

1987

# Kennecott Corporation v. Industrial Commission of Utah, Second Injury Fund and Angelo Maldonado : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 87-0115-CA

IN THE COURT OF APPEALS

STATE OF UTAH

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KENNECOTT CORPORATION, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
THE INDUSTRIAL COMMISSION OF )  
UTAH, SECOND INJURY FUND and )  
ANGELO MALDONADO, )  
 )  
Respondents. )

#6

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Utah Court of Appeals No. 87-0115-CA  
Industrial Commission No. 85000374  
and 86000654

\* \* \* \* \*

APPELLANT'S BRIEF ON APPEAL

\* \* \* \* \*

ON APPEAL FROM THE INDUSTRIAL COMMISSION OF UTAH,  
ADMINISTRATIVE LAW JUDGE TIMOTHY C. ALLEN PRESIDING

---

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JUN 30 1987

COURT OF APPEALS

IN THE COURT OF APPEALS

STATE OF UTAH

\* \* \* \* \*

KENNECOTT CORPORATION,                   )  
  )  
                  Appellant,               )  
  )  
          vs.                                )  
  )  
THE INDUSTRIAL COMMISSION OF           )  
UTAH, SECOND INJURY FUND and           )  
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Utah Court of Appeals No. 87-0115-CA  
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3. Respondent, Second Injury Fund, represented by its Administrator Erie V. Boorman, 160 East 300 South, P. O. Box 5800, Salt Lake City, Utah 84110-5800.
4. Respondent, Angelo Maldonado, on his own behalf, 2363 Green Street, No. A, Salt Lake City, Utah 84106.

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### JURISDICTIONAL AUTHORITY

This Court has jurisdiction to hear this matter pursuant to Utah Code Ann. Section 35-1-85 (CodeCo 1986) and Rule 3 of the Rules of the Utah Court of Appeals (CodeCo 1987).

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

Kennecott Copper Corporation ("Kennecott") presents on appeal the following issues:

1. Whether the Industrial Commission had jurisdiction to make an award to Applicant for workers' compensation benefits with regard to his injuries of September, 1961 through November, 1976, notwithstanding the fact that Applicant did not give notice to the Industrial Commission within either three years of the date of the injuries or the date of last payment of compensation for those injuries or within eight years of the date of the injuries, if tolled, as required under Utah Code Ann. Section 35-1-100 (CodeCo 1986).

2. Whether, as a matter of law, there was a factual basis upon which the Industrial Commission could support the finding of fact and conclusion of law that Applicant had complied with the notice requirements under Utah Code Ann. Sections 35-1-99 and 35-1-100 (CodeCo 1986) with regard to his injuries incurred between September, 1961 and November, 1976.

3. Whether the Industrial Commission had authority to make an award to Applicant for workers' compensation benefits with regard to his injuries incurred between September, 1961 and

November, 1976, notwithstanding the fact that Applicant did not file a claim for compensation within the statute of limitations period imposed under Utah Code Ann. Section 35-1-99 (CodeCo 1986).

4. Whether Kennecott was denied due process of law with regard to the Industrial Commission's award, since Kennecott was given no notice prior to the hearing that the Commission would consider Kennecott's liability in connection with Applicant's injuries from September, 1966 through June, 1984 and, therefore, was not provided with the opportunity to prepare an adequate defense.

#### DETERMINATIVE STATUTES

Utah Code Ann. Sections 35-1-99 and 35-1-100, relied upon by Kennecott are attached hereto as Appendices A and B, respectively, pursuant to Rule 24(a)(6) of the Rules of the Utah Court of Appeals (CodeCo 1987).

#### STATEMENT OF THE CASE

This is an appeal from the Findings of Fact, Conclusions of Law and Order issued on January 14, 1987 by the Industrial Commission through its Administrative Law Judge ("ALJ") Timothy C. Allen and the Commission's affirmance thereof on March 6, 1987. In the January 14, 1987 decision, the ALJ ordered Kennecott to pay 100% of the total benefits payable to Applicant, based on a finding that Kennecott was responsible for all of Applicant's injuries from 1961 through 1984. On or about

February 11, 1987, Kennecott, in accordance with Utah Code Ann. Section 35-1-82.55 (CodeCo 1986) filed a Motion for Review requesting review and reconsideration by the Industrial Commission of the Order of January 14, 1987, awarding benefits. On March 6, 1987, the Industrial Commission denied Kennecott's Motion for Review and upheld the ALJ's award to Applicant.

Therefore, this appeal is taken from the Findings of Fact, Conclusions of Law and Order by the ALJ issued on January 14, 1987, and Order Denying Motion for Review by the Industrial Commission issued on March 6, 1987<sup>1</sup> (collectively referred to as the "Orders"). Copies of these Orders are attached hereto as Appendices C and D, respectively. Kennecott's Petition for Review of the Industrial Commission Award was filed with this Court on April 3, 1987.

#### STATEMENT OF FACTS

Applicant Angelo Maldonado was employed by Kennecott from May 31, 1961, until October 1, 1985, at which time he was placed on the company-sponsored permanent and total disability pension based on an occupational hearing loss. Applicant was first employed as a laborer for Kennecott and later employed as a puncher. As a puncher, Applicant was required to keep air vents

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<sup>1</sup> The Findings of Fact, Conclusions of Law and Order entered by the ALJ and subsequently adopted by the Industrial Commission in its Order Denying Motion for Review are hereinafter referred to as the Findings and Conclusions of the Commission.

under the furnace clean. On September 21, 1961, Applicant, while working on the No. 2 Converter, slipped and sustained an injury to his lower back and neck. He was assisted to the Kennecott Clinic where his lower back and neck were treated for a period of two weeks. Thereafter, Applicant returned to work.

On or about March 21, 1986, Applicant filed an Application for Hearing ("Application") with the Industrial Commission, requesting compensation for injuries sustained during the course of his employment on September 21, 1961. Although notice of Applicant's 1961 injury was given to Kennecott within one year from the date of the accident as required by Utah Code Ann. Section 35-1-99 (CodeCo 1986), neither notice of injury was given nor claim of compensation made with regard to the 1961 injury to the Industrial Commission within the prescribed limitations period under Utah Code Ann. Sections 35-1-99 and 35-1-100 (CodeCo 1986).

During the course of the hearing, scheduled on August 20, 1986 to hear testimony regarding the September 21, 1961 injury, the ALJ informed Kennecott, despite no notice to Kennecott prior to the hearing, that Applicant's case appeared to be a claim for permanent and total disability and that testimony would be heard on all of Applicant's injuries incurred as a result of his employment with Kennecott, including the hearing loss. In response to inquiries by the ALJ, Applicant testified to additional injuries on September 22, 1966, January 21, 1971,

November 7, 1976, March 6, 1980, November 18, 1982, April 26, 1983 and June 20, 1984.

Kennecott agrees that Applicant's filing of the March, 1986 Application satisfied the notice requirement to the Industrial Commission under Utah Code Ann. Section 35-1-100 (CodeCo 1986) for the industrial injuries which occurred on November 18, 1982, April 26, 1983 and June 20, 1984. Kennecott further agrees that Applicant's claim filed on March 21, 1986, satisfied the statute of limitations under Utah Code Ann. Section 35-1-99 (CodeCo 1986) for his industrial injuries of 1982, 1983 and 1984. Since Applicant gave notice of the November 18, 1982, April 26, 1983 and June 20, 1984 injuries to both his employer and the Industrial Commission within the prescribed time limitations set forth under Utah Code Ann. Sections 35-1-99 and 35-1-100 (CodeCo 1986), the Industrial Commission had the requisite jurisdiction to make an award of compensation with respect to Applicant's 1982, 1983 and 1984 injuries.

Although Applicant gave notice of his injuries between September, 1966 and November, 1976 to Kennecott within the one-year time requirement, there exists no evidence in the record that Applicant gave notice to or made a claim for compensation with the Industrial Commission with respect to those injuries, as required under Utah Code Ann. Sections 35-1-99 and 35-1-100 (CodeCo 1986). Moreover, Kennecott has never provided any temporary total, temporary partial, permanent partial or

permanent total compensation for any of the injuries sustained by Applicant between September, 1961 and November, 1976.

Adopting the findings of the Medical Panel, the Commission found that Applicant had sustained a 10% permanent partial impairment relating to his injuries between September, 1961 and June, 1984. This impairment rating is based upon Applicant's having sustained a 5% permanent partial impairment due to the injury of September 21, 1961, a 1% permanent partial impairment due to the injury of September 22, 1966, a 2% permanent partial impairment due to the injury of November 16, 1976, a 1% permanent partial impairment due to the injury of November 18, 1982 and a 1% permanent partial impairment due to the injury of June 20, 1984. The Commission, further adopting the findings of the Medical Panel, found a 3% permanent partial impairment with regard to Applicant's industrial-related hearing loss. The Commission further found a 4% impairment due to arthritis in Applicant's knee as a result of pre-existing conditions. Having found no permanent aggravation of Applicant's pre-existing knee problems in the injuries of 1961 through 1984, the Commission found no liability against the Second Injury Fund. The Commission ordered Kennecott to pay 100% of the total benefits payable to Applicant, based on a finding that Kennecott was responsible for all of Applicant's injuries from 1961 through 1984.

However, Kennecott objects to the Commission's findings of fact and legal conclusion that Kennecott is responsible for

Applicant's total impairment relating to his injuries from September, 1961 through November, 1976. The Commission lacked jurisdiction to make an award to Applicant for compensation with regard to those injuries. Accordingly, the percentage of Applicant's total impairment (61.5%) relating to Applicant's injuries between September, 1961 and November, 1976 should be regarded as pre-existing injuries and, therefore, the responsibility of the Second Injury Fund. See Utah Code Ann. Section 35-1-69 (CodeCo 1986).

Furthermore, Kennecott contends that the portion of the Commission's Order that imposes liability on Kennecott for Applicant's injuries between September, 1966 and June, 1984, without prior notice to Kennecott, was made without due process of law as guaranteed by the Federal and State Constitutions and, therefore, should be set aside by this Court.

Thus, unlike the position taken in Kennecott v. Industrial Commission and Kenneth Davis<sup>2</sup> (Case No. 860228-CA), a case argued before this Court on April 29, 1987, Kennecott

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<sup>2</sup> Although the legal issues raised in Maldonado are virtually identical to those raised in Davis, there are factual distinctions between the two cases that necessitate a slightly different outcome. In Davis, Kennecott objected on jurisdictional and constitutional grounds to the imposition of liability with regard to applicant's injuries in 1969 and 1976, but Kennecott did not contest liability arising from applicant's claim of compensation for his injury of September, 1984 since it was the injury for which he actually filed a claim. Furthermore, notice of that claim was given to Kennecott in a timely manner. However, in Maldonado, Kennecott contests Applicant's claim of compensation

contends in the instant matter that the Commission's Findings of Fact, Conclusions of Law and Order must be set aside by this Court in its entirety on jurisdictional and/or constitutional grounds.

#### SUMMARY OF ARGUMENT

Utah Code Ann. Sections 35-1-99 and 35-1-100 clearly mandate that an applicant notify his employer within one year from the date of an industrial accident, and that a claim for compensation or notice be given to the Commission within either three years of the date of the accident or the date of the last payment of compensation for that accident, or within eight years of the date of the accident, if tolled. Failure on the part of an applicant to satisfy both requirements with regard to a particular industrial injury effectively bars the Commission from asserting jurisdiction over a claim of compensation for that injury.

In the instant matter, Applicant gave no notice of his injuries between September, 1961 and November, 1976 to the Commission. Applicant further failed to make a claim of compensation before the Commission within the required time period from

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for his September, 1961 injury, the injury which formed the basis of his actual written claim, on jurisdictional grounds as well as the imposition of liability for Applicant's injuries between 1966 and 1984 on jurisdictional and/or constitutional grounds because Kennecott had no notice of these injuries in the claim.



the date of the injuries.<sup>3</sup> Accordingly, the Commission never obtained jurisdiction under Utah Code Ann. Section 35-1-100 so as to have authority to compensate Applicant at Kennecott's expense for the injuries between September, 1961 and November, 1976. Having never obtained jurisdiction over Applicant's previous injuries, the Commission acted without or in excess of its authority in affirming the compensation award based, in part, on those injuries. The award, having in part been made in disregard and in violation of the jurisdictional requirements as established and followed by the Utah Supreme Court in its interpretations of Sections 35-1-99 and 35-1-100 of the Utah Workers' Compensation Act, should therefore be set aside.

Furthermore, in order for the Commission to reach the conclusion that Kennecott is responsible to pay workers' compensation benefits for Applicant's injuries between September, 1961 and November, 1976, the Commission would have to make a finding of fact that Applicant complied with the notice requirements under Utah Code Ann. Sections 35-1-99 and 35-1-100. The Commission, however, made no findings of fact as to whether Applicant gave notice to or filed a claim for compensation with the Commission within the prescribed time period. Indeed, there is no evidence in the record which would have allowed the Commission to

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<sup>3</sup> In fact, with the exception of his September 21, 1961 injury, Applicant has never made a claim of compensation for his injuries between September, 1961 and June, 1984.

make such findings. With the exception of his September, 1961 injury, Applicant never filed a claim for compensation with the Commission for those injuries. Thus, there exists no factual basis to support the legal conclusion that the Commission had obtained jurisdiction over Applicant's injuries between September, 1961 and November, 1976 so as to justify its imposition of liability on Kennecott for those injuries. Furthermore, the Commission's failure to make the required findings of fact is reversible error and, therefore, the award must be set aside.

Moreover, the Commission's decision in this matter completely ignores the period of limitation established under Utah Code Ann. Section 35-1-99 (CodeCo 1986). Since Applicant has not filed a timely claim for compensation for his injuries between September, 1961 and November, 1976, Applicant's right to compensation for those injuries is wholly barred under Section 35-1-99.

Finally, the hearing that took place on August 20, 1986, before the ALJ, which gave rise to the award of the Commission, was for injuries resulting from Applicant's accident in September, 1961. Kennecott had no notice prior to the hearing that the Commission would consider Kennecott's liability with regard to Applicant's injuries from September, 1966 through June, 1984 and, therefore, was unable to adequately prepare a defense. Accordingly, Kennecott has been denied procedural due process of law in connection with the compensation award to Applicant for his injuries between September, 1966 and June, 1984 and, there-

fore, the award should be set aside, in part, on constitutional grounds.

#### ARGUMENT

- I. SINCE APPLICANT FAILED EITHER TO GIVE TIMELY NOTICE TO OR TO FILE A CLAIM FOR COMPENSATION WITH THE INDUSTRIAL COMMISSION FOR HIS INJURIES BETWEEN SEPTEMBER, 1961 AND NOVEMBER, 1976, THE COMMISSION LACKED JURISDICTION TO AWARD COMPENSATION TO APPLICANT FOR THOSE INJURIES.

The Commission lacked jurisdiction to award compensation to Applicant for his injuries between September, 1961 and November, 1976. The Commission, a fortiori, had no authority to impose liability on Kennecott for those injuries. Utah Code Ann. § 35-1-100 (CodeCo 1986), which establishes jurisdictional requirements that must be satisfied before the Commission can hear a claim for compensation, provides:

Whenever an employee sustains an accident arising out of or in the course of his employment, the employee shall file with the Commission, in writing, notice of such accident, with a copy to the employer; if such notice is so filed within three years of the time of the accident or within the time limitation provided in Section 35-1-99, the Commission shall obtain jurisdiction to make its award when the injury becomes apparent. [Emphasis added.]

The requirements of Section 35-1-100 must be read in conjunction with those of Utah Code Ann. § 35-1-99 (CodeCo 1986), which establishes a statute of limitations for all claims of "compensation" filed with the Commission:

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 is wholly barred. . . . However, the filing of a report or notice of accident or injury with the Industrial Commission, the employer, or its insurance carrier, together with the payment of any compensation benefit or the furnishing of medical treatment by the employer or an insurance carrier, tolls the period for filing the claim until the employer or its carrier notifies the employee, in writing, of its denial of liability or further liability for the industrial accident or injury, with instructions upon the notification of denial to the employee to contact the Industrial Commission for further advice or assistance to preserve or protect the employee's rights. Claims for compensation in any event shall be filed within eight years after the date of the accident. [Emphasis added.]

Read together, Sections 35-1-100 and 35-1-99 clearly mandate that an employee claiming to have sustained an injury arising out of or in the course of his employment notify his employer within one year from the date of the alleged industrial accident. Moreover, the employee must either give notice to or make a claim for compensation with the Commission within either three years of the date of the accident or the date of the last payment of compensation for that accident, or within eight years of the date of the accident, if tolled. Failure to satisfy both notice requirements with regard to an industrial injury effectively precludes the Commission from asserting jurisdiction to hear a claim of compensation for said injury. See Dean Evans Chrysler Plymouth v. Morse, 692 P.2d 779, 782 (Utah 1984), aff'd

in Mecham v. Industrial Commission, 692 P.2d 783, 785 (Utah 1984).

These provisions place the burden of giving notice to the Commission squarely on the employee. Thus, Applicant in the instant matter clearly had the duty to give the Commission notice of his injuries between September, 1961 and November, 1976. Having failed to impart the requisite notice on the Commission, the Commission is precluded from asserting jurisdiction to hear a claim of compensation for Applicant's injuries between September, 1961 and November, 1976. Any award of compensation premised on those injuries, whether made directly or indirectly in connection with an award of another injury, is therefore barred by Utah Code Ann. Section 35-1-100. To conclude otherwise would be contrary to both the literal language of Utah Code Ann. Section 35-1-100, as well as Utah Supreme Court decisions interpreting this provision. See Peterson v. Industrial Commission, 29 Utah 2d 446, 511 P.2d 721 (Utah 1973); Gardner v. Industrial Commission, 30 Utah 2d 377, 517 P.2d 1329 (Utah 1973).

The Utah Supreme Court has long recognized that the Commission has no authority to assert jurisdiction to hear a claim for compensation when an applicant has failed to give notice to or file a claim for compensation with the Commission within the prescribed limitations period for that injury. In Peterson v. Industrial Commission, 29 Utah 2d 446, 511 P.2d 721 (Utah 1973), claimant sought review of an order of the Commission

that adopted the conclusion of the ALJ that his claim for compensation and benefits was barred by Utah Code Ann. Section 35-1-99. In that matter, claimant was injured in the course of his employment in February, 1964. No claim had been filed with the Commission because the insurance carrier for the claimant's employer admitted liability for coverage and paid expenses in connection with the temporary disability. The insurance carrier filed a report of injury with the Commission on August, 1966. In September, 1971, claimant filed with the Commission an application for benefits relating to an aggravation of the 1964 industrial injury. The Commission denied the request for hearing and dismissed the matter on the basis that the statute of limitations had expired under Utah Code Ann. Section 35-1-99.<sup>4</sup> Affirming the Commission, the Utah Supreme Court held:

The filing of a final report by insurance carriers is mandatory and does not, nor is it intended to, confer any jurisdiction of the settled matter upon the Industrial Commission.

Since the jurisdiction of the Industrial Commission was not attempted to be invoked for more than three years after the last payment was made, the statute had run, and the Commission was correct in refusing to grant a hearing in the matter.

Peterson, 29 Utah 2d at 448, 511 P.2d at 722. Since Applicant in

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<sup>4</sup> The eight-year tolling period under Utah Code Ann. Section 35-1-99 became effective on May 21, 1981 and, therefore, was not a subject of consideration in Peterson. See Ch. 287, § 6, Laws of Utah 1981.

the instant matter failed to file any notice of injury or claim for compensation with the Commission within the prescribed limitations period as established by Utah Code Ann. Sections 35-1-100 and 35-1-99 (CodeCo 1986) for the injuries between September, 1961 and November, 1976, the Industrial Commission lacked the requisite jurisdiction to make an award of workers' compensation benefits. Furthermore, the statutory requirement under Utah Code Ann. § 35-1-97 (CodeCo 1986) that an employer file a report of injury with the Commission, like the final report by the insurer, does not confer, nor is intended to confer, jurisdiction upon the Commission. Thus, the failure of Kennecott, if any, to file a report of injury in this case has absolutely no bearing on the issue of Applicant's failure to file a claim for compensation within the time allowed by Utah Code Ann. Section 35-1-99 (CodeCo 1986).<sup>5</sup>

Similarly, in Gardner v. Industrial Commission, 30 Utah 2d 377, 517 P.2d 1329 (Utah 1973), an employee sought review of a Commission order awarding the claimant compensation for an alleged industrial injury sustained in July, 1968. In that matter, no notice of the injury had been given to the Commission until February, 1972. In March 1972, claimant filed an

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<sup>5</sup> The Commission contends in its Findings of Fact and Conclusions of Law and Order that Kennecott's alleged failure to file a report with the Commission as required by Utah Code Ann. Section 35-1-97 caused there to be no notice of Applicant's injuries between September 1961 and November, 1976 with the Commission.

application for hearing with the Commission seeking further compensation some three years and seven months after the accident and some three years and four months after the last payment of compensation.<sup>6</sup> Reversing the Commission order awarding compensation, the Utah Supreme Court concluded:

The petitioners here simply urge that under the facts of this case, the applicant did not file his claim within the statutory time, either from the date of accident or the date of last compensation standpoint since three years passed in either case, before application was filed, and thus has no basis for receiving the requested compensation, -- with which we agree.

Gardner, 30 Utah 2d at 378, 517 P.2d at 1330. See Mannes-Vale Inc. v. Vale, 717 P.2d 709 (Utah 1986) (since applicant's claim for compensation had not been filed within the statutory three-year period as required by Utah Code Ann. Section 35-1-99, the Commission therefore had no jurisdiction to make any further award of compensation). See also Jones v. Industrial Commission, 17 Utah 2d 28, 404 P.2d 27 (1965) and Frederickson v. Industrial Commission, 19 Utah 2d 233, 429 P.2d 981 (1967) (claim for medical expenses, relating to an earlier industrial injury, denied on the grounds that no claim had been filed with the

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<sup>6</sup> Similarly, the eight-year tolling period under Utah Code Ann. Section 35-1-99, which became effective on May 12, 1981, did not apply to the Gardner matter. See Ch. 287, § 6, Laws of Utah 1981.



Commission within the three-year statutory period requirement under Utah Code Ann. Section 35-1-99).

In the instant matter, Applicant gave no notice of his injuries between September, 1961 and November, 1976 to the Commission. Furthermore, Applicant failed to make a claim for compensation to the Commission for those injuries within the prescribed limitations period under Utah Code Ann. Section 35-1-99. Indeed, with the exception of the September, 1961 injury, Applicant to this day has not made a claim for compensation with the Commission for his injuries between September, 1961 and November, 1976.<sup>7</sup> The ALJ merely elicited Applicant's testimony about his injuries between September, 1961 and November, 1976 at the hearing, and then took it upon himself to make an award broad enough to provide compensation at Kennecott's expense for those injuries which were not the subject of any claim filed by Applicant. The Commission never obtained jurisdiction over Applicant's injuries between September, 1961 and November, 1976. Thus, any award premised on those injuries, whether made directly or indirectly in connection with an award for another injury, is

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<sup>7</sup> Applicant has not filed any claim of compensation for his injuries between 1982 and 1984. However, by virtue of Applicant's testimony at the August 20, 1986 hearing, the Commission has been given notice of those injuries within the prescribed limitations period and, therefore, arguably has obtained jurisdiction over those injuries.

wholly barred under Utah Code Ann. Sections 35-1-99 and 35-1-100 (CodeCo 1986).

In its Findings of Fact, Conclusions of Law and Order, the Commission takes the position that had Kennecott filed an "Employer's First Report of Injury" with the Commission as required under Utah Code Ann. Section 35-1-97 (CodeCo 1986), the Commission would have had notice of Applicant's injuries between September, 1961 and November, 1976, and therefore, proper jurisdiction to hear Applicant's claim for compensation in connection with those injuries. The Commission's Order intimates that Kennecott's compliance with Utah Code Ann. Section 35-1-97 (CodeCo 1986) would have been sufficient to confer jurisdiction upon the Commission to hear Applicant's claim for compensation for those earlier injuries. Thus, the Commission concluded that Kennecott must not be allowed to escape liability by its alleged failure to give notice to the Commission.

However, the Commission's contention that notice under Utah Code Ann. Section 35-1-99 (CodeCo 1986) is sufficient to confer jurisdiction upon the Commission would completely nullify any effect to be given to Utah Code Ann. Section 35-1-100 (CodeCo 1986), and thus defeat the legislative intent and the purpose of the statute. Following the Commission's position to its logical conclusion, the Commission would have automatic jurisdiction and authority over every industrial accident, whether or not an

employee, in fact, filed notice with the Commission as expressly prescribed under Utah Code Ann. Section 35-1-100 (CodeCo 1986).

Furthermore, the Commission's Order denying Kennecott's jurisdictional defense directly contradicts previous decisions by the Utah Supreme Court. In both Peterson and Gardner neither the employer nor the employee gave notice to the Commission of employee's injury. Despite the employer's failure to notify the Commission, the Utah Supreme Court held in both matters that the employees had failed to satisfy the notice requirements under Utah Code Ann. Sections 35-1-99 and 35-1-100 and, therefore, the Commission lacked jurisdiction to review their claims for compensation. See also Dean Evans Chrysler Plymouth v. Morse, 692 P.2d at 783.

For the reasons stated above, the Commission lacked jurisdiction to make an award of compensation to Applicant for his injuries between September, 1961 and November, 1976. The Commission had no authority to impose liability on Kennecott to pay compensation for those injuries. Rather, Applicant's uncompensated injuries between September, 1961 and November, 1976 should be regarded as pre-existing injuries and, therefore, are properly the responsibility of the Second Injury Fund. Utah Code Ann. § 35-1-69 (CodeCo 1986). See also Second Injury Fund v. Perry's Mill Cabinet Shop, 684 P.2d 1269 (Utah 1984); Jacobsen Construction v. Hair, 667 P.2d 25 (Utah 1983).

Accordingly, Kennecott requests the Court to set aside that portion of the Commission's Order which imposes liability on Kennecott to compensate Applicant for the percentage (61.5%) of Applicant's total combined impairment that relates to its injuries between September, 1961 and November 1976.

II. THERE EXISTS NO FACTUAL BASIS UPON WHICH THE INDUSTRIAL COMMISSION COULD SUPPORT A FINDING OF FACT AND CONCLUSION OF LAW THAT APPLICANT HAD COMPLIED WITH THE NOTICE REQUIREMENTS UNDER SECTIONS 35-1-99 AND 35-1-100 WITH REGARD TO HIS INJURIES BETWEEN SEPTEMBER, 1961 AND NOVEMBER, 1976.

Utah Code Ann. Section 35-1-85 (CodeCo 1986), which governs the duty of the Commission to make findings of fact and conclusions of law, provides, in pertinent part:

. . . The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and findings and conclusions of the commission. . . .

Utah Code Ann. Section 35-1-84 (CodeCo 1986) limits the review of the findings and conclusions of the Commission by this Court. That provision provides, in pertinent part:

. . . Upon such review the court may affirm or set aside such award, but only upon the following grounds:

- (1) That the commission acted without or in excess of its powers;
- (2) That the findings of fact do not support the award.

Read together, these provisions have been construed by the Utah Supreme Court to mean that the findings by the Commission are binding upon this Court, only if such findings are supported by substantial evidence. Bennett v. Industrial Commission, 726 P.2d 427 (Utah 1986); Pinter Construction Company v. Frisby, 678 P.2d 305, 307 (Utah 1984).

Moreover, this Court need not defer to the Commission when applying statutory terms to the facts unless the application of the law to the facts should be subject to the Commission's expertise gleaned from its "accumulated practical, first-hand experience" with the subject matter. Bennett, 726 P.2d at 429; See also Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601, 611 (Utah 1983). Whether a worker has satisfied the notice requirements under Utah Code Ann. Sections 35-1-99 and 35-1-100 (CodeCo 1986), which is at issue in this case, requires the application of a statutory standard to the facts. This Court has considerable experience in the application of statutes of limitations. The Commission has no peculiar expertise in that regard. Since the resolution of the limitations issue is not benefitted by Commission expertise, this Court, therefore, need not defer to the Commission's Order on the issue in the instant matter. Bennett, 726 P.2d at 429; See also Board of Education v. Olsen, 684 P.2d 49, 51 (Utah 1984).

There can be no dispute that the Commission must first obtain jurisdiction over a claim for benefits for injuries prior

to making an award of compensation for those injuries. In order for the Commission to have reached the conclusion that Kennecott was liable for Applicant's injuries between September, 1961 and November, 1976, or for any portion of a later injury attributable in any part to those prior injuries, the Commission was required to have made a finding of fact, based on substantial evidence reviewable by this Court in the record, that Applicant complied with the notice requirements under Utah Code Ann. Sections 35-1-99 and 35-1-100 (CodeCo 1986).

In the instant matter, the Commission made findings of fact only with regard to the fact that Applicant sustained, among others, injuries between September, 1961 and November, 1976. The Commission, however, had made no findings of fact as to whether the employer or the Commission received notice of Applicant's injuries between September, 1961 and November, 1976. Indeed, there exists, as a matter of law, no factual basis upon which the Commission could have supported a finding of fact that Applicant complied with the notice requirements with regard to those injuries. Consequently, the Commission has properly not reached the legal conclusion that Applicant gave notice to the Commission that complied with the requirements of Utah Code Ann. Sections 35-1-99 and 35-1-100 (CodeCo 1986). The Commission, nevertheless, has reached the legal conclusion that Kennecott bears legal liability for Applicant's injuries between September, 1961 and November, 1976. Liability could not be imposed on Kennecott with

regard to those injuries absent these other critical findings of fact and the conclusion of law which form the premises for the imposition of liability.

It is not surprising that the record in this matter does not contain evidence sufficient to allow the Commission to make a finding of fact that Applicant had given the Commission notice of his injuries between September, 1961 and November, 1976. With the exception of the September 21, 1961 injury, Applicant has never pursued an award of compensation through the Commission for those injuries. In the proceeding before the Commission, Applicant did not seek compensation for those injuries which he suffered between 1966 and 1976 and, therefore, Applicant had no reason to present evidence to the Commission that he had satisfied the notice requirements with respect to those earlier injuries. There is simply no factual basis upon which the Commission could support a finding of fact that Applicant had complied with the notice requirements. Accordingly, there is no factual basis whatsoever to support the legal conclusion that the Commission had jurisdiction by which to impose liability against Kennecott for those early injuries. Therefore, the imposition of liability on Kennecott with regard to Applicant's injuries between September, 1961 and November, 1976 is arbitrary and capricious and should be set aside by this Court.

Furthermore, the failure of the Industrial Commission to make findings of fact and conclusions of law as to whether Applicant satisfied the notice requirements under Utah Code Ann. Sections 35-1-99 and 35-1-100 (CodeCo 1986) is reversible error. The Commission has the duty to make findings of fact and conclusions of law on all issues of material fact before it. Utah Code Ann. Section 35-1-85 (CodeCo 1986). This requirement is mandatory and may not be waived. Failure on the part of the Commission to make findings of fact that resolve all issues of material fact necessary to justify the conclusions of law and order entered thereon is reversible error. Parks v. Zions First National Bank, 673 P.2d 590, 601 (Utah 1983); Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983); Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979). The Utah Supreme Court in Rucker aptly observed:

The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law. To that end the findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.

Rucker, 598 P.2d at 1338.

In the instant matter, the Commission failed to make findings of fact with regard to whether Applicant satisfied the notice requirements of Utah Code Ann. Sections 35-1-99 and 35-1-100 (CodeCo 1986) to support a legal conclusion that the



Commission had jurisdiction by which to impose liability against Kennecott for Applicant's injuries between September, 1961 and November, 1976. The Commission's failure to make the requisite findings of fact is not mere harmless error. Rather, the Commission's failure to make the required findings of fact is reversible error and, therefore, the Commission's award with regard to Applicant's injuries between 1961 and 1976 should be set aside by this Court.

III. EVEN ASSUMING THAT THE COMMISSION HAD SUFFICIENT NOTICE OF APPLICANT'S INJURIES BETWEEN SEPTEMBER, 1961 AND NOVEMBER, 1976 TO INVOKE THE JURISDICTION OF THE COMMISSION, APPLICANT'S CLAIM FOR COMPENSATION WITH REGARD TO THOSE INJURIES IS UNTIMELY, AND THEREFORE MUST BE BARRED.

The Commission's Findings of Fact, Conclusions of Law and Order awarding Applicant workers' compensation benefits is further flawed. Even assuming this Court finds that the Commission had jurisdiction over Applicant's injuries between 1961 and 1976, Applicant's claim of compensation for those injuries is untimely and, therefore, is barred by the statute of limitations under Utah Code Ann. Section 35-1-99 (CodeCo 1986).

Utah Code Ann. Section 35-1-99 (CodeCo 1985) clearly mandates that an employee must make a claim for compensation with the Commission within either three years of the date of the accident or the date of the last payment of compensation for that accident, or within eight years from the date of the accident, if tolled. Moreover, claims of compensation for permanent total

disability are subject to Utah Code Ann. Section 35-1-99 (CodeCo 1986). See Mecham v. Industrial Commission of Utah, 692 P.2d 783, 786 (Utah 1984); Buxton v. Industrial Commission, 587 P.2d 121 (Utah 1978). Thus, failure on the part of a claimant to file a timely claim for permanent total disability under that provision bars recovery.

The purpose of the limitations provision in Utah Code Ann. Section 35-1-99 was aptly stated in Kennecott Copper Company v. Industrial Commission, 597 P.2d 875, 877 (Utah 1979):

The purpose of that statute, in common with all statutes of limitation, is that potential claims or controversy should sometime come to rest, and thus enable employers and employees to get along in peace and good will without controversies hovering in the wings. There are other valid reasons for the requirement that such claims should be asserted within some reasonable and specified time. If an investigation is necessary, it can be made promptly while the evidence and the witnesses are available. This is a safeguard not only against possible fictitious or fraudulent claims, for real or imagined old injuries, but it also calls attention to any necessity that may exist for remedial steps to protect the other employees from injury. Furthermore, the longer the period of limitation, the longer the employer must maintain records, and set up and carry reserves (or insurance), to take care of such possible claims. While the burden of the things just mentioned may initially appear to fall upon the employer (industry), it must be realized that they must also be borne by other workers, and ultimately by the public.

Kennecott Copper, 592 P.2d at 876. Here, the Utah Supreme Court has reiterated important public policies regarding the salutary

effect of statutes of limitations not only generally, but particularly as they relate to Utah's workers' compensation scheme. The Commission's decision in the instant matter ignores the period of limitation established under Utah Code Ann. Section 35-1-99 (CodeCo 1986) and, thus, thwarts those policies.

The issue raised by the Commission in its Findings of Fact, Conclusions of Law and Order as to whether the Commission was properly notified by Kennecott of Applicant's injuries between 1961 and 1976 becomes, under the facts of this case, immaterial because the statute of limitations for those injuries expired prior to any claim of compensation filed by Applicant with the Commission. As discussed above, the Utah Supreme Court has established that where the employee has failed to file a claim of compensation within the prescribed limitations period the Commission has no authority to award compensation. See Peterson v. Industrial Commission, 29 Utah 2d 446, 511 P.2d 721 (Utah 1973); Gardner v. Industrial Commission, 30 Utah 2d 377, 517 P.2d 1329 (Utah 1973). Thus, the Commission's award based, in part, on Applicant's injuries between September, 1961 and November, 1982 is barred by the statute of limitations and, therefore, should be set aside by this Court.

Accordingly, the Commission had no authority to impose liability on Kennecott to pay compensation for Applicant's injuries between September, 1961 and November, 1976. Rather, those uncompensated injuries should be regarded as pre-existing

injuries and, therefore, are properly the responsibility of the Second Injury Fund. See Utah Code Ann. Section 35-1-69 (CodeCo 1986). See also Second Injury Fund v. Perry's Mill & Cabinet Shop, 684 P.2d 1269 (Utah 1984); Jacobsen Construction v. Hair, 667 P.2d 25 (Utah 1983).

IV. KENNECOTT WAS DENIED DUE PROCESS OF LAW IN CONNECTION WITH APPLICANT'S WORKERS' COMPENSATION AWARD, SINCE KENNECOTT HAD RECEIVED NO NOTICE PRIOR TO THE HEARING THAT THERE WOULD BE ANY CONSIDERATION OF APPLICANT'S SUBSEQUENT INDUSTRIAL INJURIES.

Utah Code Ann. Section 35-1-82.51 (CodeCo 1986) provides that the Commission shall give notice and an opportunity to be heard to all parties whose rights may be affected by a compensation award:

Hearings shall be held by the commission upon reasonable notice to be given to each interested party, . . . All parties in interests shall have the right to be present at any hearing, . . . and to present such testimony as may be pertinent to the controversy before the commission and shall have the right to cross-examine.

Utah law clearly establishes that an order of an administrative agency issued without sufficient notice to affected parties is violative of due process guaranteed under the Federal and State Constitutions. Morris v. Public Service Commission, 7 Utah 2d 167, 321 P.2d 644 (1958); Fuller-Toponce Truck Co. v. Public Service Comm., 99 Utah 28, 96 P.2d 722 (1939); Denver & Rio Grande Western Railway Co. v. Industrial Commission, 74 Utah 316, 279 P. 612 (1929). In Morris, the Utah

Supreme Court set aside an order of the Public Service Commission ("PSC") cancelling a certificate of convenience and necessity of operation ("certificate") because notice to affected parties was constitutionally defective. In that matter, Neil Morris doing business as Martian Delivery Service, petitioned the PSC for a certificate as a common carrier, and to assume the operating rights of Robert Watson, doing business as Bob Watson Moving Company, under a valid certificate. The PSC issued a notice of hearing which stated that the Commission would address the application of Neil Morris who had requested a certificate to assume the operating rights of Robert Watson. A hearing was held, and subsequent thereto the PSC entered its Findings of Fact and Conclusions of Law and determined that an order should be issued denying the application of Neil Morris to assume the certificate held by Robert Watson. At the same time, the PSC cancelled the certificate held by Mr. Watson. Concluding that the PSC acted without proper notice and without due process of law in cancelling Mr. Watson's certificate, the Utah Supreme Court, setting aside the administrative order, stated:

In the instant matter the notice given by the Commission provided only that an application of Neil R. Morris for a certificate of public convenience and necessity and to assume the operating rights of Robert Watson would be entertained by the Commission. The issue of unqualified cancellation of the certificate which Watson held was not before the Commission. The Commission has attempted to utilize the evidence in the hearing properly before it to order the cancellation [of the

Watson certificate], not properly before the Commission.

Morris, 7 Utah 2d at 170-171, 321 P.2d at 646.

This principle of due process applies equally to proceedings held by the Industrial Commission. In Denver & Rio Grande Western Railway Co. v. Industrial Commission, 74 Utah 316, 279 P. 612 (1929), the Industrial Commission proceeded to amend its findings of fact without giving the railroad company the opportunity to offer additional evidence. In remanding the amended findings of fact of the Commission, the Utah Supreme Court stated:

Notice and an opportunity to be heard are elementary requirements of due process of law when the rights of a party are to be affected by judicial proceedings. [Citations omitted.] Our Workmens' Compensation Law, inferentially at least, provides that the commission shall give notice and an opportunity to be heard to all persons whose rights may be affected by its award. [Citation omitted.] Indeed, if the Legislature should enact a law dispensing with notice and an opportunity to be heard to a party whose rights will be affected by an award of the commission, such law should be a nullity.

Denver & Rio Grande, 74 Utah at 319, 279 P. at 612-613.

In the instant matter, the notice of hearing given by the Commission related solely to Applicant's claim for compensation for an injury that occurred on September 21, 1961. The issue of Kennecott's liability with regard to Applicant's injuries between September, 1966 and June, 1984 was not before the

Commission.<sup>8</sup> The Commission, nevertheless, found Kennecott liable for Applicant's total combined impairment that related to those injuries. In so finding, the Commission has attempted to utilize the evidence in the hearing before it to impose liability on Kennecott for Applicant's injuries between 1966 and 1982 not properly before it.

If the Commission had intended to address the issue of Kennecott's liability with regard to Applicant's injuries between 1966 and 1984, the Commission should have notified Kennecott and informed it of the specific grounds upon which liability was sought. Although Kennecott was represented at the hearing, such representation was not in connection with Kennecott's liability, if any, arising from Applicant's injuries between 1966 and 1984. Kennecott was never advised by the notice given that such liability was contemplated and was present at the hearing solely with regard to Applicant's September, 1961 injury. Not having been advised by notice prior to the hearing, Kennecott, unrepresented by counsel at that hearing, was wholly unprepared to present pertinent evidence or raise defenses in connection with Applicant's previous injuries.

The imposition of liability on Kennecott for Applicant's injuries between 1966 and 1984 was without due

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<sup>8</sup> Furthermore, for the reasons stated in Sections I and II above, the Commission did not have jurisdiction to address Kennecott's liability with regard to Applicant's injuries between September, 1961 and November, 1976.

process of law as guaranteed under both the Federal and State Constitutions. The Commission acted without authority and beyond its jurisdiction. Accordingly, that portion of the Commission's Order that pertains to Kennecott's liability with regard to Applicant's injuries between September, 1966 and June, 1984 should be set aside by this Court.

#### CONCLUSION

Applicant filed a claim of compensation for his September 21, 1961 injury. The Notice of Hearing given by the Commission related solely to Applicant's claim for compensation for the 1961 injury. The Commission, nevertheless, made a finding of liability against Kennecott with respect to Applicant's injuries between September, 1961 and June, 1984. Applicant never filed timely notice of his injuries between September, 1961 and November, 1976 with the Commission and, with the exception of the September, 1961 injury, nor has Applicant filed a claim for compensation with the Commission with regard to those injuries. Thus, the Commission lacked jurisdiction under Utah Code Ann. Sections 35-1-99 and 35-1-100 (CodeCo 1986) to make any award for compensation to Applicant in connection with his injuries sustained between September, 1961 and November, 1976.

Even if Applicant had sought to be compensated now for those earlier injuries, there exists simply no factual basis upon which the Commission can support a finding of fact that the



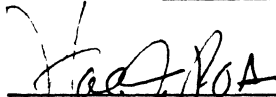
Commission had adequate notice of Applicant's injuries between September, 1961 and November, 1976 to confer jurisdiction upon the Commission over those injuries.

Furthermore, even assuming that this Court finds that the Commission had adequate notice to confer jurisdiction for Applicant's injuries between 1961 and 1976, the Commission's award of compensation relating to those injuries is nevertheless improper because Applicant's claim for those injuries, having never been filed timely, is barred by the statute of limitations under Utah Code Ann. Section 35-1-99 (CodeCo 1986).

Finally, that portion of the Commission's order that imposes liability on Kennecott for Applicant's injuries between September, 1966 and June, 1984, without prior notice to Kennecott, is made without due process of law as guaranteed by the Federal and State Constitutions.

Accordingly, Kennecott requests that this Court set aside the Commission's award for workers' compensation benefits to Applicant.

RESPECTFULLY SUBMITTED this 30th day of June 1987.

  
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JAMES M. ELEGANTE  
HAL J. POS  
of and for  
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Attorneys for Kennecott Corporation  
185 South State Street, Suite 700  
P. O. Box 11898  
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MAILING CERTIFICATE


I hereby certify that I caused to be mailed, postage prepaid, four (4) true and correct copies of the foregoing document to the following on this 30th day of June, 1987:

The Industrial Commission of Utah  
160 East 300 South  
P.O. Box 5800  
Salt Lake City, Utah 84110-5800

David L. Wilkinson, Esq.  
Ralph Finlayson, Esq.  
Utah Attorney General's Office  
236 State Capitol Bldg.  
Salt Lake City, Utah 84114

Erie V. Boorman, Esq.  
Administrator, Second Injury Fund  
160 East 300 South  
P.O. Box 5800  
Salt Lake City, Utah 84110-5800

Angelo Maldonado,  
2363 Green Street, No. A  
Salt Lake City, Utah 84106

  
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298:061287A

## APPENDIX A

35-1-99 NOTICE OF INJURY AND CLAIM FOR COMPENSA-  
TION -- LIMITATION OF ACTION -- TOLLING  
PERIOD FOR FILING CLAIM.

When an employee claiming to have suffered an injury in the service of his employer fails to give notice to his employer of the time and place where the accident and injury occurred, and of the nature of the accident and injury, within 48 hours, when possible, or fails to report for medical treatment within that time, the compensation provided for herein shall be reduced 15%; provided, that knowledge of the injury obtained from any source on the part of the employer, his managing agent, superintendent, foreman, or other person in authority, or knowledge of any assertion by the injured sufficient to afford an opportunity to the employer to make an investigation into the facts and to provide medical treatment is equivalent to this notice; and no defect or inaccuracy in the notice subjects the claimant to this reduction, if there was no intention to mislead or prejudice the employer in making his defense, and the employer was not, in fact, so misled or prejudiced. If no notice of the accident and injury is given to the employer within one year after the date of the accident, the right to compensation is wholly barred. If no claim for compensation is filed with the Industrial Commission within three years after the date of the accident or the date of the last payment of compensation, the right to compensation is wholly barred. However, the filing of a report or notice of accident or injury with the Industrial Commission, the employer, or its insurance

carrier, together with the payment of any compensation benefit or the furnishing of medical treatment by the employer or an insurance carrier, tolls the period for filing the claim until the employer or its carrier notifies the employee, in writing, of its denial of liability or further liability for the industrial accident or injury, with instructions upon the notification of denial to the employee to contact the Industrial Commission for further advice or assistance to preserve or protect the employee's rights. The claim for compensation in any event shall be filed within 8 years after the date of the accident.

## APPENDIX B

35-1-100 DUTY OF EMPLOYEE TO FILE NOTICE OF ACCI-  
DENT WITH COMMISSION -- COPY TO EMPLOYER  
-- TIME LIMITATION -- JURISDICTION OF  
COMMISSION.

Whenever an employee sustains an accident arising out of or in the course of his employment, the employee shall file with the commission, in writing, notice of such accident, with a copy to the employer; if such notice is so filed within three years of the time of the accident or within the time limitation provided in section 35-1-99, the commission shall obtain jurisdiction to make its award when the injury becomes apparent.

## APPENDIX C



THE INDUSTRIAL COMMISSION OF UTAH

Case Nos. 85000374 & 86000654

*Received  
extension  
until 12-13-87  
from Judge H/kron  
1-29-87  
bsp*

ANGELO MALDONADO,

Applicant,

vs.

KENNECOTT  
(SELF-INSURED) and  
SECOND INJURY FUND,

Defendants.

\*\*\*\*\*

RECEIVED  
JAN 22 1987  
HUMAN RESOURCES DEPT.  
FINDINGS OF FACT  
CONCLUSIONS

AND ORDER

HEARING:

Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on August 20, 1986, at 8:30 o'clock a.m.; same being pursuant to Order and Notice of the Commission.

BEFORE:

Timothy C. Allen, Administrative Law Judge.

APPEARANCES:

Angelo Maldonado, PRO SE.

Kennecott was represented by Laurie Priano, Personnel Benefits Analyst.

The Second Injury Fund was represented by Erie V. Boorman, Administrator.

At the conclusion of the evidentiary hearing, the Administrative Law Judge notified the parties that since the Applicant had previously filed an Occupational Disease Claim for hearing loss, that that claim would also be joined in the Applicant's Claim for Permanent and Total Disability Benefits. By way of explanation, the Applicant originally filed an Application for Hearing Loss based on harmful industrial noise encountered while at Kennecott. The Application was set for hearing and heard before Judge Martinez of the Commission on January 9, 1986. The employer, Kennecott, fully defended the matter and as such has been accorded their due process rights with respect to the Applicant's hearing loss claim. After the matter had been submitted to a Medical Panel by Judge Martinez, the Panel entered its Report dated March 17, 1986. However, before the Medical Panel Report could be distributed to the parties, Mr. Maldonado contacted the Commission and requested that his hearing loss claim be withdrawn. Accordingly, on April 8, 1986, Judge Martinez caused a letter to be written to the parties indicating that the hearing loss claim had been withdrawn and was dismissed without prejudice.

Just prior to the Dismissal of the Hearing Loss Claim, the Applicant filed an Application for Hearing claiming disability benefits for an industrial accident he sustained at Kennecott on September 21, 1961. This claim was assigned Case No. 86000654, and was heard by the undersigned on August 20, 1986. At that hearing, it became clear that although the Applicant was without the benefit of legal counsel, that his claim was a claim for permanent and total disability. It also became evident that not only had the Applicant sustained an industrial injury on September 21, 1961, but that he had also sustained industrial accidents on September 22, 1966, January 21, 1971, November 16, 1976, March 6, 1980, November 18, 1982, April 26, 1983, and June 20, 1984, all while employed by Kennecott. Following that hearing, the Administrative Law Judge caused the Medical Panel Report concerning the Applicant's hearing loss to be distributed to the parties. The parties were advised that they should file Objections to the Medical Panel Report or that the same would be admitted into evidence.

In that Report, the Medical Panel had concluded that the Applicant was exposed to harmful industrial noise at Kennecott, and that "this is his only source of noise exposure." The employer responded to the Panel Report indicating that the Commission had no jurisdiction to adjudicate the hearing loss claim. This position is clearly not supported by the law which provides the Commission with continuing jurisdiction to modify prior findings. Further, the Defendant, Kennecott, was notified at the hearing of August 20, 1986, that the Administrative Law Judge would be considering all of the Applicant's injuries and claims at one time so as to minimize continual litigation. Further, since the employer had retired the Applicant because of his hearing loss, it was apparent that that hearing loss was significant enough to have some bearing or effect on the Applicant's claim for permanent and total disability. In addition, since the hearing loss claim had been dismissed without prejudice, it was abundantly clear to the Administrative Law Judge that more than enough jurisdiction existed to reopen that claim and adjudicate the same in light of the Applicant's permanent and total disability claim. The employer also took the position that the only claim properly before the Commission was that involving an alleged industrial accident in 1961. In that respect, the employer contended that since they had failed to file any Employer's First Reports of Injury, that the Commission was thereby foreclosed from exercising jurisdiction over the Applicant's claim. This position of the employer is fallacious and incorrect, which will be explored later in this Order.

Thereafter, the claim was referred to the Division of Rehabilitation Services for their evaluation after the Administrative Law Judge had made a tentative finding that Mr. Maldonado was permanently and totally disabled. The Division submitted its report indicating that the Applicant was not a feasible candidate for rehabilitation and retraining. Kennecott then objected to that Report of the Division of Rehabilitation Services, and taking their independent rehabilitation counselor's report out of context, contended that the Applicant was a candidate for rehabilitation and retraining. Yet, the bottom line of the report from Mr. Heal is that "Mr. Maldonado is not a viable

ANGELO MALDONADO  
ORDER  
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candidate for vocational rehabilitation presently, and would not be unless his physical activity level is increased in some way to allow him to participate in vocational rehabilitation." It is also interesting to note that Kennecott concluded that the Applicant could not perform or be retrained to perform any other job within the bargaining unit, and so, he was given a permanent total medical retirement effective October 1, 1985. Following receipt of Kennecott's Objection, the file was in a posture for the issuance of an Order, when the Administrative Law Judge reviewed the file further and determined that a Medical Panel evaluation would be needed to determine the extent of the Applicant's impairment due to his industrial accidents at Kennecott. Thereafter, the file was referred to the Medical Panel for its evaluation. The Medical Panel Report was received and copies were distributed to the parties. No objections having been received to the Medical Panel Report, it is admitted into evidence. Being fully advised in the premises, the Administrative Law Judge is prepared to enter the following

#### FINDINGS OF FACT:

Angelo Maldonado started working as a laborer for Kennecott in 1961, when he was eighteen years of age. He originally started out as a laborer and was able to work his way up to the job of a puncher, which required that he keep the air vents under the furnace cleared. On September 21, 1961, Mr. Maldonado was working on the number two convertor, going up a walkway when he slipped on oil slick and fell, twisting his back and then striking his low back and neck on the metal platform. The evidence on the file clearly indicates that the Applicant was taken to the Kennecott Clinic, where he reported his injury to the medical assistant, who faithfully reported in the records that the Applicant was hurt on the job. The Applicant was given an ice lolly on his back and neck and he was also given Percodan. He stayed at the Clinic all of that day and was then told to return to the Clinic the following day. He did so, and his timecard was turned in by the Clinic daily for approximately two weeks so that he could continue to receive his regular pay. The daily treatment received by the Applicant consisted of Percodan and lying around the Clinic. After this course of treatment, Mr. Maldonado was placed on "light duty", where he sat around the coffee room for another week and a half.

Thereafter, the Applicant was able to perform some work. Since he was still complaining, his employer sent him to Dr. Kuhe on December 27, 1961. Dr. Kuhe took x-rays of the Applicant and indicated that his problem was non-industrial. Mr. Maldonado was then referred to Dr. Boyd Holbrook for an orthopedic consultation, and in March of 1962, the Applicant was given a lumbosacroal brace, which he was told to wear at all times. He was also given muscle relaxants and pain killers. He continued to have spasms in his back at that time. On May 3, 1963, Mr. Maldonado received a cortisone injection in his back.

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On September 22, 1966, Mr. Maldonado sustained another industrial accident. As contained in the Kennecott medical records, it indicates that "fell on job and caught self with left arm - now has pain in left back and left arm." It further indicates that the Applicant received an injection and was having some subscapular pain. In 1963, the Applicant was involved in an automobile accident when a lady ran a stop sign and struck his car on the right front passenger side. As a result, the Applicant was shaken up and experienced some spasms in his back, but lost no time from work.

On January 21, 1971, the Applicant was working on the number three convertor, when a plank fell and struck him on his hard hat, with the result he sustained a neck injury and was treated with traction in the company clinic. Again, this history was faithfully reported in the employer's medical records kept by the Wasatch Medical Group, which had been retained by Kennecott to provide medical services to their employees. The Applicant was x-rayed at that time and the reports indicate the same was negative for a fracture or dislocation. On July 19, 1973, the Applicant reported to the Wasatch Medical Group and their office note indicates that he had an old fracture of his fourth lumbar vertebra with an old fracture of his coccyx. The Applicant's next injury occurred apparently on November 7, 1976, when he fell down some stairs and landed on some ice. The Applicant was treated by Dr. Brasher, a company physician, and was released to return to work on November 16, 1976.

Mr. Maldonado was then injured on March 6, 1980, when he fell on the west crane landing, twisting his left knee according to his testimony. However, the medical records of the company clinic would seem to indicate that the right knee was injured. Mr. Maldonado was examined by Dr. Coda and was given ice.

On November 18, 1982, the Applicant injured his back while lifting cables on the east crane platform. He and a fellow employee were lifting the cables when the other employee lost his grip, giving the full weight to the Applicant. He reported to the company clinic and was seen by Dr. Reese who diagnosed a muscle strain of the lower back on the left side. Mr. Maldonado was given an ice lolly massage and he was also given Darvocet and Soma. He was able to continue working at Kennecott and had no further problems until April 26, 1983. On that date, as he was getting out of a truck, his left leg gave way and his right knee was twisted. He reported to the company clinic where he was examined and an ace wrap was applied along with ice. At that time, he was diagnosed as having a possible strained ligament.

On June 20, 1984, Mr. Maldonado and a co-worker, were lifting a forty pound motor which was to be installed in a screw conveyor. As they were carrying the motor up two flights of stairs, the Applicant's left leg gave out on him and he fell down a few of the stairs and wrenched his back in the process. He reported his injury to Dr. Reese and was then sent to Dr. Lamb by

Kennecott. He was temporarily and totally disabled for the period June 21, 1984, through July 2, 1984. He then returned to work on July 3, 1984, and continued working.

On January 2, 1985, the Applicant reported to Dr. Reese with continuing back pain, and at that time, the doctor advised him not to lift or climb, which he could not avoid in his job. He last worked for Kennecott on March 31, 1985. At that time, he was taken off the job by Kennecott and was given a permanent and total disability pension based on severe hearing loss. He was certified for his retirement as of March 31, 1985, but the actual pension benefits do not commence until six months subsequent to that date, which explains the October 1, 1985, date previously indicated hereinabove. Kennecott relied on the impairment rating given by their medical expert, Dr. Sonkens, which indicated that the Applicant had a 35% binaural hearing loss or a 12% whole man impairment due to industrial noise while employed by Kennecott. Although that was the basis of the permanent and total disability, the records should also reflect that the Applicant was suffering from degenerative disc disease and retropatellar chondritis of both knees. Dr. Reese concluded that the Applicant was permanently and totally disabled as the result of spinal stenosis and retropatellar chondritis of both knees, however, the final retirement was based on the Applicant's severe hearing loss resulting from his exposure to industrial noise while employed by Kennecott. As indicated previously, the medical panel convened by the Industrial Commission to evaluate the Applicant's hearing loss found that he had a 7.5 percent binaural hearing loss or a 3% impairment of the whole person.

With the file in this posture, the case was referred to a Medical Panel for evaluation of the orthopedic injuries. The Panel found that the Applicant has a 10% permanent partial impairment of the whole person due to low back problems. The Panel concluded that as a result of the original industrial accident of September 21, 1961, the Applicant sustained a 5% permanent partial impairment, and that he has a 1% impairment of the whole person due to the industrial injury of September 22, 1966, a 2% permanent partial impairment due to the industrial accident of November 16, 1976, a 1% impairment of the whole person due to the industrial injury of November 18, 1982, and a 1% impairment of the whole person due to the industrial injury of June 20, 1984. The Panel also found a 4% impairment of the whole person due to arthritis in the Applicant's knees as a result of pre-existing conditions. The Panel also found that there was no impairment due to conditions existing before September 21, 1961, and that the industrial accident of November 18, 1982, did not aggravate a pre-existing condition other than the prior industrial accident of 1961, and the Panel made the same finding with respect to the industrial injury of June 20, 1984. With respect to the industrial accident of April 26, 1983, the Panel found that this industrial accident caused only a temporary aggravation of the Applicant's chronic progressive degenerative knee condition. The Administrative Law Judge adopts the findings of the Medical Panel as his own.

At the present, the Applicant's daily routine consists of some reading on a very limited basis, since he is unable to sit for more than ten or fifteen minutes. He has constant spasms and throbbing pain in his back, and he is able to climb some stairs and can walk for a limited distance.

On October 31, 1986, the Social Security Administration entered its decision that the Applicant was permanently and totally disabled. While not binding on the Administrative Law Judge, it is evidence of the extent of the Applicant's disability. As previously indicated, Kennecott's own evaluator, Alan Heal, found that the Applicant was not a viable candidate for rehabilitation training, as did the Division of Rehabilitation Services as required by Section 35-1-67, Utah Code Annotated. Accordingly, the overwhelming preponderance of the evidence on the file clearly supports a finding of permanent and total disability as the result of his industrial accidents and his occupational hearing loss claim. Accordingly, the Applicant is entitled to permanent and total disability benefits. Although the law is somewhat unclear in this area, it would appear to the Administrative Law Judge that the permanent total disability award should be based on the compensation rate in effect at the time of the Applicant's last industrial injury of June 20, 1984, which will entitle him to the maximum compensation benefits of \$255.00 per week for 312 weeks.

Finally, the Defendant, Kennecott, has urged that the Applicant's claim be dismissed for permanent and total disability for the reason that the Commission file contains no Employer's First Reports of Injury for any of the industrial accidents. This case involves a situation where the self-insured employer, Kennecott, was clearly aware of the industrial accidents of Mr. Maldonado since he reported them to their dispensary, and they were faithfully recorded by the dispensary personnel. Therefore, Kennecott had the burden of submitting both the First Report of Injury and the first medical report, neither of which were filed for the Applicant's industrial injuries. The Applicant had no reason to file any type of Application for Hearing or other request for litigation with respect to his injuries, since Kennecott paid him his benefits and provided the medical care that he needed. For Kennecott to now argue that they should not be liable for benefits because they did not give the required legal notice to the Commission is an attempt by Kennecott to take advantage of its own failure to comply with their legal responsibilities. The Administrative Law Judge will not allow Kennecott's failure to comply with the law to work or redound to their benefit. Therefore, the Administrative Law Judge finds that Kennecott is estopped from raising this defense.

There being no permanent aggravation of the pre-existing knee problems by the industrial accidents, the Administrative Law Judge finds that there is no Second Injury Fund participation indicated. Accordingly, Kennecott shall be liable for the initial permanent and total disability award, which shall commence effective April 1, 1985. Pursuant to Section 35-1-67, the Second Injury Fund will then commence permanent and total disability benefits to the Applicant at that same weekly rate effective March 25, 1991.

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CONCLUSIONS OF LAW:

Angelo Maldonado is permanently and totally disabled as the result of his industrial accident at Kennecott and his occupationally caused hearing loss.

ORDER:

IT IS THEREFORE ORDERED that Kennecott pay Angelo Maldonado compensation at the rate of \$255.00 per week for 312 weeks for a total of \$79,560.00, as compensation for his permanent and total disability resulting from his industrial accidents and occupational hearing loss at Kennecott. These benefits shall commence effective April 1, 1985, with accrued amounts to be paid in a lump sum including interest of 8% per annum from April 8, 1985, until benefits are made current.

IT IS FURTHER ORDERED that the Second Injury Fund place Angelo Maldonado on their payroll effective March 25, 1991, with benefits to be paid at the rate of \$255.00 per week for as long as the Applicant shall live or until further order of the Commission.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) 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  
Administrative Law Judge

Passed by the Industrial Commission  
of Utah, Salt Lake City, Utah, this

14th day of January, 1987.

ATTEST:



Linda J. Strasburg  
Commission Secretary

CERTIFICATE OF MAILING

I certify that on January 14<sup>th</sup>, 1987, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of Angelo Maldonado, issued January 14<sup>th</sup> 1987, was mailed to the following persons at the following addresses, postage paid:

Angelo Maldonado, 2363 Green Street, #A, SLC, UT 84106

Laurie Priano, Kennecott, P. O. Box 525, Bingham Canyon, UT 84006-0525

Erie Boorman, Administrator, Second Injury Fund

THE INDUSTRIAL COMMISSION OF UTAH

By Stelma  
Wilra



## APPENDIX D

THE INDUSTRIAL COMMISSION OF UTAH

Case Nos. 85000374 & 86000654

ANGELO MALDONADO,

Applicant,

vs.

KENNECOTT  
(SELF-INSURED) and/or  
SECOND INJURY FUND

Defendants.

\*\*\*\*\*

DENIAL OF

MOTION FOR REVIEW

On or about January 14, 1987, an Order was entered by an Administrative Law Judge of the Commission wherein benefits were awarded in the above entitled case.

On or about February 11, 1987, the Commission received a Motion for Review from the Defendants, Kennecott, by and through their attorney.

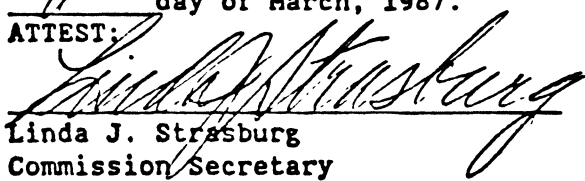
Thereafter, the matter was referred to the entire Commission for review pursuant to Section 35-1-82.53, Utah Code Annotated. The Commission has reviewed the file in the above entitled case and we are of the opinion that the Motion for Review should be denied and the Order of the Administrative Law Judge affirmed. In affirming, the Commission adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge.

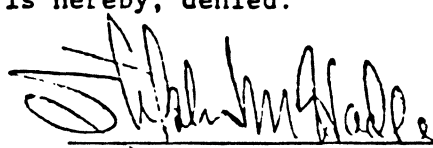
IT IS THEREFORE ORDERED that the Order of the Administrative Law Judge of January 14, 1987, shall be, and the same is hereby, affirmed and the Motion for Review shall be, and the same is hereby, denied.


Passed by the Industrial Commission  
of Utah, Salt Lake City, Utah, this

11th day of March, 1987.

ATTEST:

  
Linda J. Strasburg  
Commission Secretary

  
Stephen M. Hadley  
Chairman

  
Walter T. Axelgard  
Commissioner

  
Lenice L. Nielsen  
Commissioner

CERTIFICATE OF MAILING

I certify that on March 6, 1987, a copy of the attached Denial of Motion for Review in the case of Angelo Maldonado, issued March 6 1987, was mailed to the following persons at the following addresses, postage paid:

Angelo Maldonado, 2363 Green Street, #A, SLC, UT 84106

Laurie Priano, Kennecott, P. O. Box 525, Bingham Canyon, UT 84006-0525

James M. Elegante, Atty., P. O. Box 11898, SLC, UT 84147-0898

Erie V. Boorman, Administrator, Second Injury Fund

THE INDUSTRIAL COMMISSION OF UTAH

By \_\_\_\_\_  
Wilma