS WITHIN FIVE YEARS AFTER TERMINATION OF EMPLOYMENT.*

Justin W. Peay died on January 11, 1974 almost *seventeen* (17) years after he last worked for plaintiff. Plaintiff contends that both the intent and the clear language of the Utah Occupational Disease Act, §35-2-13(b) (3), Utah Code Annotated 1953, as amended, make it apparent that a claim by Mr. Peay's widow for death benefits of any kind, including burial expenses, is barred by the provisions of that limitation statute.

§35-2-13(b) (3) reads as follows:

“There is imposed upon every employer a liability for the payment of compensation to the de-

pendents of every employee in cases where death results from an occupational disease, subject to the following conditions:

• • • • •  
(3) No compensation shall be paid for death from silicosis unless the death results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except:

(a) in those cases where death results during a period of continuous total disability from silicosis for which compensation has been paid or awarded, or (b) in those cases where death results from silicosis complicated by active tuberculosis and such silico-tuberculosis is evidenced by positive laboratory sputum tests and X-rays and other clinical findings, and *in such cases compensation shall be paid if such death results within five years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.*" (emphasis added)

It is apparent from the above that the *maximum* time for any compensation for death by silicosis in any form is *five* (5) years after the last day the employee worked for the employer against whom compensation is claimed. Indeed, for silicosis such as involved herein, the same limitation has been in existence since the Utah Occupational Disease Disability Law was first passed in 1941. The limitation provisions at that time were found in Chapter 41, Section 13 and read in pertinent part as follows:

"Section 13 — Employer Liability for Compensation-Conditions When no Payment to Be Paid.

(a) There is imposed upon every employer a liability for the payment of compensation to every employee who becomes totally disabled by reason of an occupational disease subject to the following conditions:

(1) . . .

(2) . . .

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

(4) . . .

(b) There is imposed upon every employer a liability for the payment of compensation to the dependents of every employee in cases where death results from an occupational disease, subject to the following conditions:

(1) . . .

(2) . . .

(3) *No compensation shall be paid for death from silicosis unless the death results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except in those cases where death results during a period of continuous total disability from silicosis for which compensation has been paid or awarded, and in such cases compensation shall be paid if such death*

*results within five years from the last day upon which the employee actually worked for the employer against whom compensation is claimed."* (emphasis added).

(4) . . .

(5) . . .

The provisions set forth above became §42-1a-13, Utah Code Annotated until 1953 when it became §35-2-13, Utah Code Annotated, 1953. The section then, as now, required reading and interpretation in conjunction with the Definitions set forth in Section 12 (now §35-2-12) and the *Benefits* listed in Section 15 (now §35-2-15).

Section 12-Terms Construed-Definitions-of the 1941 act read as pertinent hereto as follows:

"The following terms as used in this act shall be construed as follows:

(a) . . .

(b) '*Compensation*' shall mean the payments and benefits provided for in this act.

(c) '*Award*' shall mean the finding or decision of the commission as to the amount of *compensation* due any disabled or the dependents of any deceased employee." (emphasis added).

(d) . . .

And Section 15-Benefits-Amounts.

"The benefits to which a disabled employee or his dependents shall be entitled under this act are limited to the following:

(a) Where claim is by the employee he shall be entitled to and shall receive compensation in the amount of \$12 per week during total disability plus 5% of such award for each dependent minor child under the age of eighteen years up to a maximum of five such dependent children, provided that in no event shall the total of such payments exceed \$3,000.

(b) In case of death the dependents of the deceased employee shall be entitled to and shall receive the difference between the sum paid for total disability as in paragraph (a) of this section provided and the maximum amount of \$3,000; payments to be made at the rate of \$12 per week plus 10% of such weekly payment for each dependent minor child under the age of eighteen years up to a maximum of five dependent minor children.

(c) In the event an employee becomes totally disabled from an occupational disease, the employer shall furnish and pay for such medical service, hospitalization and medicines as may be reasonably required, but not to exceed the sum of \$500.

(d) *In case death results from such occupational disease the employer shall pay not to exceed \$150 burial expenses.*" (emphasis added).

The above provisions, then and now, present a clear picture of disablement, compensation — including death benefits, medical expenses and burial expenses — and the conditions when *no* payment of any kind need be paid. Refinements have been made to provide for such things as partial permanent disability (see §35-2-12(e), and for disablement [§35-2-13(a)(3)] or

death [35-2-13(b) (3) (b)] from silicosis *complicated by active tuberculosis*, as well as for vocational rehabilitation (§35-2-15), changes in the limitation periods and benefit amounts, including allowances for death benefits, medical expenses and burial expenses. The basic provisions, however, including all those applicable to this controversy, have remained in effect throughout the life of the Utah Occupational Disease Disability Law.

The provisions pertinent to this inquiry do not require any sophisticated explanation or interpretation and may be summarized as follows:

1. Compensation means just what it says in Section 12 (1941 and today) viz: “. . . the payments *and benefits* provided for in this act.

2. *Benefits* include the weekly amounts set forth in Section 15 *and* include also death benefits, medical expenses, and burial expenses all of which have been increased by the legislature from time to time through the years.

3. The conditions set forth in Section 13 when no payment need be made mean just what they specify, viz: no compensation *of any kind* need be paid under any of the conditions specified in that chapter.

For example, in a silicosis claim such as that involved herein, subsection (a) of Section 13 (§35-2-13 (a)) sets forth clearly the requirements before *disability* compensation *of any kind* need be paid.

(1) Disability must be *total* (separate provisions now appear in §35-2-56 for permanent *partial disability*.)

(2) Exposure requirements — 5 years in this state during 15 years immediately preceding the disablement.

(3) Disability (total) must result within 2 years from last day employee actually worked for the employer against whom compensation is claimed (5 years if silicosis is complicated by active tuberculosis).

(4) Claim must be filed within time fixed by §35-2-48.

Likewise, subsection (b) of Section 13 [§35-2-13 (b)] establishes with similar clarity the requirements before compensation of any kind need be paid to dependents where death has resulted to the employee from silicosis:

(1) Exposure requirements — 5 years during the 15 years immediately preceding disablement.

(2) Death must result within two (2) years after last day employee actually worked for the employer against whom compensation is claimed. This 2 year limitation is extended to 5 years from last day worked where death results during a period of continuous total disability *and* compensation has been paid or awarded (see subsection (b) (3) of Section 13). There is also a 5 year limitation in cases where death results from silicosis complicated by active tuberculosis. However,

both the *disability* under subsection (a) (3) and the *death* under subsection (b) (3) of Section 13 must result within 5 years, at the most, from the last day worked in order to qualify for compensation of any kind under the Utah statute.

(3) Claim for death benefits also must be filed within time fixed by §35-2-48.

The requirements of the statute set forth above for silicosis disability and/or death compensation payments have been in effect since 1951; prior to that time, exposure requirements were more restrictive (5 years in last 10 years) and there was no provision for silicosis complicated by active tuberculosis. It seems clear, therefore, that the limitations for compensation payment were clearly expressed by the Utah Legislature from the beginning and have continued to be applicable except as specifically refined or modified since that time.

One such specific modification is found in Section 26 of the original Act, reading as follows:

*“No compensation shall be allowed for the first seven (7) days of disability, unless such disability continues for a period of more than four continuous weeks, except the disbursements authorized for medical, nurse and hospital services, and for medicines and funeral expenses, shall be made by the employer.”* (emphasis added).

This provision later was amended and became §35-2-25, Utah Code Annotated, 1953 as follows:

“No compensation shall be allowed for the first 3 days of disability, except the disbursements herein authorized for medical, nurse and hospital services and for medicine and funeral expenses.”

In both cases the reference is to “no compensation shall be allowed. . . .” then the *exception* is made for medical expenses and *burial expenses* for special application of that particular section, thus indicating beyond question that unless excepted, compensation refers to medical and burial expenses as well as to the weekly payments.

Another such modification which confirms the literal construction of compensation asserted herein by plaintiff is found in Section 25 of the original Act, since repealed, reading in part as follows:

“Compensation when payable under this act, exclusive of medical, hospital and funeral benefits, for disability or death due to silicosis, notwithstanding anything in this act otherwise provided, shall be payable to employees, or their dependents, in the following manner and amounts: . . .”  
§42-1a-25.

Here again, the normal and literal application accorded to “compensation” has been modified to exclude medical, hospital and *funeral* benefits for purposes of the application of that particular statutory provision. The clear inference which follows from such language is that compensation includes medical, hospital and funeral expenses for other purposes of the act, just as the definition specifically expresses.

Finally, reference to the limitations set forth in the Occupational Disease Act for the *filing* of compensation claims in Section 49 of the original act (§42-1a-49) and presently found in §35-2-48, Utah Code Annotated 1953, as amended, indicates beyond reasonable controversy that compensation as used therein includes all the benefits included in the definition; i.e. weekly payments, medical and hospital expenses, death benefit payments *and funeral expenses*. Surely, it could not reasonably be contended that a claim for “compensation” barred because not filed in time under §35-2-48 is not barred also for burial expenses or medical expenses because “compensation” as used in §35-2-48 does not spell out the inclusion of all the benefits found in §35-2-15. We submit that “compensation” includes all the benefits referred to in the definition for purposes of §35-2-13 here in controversy as well as for §35-2-48; the language is used in identical fashion in both sections and properly requires the same construction. Indeed, §35-2-13(a)(4) and §35-2-13(b)(5) both refer to “compensation” claims which must be filed as set forth in §35-2-48 in order to qualify for any compensation for disability or death respectively.

In view of the above, plaintiff Kennecott Copper Corporation asserts that the language of the Utah Occupational Disease Disability Law is both clear and consistent (1) with respect to the requirements to be met in order to qualify for payment of compensation for disability or death, (2) with respect to the filing of claims for such compensation and (3) with respect to

the inclusion of *burial expenses* as compensation under the proper application of those provisions, including specifically the application of §35-2-13(b) (3) which clearly requires that death must result within five (5) years after termination of employment in order to qualify for any death benefits, including burial expenses.

**B. UTAH SUPREME COURT DECISIONS SUPPORT PLAINTIFF'S POSITION THAT NO COMPENSATION, INCLUDING BURIAL EXPENSES, CAN BE RECOVERED UNLESS THE REQUIREMENTS OF SECTION 35-2-13 HAVE BEEN SATISFIED.**

A plethora of case authority would not be expected for a proposition so obvious and so clearly expressed in the language of §35-2-13 of the Utah Occupational Disease Statute. However, there are clear indications from Utah Supreme Court decisions that burial expenses are indeed a part of "compensation" under the Utah Occupational Disease Law and that the exposure limitations and the time limitations for disability and death *after termination of employment* set forth in §35-2-13(a) and (b) operate as a bar to recovery of *any* compensation under the act unless the requirements of the section are met.

In *Pacific States Cast Iron Pipe Co. v. Industrial Commission, et al*, 118 Utah 46, 218 P.2d 970 (1950), the Utah Supreme Court applied literally the clear language of §42-1a-13(b) (3) (now §35-2-13(b) (3))

to reverse a death benefit award which included burial expenses. In that case, the employee died more than two (2) years but less than five (5) years after his last day of employment with plaintiff-employer. He had filed for compensation for silicosis but no award had been made at the time of his death.

There was no contention that any part of the award would not be subject to application of the limitation statute; the issue was whether or not an actual award was necessary prior to the employee's death in order to extend the time of death limitation from 2 to 5 years from date of last employment. The court held that the language was clear and unambiguous and required literal application despite the hardship imposed in that particular case (118 Utah 56) but stated:

“... We are mindful of the hardship imposed in this case, but even so we are powerless to re-write the statute or escape its effect. . .”

The award was vacated in its entirety including the amount awarded for burial expenses, indicating clearly that that item also came within the qualification requirements of §42-1a-13(b)(3), which is precisely what plaintiff Kennecott Copper Corporation has asserted throughout this controversy.

In *Silver King Coalition Mines Co. v. Industrial Commission, et al.* 2 Utah 2d 1, 268 P.2d 689 (1954), the statute in controversy was, as here, §35-2-13(b)(3). The Industrial Commission compensation award included medical expenses *and burial expenses*. The issue

was whether to apply the silicosis 2 year limitation *after date of last employment* under §42-1a-13(b) (3) or the 1951 amendment which added a 5 year limitation *after date of last employment* in §35-2-13(b) (3) (b) for silicosis complicated by active tuberculosis. There was no contention that burial expenses or medical expenses or any other portion of the award would have a *longer* period than that specified in the applicable statute; indeed the court stated:

“*It is conceded* that if the amendment does not apply, *compensation* cannot be awarded for the death of Glade Mitchell inasmuch as his death occurred more than three years after termination of his employment with the mining company. . .” (emphasis added). (2 Utah 2d 4)

We submit that such reference to “compensation” is consistent with the language of the Occupational Disease Disability Act and includes—just as the legislature intended—medical and hospital expenses and *burial* expenses in addition to weekly benefits. As the above language indicates, all parties seem to have accepted the interpretation that *compensation* for death or disability is not divisible insofar as application of the requirements of §35-2-13(a) or (b) is concerned.

It is significant to note that in the *Mitchell* case described above, the Supreme Court of Utah held that the dependent widow had a separate and distinct cause of action which arose at the date of death of the deceased employee and, therefore, the 5 year limitation “*from the last day upon which the employee actually*

*worked for the employer. . .*" applied for determination of her eligibility for compensation.

Since the deceased employee died *within* 5 years of his last day of employment, his dependent widow was entitled under §35-2-13(b) (3) to compensation which included also medical expenses and burial expenses. In this case, however, the dependent widow does not qualify for any death benefits because 17 years elapsed between the date of death of Justin W. Peay and the last day upon which he worked for his employer, Kennecott Copper Corporation. The same statute, §35-2-13(b) (3), is applicable to the claim of Mrs. Peay and by its clearly expressed terms, no compensation payment need be paid for death benefits, including, of course, burial expenses.

Finally, the Utah Supreme Court decision in *Henrie v. Rocky Mountain Packing Corporation*, 113 Utah 415, 196 P.2d 487, (1948) makes it clear beyond reasonable controversy that "compensation" as used in the Utah Workmen's Compensation Act (as well as the Occupational Disease Disability Law here involved) includes burial expenses and medical and hospitalization expenses in addition to disability payments. The language of the court (113 Utah 427-28) :

"'Compensation' as used in the amendment to the Consitution, means the same as it is used and defined in the compensation act, i.e. any payment required by the act to be made to a workman or to his dependents, or for their benefit, or into the state treasury for the special purposes of the compensation act. *This includes disability*

*payments, death benefits, medical and hospitalization expenses, burial expenses, and payments into the state treasury as provided by the act. . .*" (emphasis supplied) and further:

"The payment of part of decedent's burial expenses . . . in the state treasury in accordance with the order of the Industrial Commission, and as provided by statute, was payment of 'compensation' within the meaning of Article XVI, Section 5, of the Constitution."

The definition of compensation in the Workmen's Compensation Act at that time was: "The payments and benefits provided for in this title" (§42-1-42(6), Utah Code Annotated, 1943), a definition identical to that found in the Occupational Disease Disability Law applicable to this case, viz: (§35-2-12(b)), Utah Code Annotated 1953, as amended.

As indicated above the *Henrie* case refers to the tie-in between "compensation" as used and defined in the Compensation Act and as used in Article XVI, Section 5 of the Utah Constitution. There is a similar tie-in relationship in many areas between the Utah Occupational Disease Disability Law and the Utah Workmen's Compensation Act. For instance, both the Workmen's Compensation Act in §35-1-44(7) and the Occupational Law in §35-2-12(c) define "award" as the "finding or decision of the Commission as to the *amount* of *compensation* due any injured (disabled) or the dependents of any deceased employee". Obviously, the "award" and thus the "compensation" includes under both statutes medical and hospitalization expenses and

*burial expenses* in addition to weekly and/or lump-sum benefit payments. Likewise the term “compensation” is identical as found in the two acts: §35-1-44(6) in the Workmen’s Compensation Act and §35-2-12(b) in the Occupational Disease Law both construing the term in its broadest sense i.e. the “payments and benefits provided for in this title (act)”. Another pertinent and significant likeness is found in the following limitation statutes:

Workmen’s Compensation §35-1-99:

“... If no notice of the accident and injury is given to the employer within one year from the date of the accident, the right to *compensation* shall be *wholly barred*. If no claim for compensation is filed with the industrial commission within three years from the date of the accident or the date of the last payment of compensation, the right to *compensation* shall be *wholly barred*.” (emphasis added).

Occupational Disease Law-§35-2-48:

“The right to *compensation* under this act for disability or death from an occupational disease shall be *forever barred* unless written claim is filed with the commission within the time as in this section hereinafter provided: . . .” (emphasis added).

Obviously “compensation” as used above includes the other benefits, including burial expenses, for the intended application of the limitation provisions of both acts. Such statutory construction was evidenced in *Masich v. United States Smelting, Refining & Mining*

*Co., et al*, 113 Utah 101, 191 P.2d 612 (1948) in which the Supreme Court of Utah applied former interpretations of the exclusive remedy provisions of the Workmen's Compensation Act to similar provisions in the Occupational Disease Act to deny common law remedy to an employee partially disabled by an occupational disease, even though the Occupational Disease Act did not provide compensation for such partial disability. In recognizing the relationship between the two Acts the Court observed that much of the wording of the Occupational Disease Act was taken from the Workmen's Compensation Act, then stated that: "... the intent, purposes and objectives of the Occupational Disease Act, which is closely allied to the Workmen's Compensation Act, can be determined by reliance on former interpretations of the Workmen's Compensation Act without searching through the refinements of construction necessary had the former act not been before the legislature on many occasions . . ." (113 Utah 108). The Court further concluded (p. 123) that "the legislature occupied the complete field of silicosis. . . ." and later made the following observation pertinent to this controversy: ". . . If the legislature can deny the right to rely on the defense of contributory negligence and assumption of risk, and make the employer absolutely liable regardless of fault, then *we believe it also has the right to say that compensation shall not be awarded until the employee has brought himself within the terms of the statute.*" (113 Utah 126) (emphasis added).

We submit that the rationale of the *Masich* opinion summarized above supports the application to the Utah Occupational Disease Act of the *Henrie* decision (113 Utah 415) and that "compensation" includes burial expenses and medical expenses in the Utah Occupational Disease Statute as well as in the Utah Constitution and the Utah Workmen's Compensation Act. Moreover, the *Masich* case indicates clearly that the Utah Legislature did in fact cover the "complete field of silicosis" and that the legislature has made it clear that compensation shall not be awarded until the employee (or any dependent seeking compensation) has brought himself within the terms of the statute.

## CONCLUSION

Plaintiff respectfully submits that the award of burial expenses to defendant Irene W. Peay, widow of Justin W. Peay, deceased, issued by the defendant Industrial Commission of Utah in its Amended Order of February 22, 1974 was barred by the provisions of §35-2-13(b) (3), Utah Code Annotated 1953, as amended. The conditions qualifying payment of compensation are clearly set forth in §35-2-13 of the Occupational Disease Statute; the pertinent definitions which expressly include burial expenses as a part of compensation, are clear and consistent in both language and application; §35-2-13(b) (3) bars compensation of any kind for death which results more than five years after termination of employment; Justin W. Peay died almost 17 years after he last worked for Kennecott Cop-

per Corporation. Under the clear language of the statute, supported by the decisions and rationale expressed in the Utah Supreme Court cases set forth above, the claim of applicant, dependent widow of Justin W. Peay, does not qualify for compensation payments of any kind, including burial expenses. Therefore, the Amended Order heretofore entered by the Industrial Commission on February 24, 1974 and finalized on April 15, 1974 was contrary to law and properly should be set aside.

Respectfully submitted,

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