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Kennecott Copper Corporation v. The Industrial Commission of Utah and Robert E. Markus : Brief of Appellant

Utah Supreme Court

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CKET NO. 10534 P1

**SUPREME COURT
OF THE
STATE OF UTAH**

KENNECOTT COPPER CORPORA-
TION,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH and ROBERT E. MAR-
KUS,

Defendants.

Case No.
10534

PLAINTIFF'S BRIEF

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

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

KENNECOTT COPPER CORPORATION,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH and ROBERT E. MARKUS,

Defendants.

Case No.
10534

PLAINTIFF'S BRIEF

STATEMENT OF KIND OF CASE

This is an original proceedings before the Supreme Court of Utah for the purpose of having the lawfulness of an award dated December 14, 1965 of the Industrial Commission of Utah in a proceedings entitled Robert E. Markus, Applicant, vs. Kennecott Copper Corporation, defendant, Claim No. 6315, inquired into and determined as provided by Section 35-1-83, U. C. A., 1953, as amended by Laws of Utah, 1965.

DISPOSITION BY INDUSTRIAL COMMISSION OF UTAH

On December 14, 1965, the Industrial Commission of Utah made its order and award that Kennecott Copper Corporation pay Robert E. Markus temporary total compensation from June 11, 1964 until Applicant was released by his physician, that it pay all medical and hospital bills incurred because of the injury to said Applicant, that it pay him permanent partial disability for 10% loss of bodily function of 20 weeks at \$51.40 per week for a total of \$1,028.00, and that it pay Matt Biljanic the sum of \$150.00 for his services in connection with the proceedings before the Commission, the same to be deducted from the award. Kennecott Copper Corporation filed with the Industrial Commission of Utah a Motion for Review on December 29, 1965 as required by Section 35-1-82.55, U. C. A., 1953, as enacted by Laws of Utah, 1965 as a prerequisite for the filing of this action in the Supreme Court of Utah. This Motion for Review was denied by order of the Industrial Commission of Utah dated January 13, 1966.

RELIEF SOUGHT ON REVIEW

Kennecott Copper Corporation, upon this review, seeks to have the award of the Industrial Commission dated December 14, 1965 set aside by the Supreme Court of Utah.

STATEMENT OF FACTS

Claim and Denial

The claim of Applicant was that he sustained injury on May 16, 1964 while employed as a brakeman at the

Bingham open pit copper mine by Kennecott Copper Corporation. That he was re-railing a train car and was pushing a frog up under the wheels and got a sharp pain between his shoulder blades (R. 4). Kennecott denied liability (R. 7). Kennecott, as shown by its Safety Engineer's report dated July 10, 1964, claimed that there was no accident or incident such as a trip, slip, fall or blow on May 16, 1964 and that Applicant had had back trouble before and that the pain which Applicant felt on that date and subsequent thereto was the result of his previous bodily condition and was not caused by any accident or incident on May 16, 1964 (R. 12-14).

Proceedings Before the Industrial Commission

The Employee's Application for Hearing to Settle Industrial Accident Claim was filed with the Industrial Commission of Utah on August 26, 1964 (R. 4). On December 7, 1964, a hearing was held before Commissioner Wiesley (R. 29-82). The notice of the hearing had written thereon "Medical evidence will be received only after the panel report has been filed" (R. 11). On February 17, 1965, the Commission made its order denying the application (R. 83). A Petition for Rehearing was filed with the Commission by Markus on March 8, 1965 (R. 84-6). By order dated March 12, 1965, the Commission made its order denying the Petition for Rehearing (R. 87). No application was made by Markus to the Supreme Court of Utah as provided by Section 35-1-83, U. C. A., 1953, for a Writ of Certiorari for the purpose of having the lawfulness of the order denying the application, dated February 17, 1965, or

the lawfulness of the order denying the Petition for Rehearing, dated March 12, 1965, inquired into and determined. On April 13, 1965, apparently on its own motion, the Commission made an order granting the Petition for Rehearing and rescinding its order of March 12, 1965 (R. 88).

The Industrial Commission of Utah on June 28, 1965, made its order setting time and place for further hearing for the 12th day of July, 1965 and said hearing was held on said date. Following this hearing, the medical issues were referred to a Medical Panel by the Industrial Commission and the Medical Panel filed its report with the Commission (R. 94-5). Copies thereof were mailed by the Commission to the Applicant and employer on October 19, 1965 (R. 92). No objection was filed to the Medical Panel report although Kennecott, through its attorneys, filed with the Commission a letter in regards thereto on November 4, 1965 (R. 96). The Commission, on December 14, 1965, made its order awarding compensation to the Applicant (R. 115). On December 29, 1965, Kennecott filed its Motion for Review with the Commission (R. 116-17). This was by the Commission denied on January 13, 1966 (R. 119).

The Claimed Accident

On May 16, 1964, at about 10:00 A.M., Markus was underneath the wheels of a train car which had been derailed for the purpose of re-railing it. This was part of his regular duties as a brakeman, at which job he was then working. At the hearing on December 6, 1964, he testified

that he was pushing a frog up under the wheels (R. 32-3) and straining and lifting as much as possible to get it into position (R. 41). He said that at the time he got a sharp pain between his shoulder blades (R. 32). A frog is a piece of equipment used to re-rail a railroad car. According to Markus, it weighs between 50 and 100 pounds (R. 33). Mr. Ross Pino, Safety Engineer for Kennecott, testified that it weighs between 60 and 75 pounds (R. 76). Pictures of a frog were received in evidence (R. 25-6). Markus continued to work the rest of the shift. He testified that that afternoon it really started to bother him, that he laid on a heating pad all that night and the next day he went to work and went to the Company's clinic in the afternoon (R. 33). Markus complained to his engineer on the day of the re-railing that he had hurt his back re-railing the train (R. 35). The engineer on the train, Mr. Asay, confirmed that Markus was bothered with his back that afternoon and more marked the next day. That a day or two before that, he had worked with Markus and hadn't noticed any problem. Markus worked with Asay only occasionally and they were never listed permanently as a crew (R. 51). George J. Strand, the operator of the shovel which was loading the cars of the train on which Markus was the brakeman, testified that he thought that Markus had indicated that he suffered some injury because after re-railing the train and when the cars of the train had been loaded and the train had gone to the dump and returned to the shovel, Markus "couldn't hardly get up the ladder" of the engine (R. 56). He further testified that Markus said he hurt his back underneath the car and that Markus was going

around like an old man that was hurt (R. 57). Markus did not report any accident to his foreman, John Robertson, on the day of the claimed accident (R. 59).

Conduct of Markus After Alleged Accident

Markus continued to work for Kennecott on his regular job from the date of the alleged accident, May 16, 1964, uninterruptedly on his scheduled days until May 29, 1964 (R. 46-7, 66). Since going to California on or about June 1, 1964, he has continued to reside there. He went to the office of Lester O. Hamlin, Industrial Relations Representative of Kennecott on May 28 or 29, 1964 for the purpose of terminating his employment. Markus did not complain of any injury that he was suffering from at that time (R. 66). He planned on taking his vacation and terminating his employment on or about June 8, 1964. On June 7, 1964, Warren Cole, an official of the Union in which Markus was a member, notified Hamlin not to remove Markus from the payroll because he had been hospitalized in California. Markus was then kept on the payroll (R. 22, 66). He was still living in California at the time of the original hearing before Commissioner Wiesley on December 7, 1964 (R. 35-6). He was still there on July 12, 1965 at the time of the further hearing before Commissioner Wiesley on July 12, 1965 (R. 111). He returned to Salt Lake City to receive medical treatment upon recommendation by California doctors and first consulted Dr. Wayne Hebertson (R. 36-7) and received various treatments recommended by him and finally was operated on by Dr. Boyd G. Holbrook on June 25, 1964 who performed an anterior excision

of the C-6, 7 intervertebral disc and an interbody fusion (R. 2). He was not referred to either Dr. Hebertson or Dr. Holbrook by his employer or its doctors, but he received the services of these doctors at his own request. He did not consult Kennecott or its doctors after leaving Utah on or about June 1, 1964 (R. 48).

Markus made application with Travelers Insurance Company for benefits as a result of the condition of his neck as a non-industrial accident (R. 72). He explained that Mr. Christensen who has charge of medical records for Kennecott (R. 78) told him to go ahead and file with Travelers and he would have money coming in before waiting for the Industrial Commission decision (R. 81).

Mr. Markus did not file his Application for Hearing to Settle Industrial Claim with the Industrial Commission of Utah until August 26 ,1964 which was approximately two months after he had had the operation by Dr. Holbrook. The Industrial Commission of Utah had not been requested to grant permission, for the operation or to authorize it.

Back and Neck Trouble Suffered by Markus

Mr. Markus advised Dr. Holbrook on June 21, 1964 that he has a curvature of the low back due to a birth defect but that he had not had much trouble with it (R. 1). X-Rays of the cervical spine as reported by Dr. Holbrook showed a congenital fusion of C-1 and C-3 (R. 2). While in California in June, 1964, his back bothered him and he consulted doctors there and returned to Salt Lake City and was operated on on June 25, 1964 (R. 2). Before the oper-

ation, a myelogram was performed by Dr. Hebertson which showed a large defect on the right between C-6 and 7 (R. 103). The operation by Dr. Holbrook confirmed a ruptured or protruded disc which was excised (R. 2). He had had back trouble for several years. As early as May 31, 1957, he had "aching shoulders for five days" (R. 9, 27, 38). He had an injury to the back on April 13, 1963 (R. 27). The incident of May 16, 1964 was reported as an industrial injury by Markus when he went to the Company clinic on May 17, 1964. The doctor there diagnosed it as a sprain (R. 15, 28). Markus also went to Dr. B. O. Egbert, a chiropractor, during the months of March, April and May of 1961 (R. 9, 38). He also went to Dr. R. S. Clegg, an orthopedic surgeon in Salt Lake City in December, 1961 because his lower back was bothering him (R. 9, 39). Markus slipped and fell on the ice as he was walking out of his garage in January, 1963 and had a stiff neck for three or four days and was off work for four days being treated by Dr. J. A. Parker (R. 9, 39).

Medical Evidence of the Claimed Injury to Markus

Kennecott's doctor diagnosed it as a sprain (R. 15, 28). Dr. Boyd G. Holbrook, who was engaged by Markus as a private surgeon, performed an operation with the anterior excision C-6, 7 intervertebral disc and an interbody fusion on June 25, 1964. This was before Markus filed his claim with the Industrial Commission. Dr. Holbrook's report of this operation dated June 30, 1964, however, was made to Kennecott and a copy sent to the Industrial Commission and received by it on July 1, 1964 (R. 1). A copy thereof

was also introduced in evidence as part of Exhibit 1 (R. 19-20) at the hearing before the Commission on December 7, 1964 (R. 61). Dr. Holbrook testified at the further hearing before the Commission on July 12, 1964 (R. 100-12). His testimony included a repeat of the information given in his letter of June 30, 1964. In answer to a hypothetical question as to whether he had an opinion as to the likelihood of Markus suffering an injury, he answered that he could give an opinion (R. 106). He then gave a dissertation and explained that it is very rare for a completely normal disc to ever be ruptured by any type of trauma; that ordinarily when a disc ruptures or protrudes, it is a disc that has previous degenerative changes and degenerative changes are almost universal (R. 106). He did in response to a very leading question answer that it would be likely for a man to sustain the type of injury where he was doing some *heavy lifting * * ** and where he was unable to *function properly thereafter* (R. 107). (Emphasis added.) Markus did not tell Dr. Holbrook of his fall on the ice on January 12, 1963 or that he had received treatments from Dr. B. O. Egbert or that he had consulted with Dr. Clegg on January 4, 1962.

Markus was examined on August 27, 1965 by a Medical Panel appointed by the Commission consisting of Norman R. Beck, M.D., Chairman, Sherman S. Coleman, M.D. and Samuel Taylor, M.D. They made their report under date of September 10, 1965 (R. 94-5). The Panel made findings including the following:

“(1) The type of maneuver as described by the patient could be conceived to cause the hernia-

tion of the cervical intervertebral disc giving rise to nerve root pain" (R. 95).

There is nothing in the report which indicates that Markus told the Panel about his former back and neck troubles, including his fall on the ice on January 12, 1963.

ARGUMENT

POINT I.

THE INDUSTRIAL COMMISSION OF UTAH
HAD NO JURISDICTION TO ISSUE ITS OR-
DER OF APRIL 13, 1965 GRANTING THE PE-
TITION FOR REHEARING.

This problem was considered by the Supreme Court of Utah in the case of *Salt Lake City v. Industrial Commission*, decided May 25, 1923, 61 Utah 514, 215 P. 1047.

In this case, the applicant, an employee of Salt Lake City, claimed to have been injured in the course of his employment and filed an application for compensation. A hearing was had before the Industrial Commission and on June 17, 1922, compensation was awarded. Salt Lake City immediately applied for a rehearing, which, on August 1st, was granted, and on the same day the hearing was had, the award set aside and compensation denied. On September 6th, the applicant filed a new application before the Commission setting forth the circumstances of the injury the same as if the case had not been previously determined. After hearing the evidence, the Commission on December 2nd entered an order setting aside its decision of August

1st and reinstated its former order awarding compensation. Salt Lake City applied for a rehearing and when it was denied by seasonable application to the Supreme Court sought to have the case reviewed and the award set aside.

The Supreme Court annulled, vacated and set aside the award of the Commission entered on December 2nd.

The court held that in the last hearing the Commission proceeded without jurisdiction.

The court interpreted Section 3148, Compiled Laws of Utah, 1917, as amended in Session Laws, 1919, page 164 which reads as follows:

“Within thirty days after the application for a rehearing is denied, or, if the application is granted, within thirty days after the rendition of the decision on the rehearing, any party affected thereby (including the state insurance fund), may apply to the Supreme Court of this state for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original award or the award on rehearing inquired into and determined” (215 P. 1047-8, 61 Utah 517).

The provisions of the above quoted section are the same as Section 35-1-83, U. S. C., 1953, except for the substitution in the latter of the “Commission of Finance” for “the state insurance fund”. This section was later amended by the 1965 Legislature, the amendment taking effect on July 1, 1965. This 1965 amendment did not, however, alter the substance of the section.

The court also interpreted and had in mind Section 3144 of the Compiled Laws of Utah, 1917, which reads as follows:

“The powers and jurisdiction of the Commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto as in its opinion may be justified” (215 P. 1048, 61 Utah 518).

The provisions of the above quoted section are the same as Section 35-1-78, U. C. A., 1953, as amended in 1961 and 1963, except for the addition in 1961 of a provision for the destruction by the Commission of records in certain cases and in 1963 by the insertion of a reference to a claim filed as in 35-1-99.

The following language by Judge Thurman appears applicable to the present case:

“In this case the Commission on the first hearing, in June, 1922, awarded the applicant compensation. The city, in accordance with the provisions of the section above quoted, applied for a rehearing. The rehearing was granted, the award set aside, and compensation denied. Under the plain, unequivocal provisions of the statute the remedy of the applicant was to apply to this court within 30 days for a writ of review. Instead of pursuing that course, applicant delayed for more than 30 days and filed a new application for a hearing before the Commission the same as if the case had never before been heard. Such a procedure flies in the very face of the statute. If such procedure is upheld, litigation before the Commission in any given case may never end. It was just as obligatory upon the ap-

plicant, when the Commission granted the city's application for a rehearing, August 1, 1922, to apply to this court within 30 days for a writ of review, as it would have been for the city to do so if its application for rehearing had been denied" (215 P. 1048, 61 Utah 517).

The above case was cited with approval in *Ferguson v. Industrial Commission*, decided July 21, 1923, 63 Utah 112, 221 P. 1099.

In the *Ferguson* case, after the denial of compensation, a Petition for Rehearing was filed with the Industrial Commission on April 28, 1922 which was denied on May 8, 1922. On September 10, 1922, a second Petition for Rehearing was filed which the Commission granted. On the second hearing, the Commission made an order on October 31, 1922 that the application be dismissed. Within 30 days from the date of the last order, the plaintiff applied to the Supreme Court for a writ of Review. In referring to the jurisdiction of the Commission, this court said:

"The first petition for rehearing having been denied on May 8, 1922, the jurisdiction of the Industrial Commission ceased. It was then incumbent upon the applicant to apply to this court within 30 days for a writ of review or to abide by the decision" (221 P. 1099, 63 Utah 114).

A more recent case of *Callahan v. Industrial Commission*, decided June 24, 1943, 104 Utah 256, 139 P. 2d 214, again considered the problem. After a hearing before the Industrial Commission, the Commission on June 11, 1942 denied compensation. On July 13, 1942, the plaintiff filed an application with the Commission for a rehearing out-

lining several reasons therefor and on July 16, 1942, this application for rehearing was denied. On August 13, 1942, the plaintiff filed with the Commission a "Supplemental Application for Rehearing". The Commission took no action on this "Supplemental Application" and the plaintiff on August 15, 1942 applied to the Supreme Court for a writ of review. The court made the following statement:

"Plaintiff then filed with what he terms a 'Supplemental Application', three affidavits containing the proffered additional evidence. This was simply a second petition for rehearing, for which there is no authority in law. The statute above quoted is jurisdictional, and the Commission was warranted in disregarding this untimely 'Supplemental Application'. *Ferguson v. Industrial Commission*, 63 Utah 112, 221 P. 1099, wherein it is said:

"The first petition for rehearing having been denied on May 8, 1922, the jurisdiction of the Industrial Commission ceased. It was then incumbent upon the applicant to apply to this court within 30 days for a writ of review or to abide by the decision. *Salt Lake City v. Industrial Commission* [61 Utah 514], 215 P. 1047'" (139 P. 2d 216, 104 Utah 260).

The section of the statute referred to was 42-1-76, U. C. A., 1943 which is the same as 35-1-82, U. C. A., 1953.

None of the above cases have been overruled.

The Commission, in its order of April 13, 1965 granting a rehearing to the Applicant, stated that it was compelled to do so by the Supreme Court's decision on the Ruth

B. Griffith case, No. 10126 (R. 88). This case is *Griffith v. Industrial Commission*, decided February 18, 1965, 16 Utah 2d 264, 399 P. 2d 204. Commissioner Wiesley at the further hearing held on July 12, 1965 explained:

"The Commission issued an order(ed) on 2-17-65 denying Applicant's claim. A petition for rehearing was filed on March 8, 1965. The Supreme Court decision in the Ruth B. Griffith, No. 1016, compelled the Commission to rescind its previous order of 3-12-65, and on 4-13-65 the petition for rehearing was granted.

"The reason for the change is the Supreme Court finally decided that, if the 30th day falls on a holiday, they can have until the next working day to file, and for that reason the petition for rehearing was granted" (R. 99).

The Commission, in its order of December 14, 1965 granting compensation to Markus, also included therein the above quoted paragraphs.

The reason given was not applicable in this case. The order denying compensation was dated February 17, 1965 (R. 83). The Petition for Rehearing was filed March 8, 1965 (R. 84). It was filed well within the thirty-day period provided by 35-1-82, U. C. A., 1953 within which a Petition for Rehearing is permitted to be filed with the Commission.

It is respectfully submitted that the Industrial Commission had no jurisdiction to issue its order of April 13, 1965 granting the Petition for Rehearing and that it was not compelled to do so by the decision of the Supreme Court

in the Ruth B. Griffith case. The only remedy which the Applicant, Robert H. Markus, had following the decision of the Industrial Commission denying his application for rehearing which was dated March 12, 1965 was to apply to the Supreme Court for a Writ as provided by 35-1-83, U. C. A., 1953. Inasmuch as he did not do so within thirty days from the order denying his application for rehearing, he exhausted his remedy. The order denying compensation dated March 12, 1965 should be approved and affirmed.

If this court does not agree with plaintiff's contention on Point 1, then it is necessary for it to give consideration to plaintiff's Point 2.

POINT II.

THERE ARE NO FINDINGS OF FACT AND CONCLUSIONS OF LAW OR EVIDENCE TO SUPPORT THE AWARD OF THE INDUSTRIAL COMMISSION.

Plaintiff is not unmindful of the many cases decided by this court which hold that the Industrial Commission is vested with exclusive power and responsibility of deciding questions of fact. It is the contention of plaintiff that there is no material, substantial, competent, legal evidence in the record upon which the Commission could make an award in favor of the Applicant and that in doing so, it acted arbitrarily.

The Commission, after the original hearing, made its order dated February 17, 1965 denying compensation. In the order, it recited the facts of the incident upon which

the Applicant based his claim for compensation. It found that there was nothing unusual about the incident. As plaintiff interprets the order, it negates any unusual exertion, a slip, a fall or a blow suffered by Applicant in the course of his day in and day out employment activities (R. 83).

The Applicant's surgeon added nothing to the factual situation. He could not and did not testify that the protruding disc which he excised on June 25, 1964 was caused by the incident of May 16, 1964. In his report of June 30, 1964, he advised that Markus had related to him that he was in good health until about one month before when he was under the wheels of a derailed train and was *lifting* and developed a sudden pain between the shoulder blades (R. 1) (Emphasis added). The order of the Commission dated February 17, 1965 in effect found that Markus was not lifting. The application of Markus stated that he was pushing a frog, not lifting it (R. 4, 83). The commission in its order of February 17, 1965, stated: "Applicant on several occasions told about pushing, not lifting a frog. His counsel suggested lifting" (R. 83).

In the hypothetical question asked of Dr. Holbrook by Applicant's attorney at the further hearing on July 12, 1965, Dr. Holbrook was asked to assume that Markus on May 16, 1964 was doing some *heavy lifting* and was unable to *function properly* thereafter (R. 107) (Emphasis added). These facts were not in evidence and the opinion of Dr. Holbrook was therefore improper. His opinion was also given without being informed by Markus that he had

had previous back and neck trouble. As stated in an opinion of Judge Elias Hansen in the case of *Diaz v. Industrial Commission*, decided July 21, 1932, 80 Utah 77, 13 P. 2d 307:

“Answers to hypothetical questions not founded upon, but contrary to, the established facts in a case have no probative value” (13 P. 2d 317, 80 Utah 104).

The Industrial Commission, by its order of December 14, 1965 awarding compensation, adopted the Medical Panel report dated September 10, 1965. The only finding therein connecting the incident of May 16, 1964 with the herniated disc for the excision of which Dr. Holbrook operated on June 25, 1964, is:

“(1) The type of maneuver as described by the patient *could be conceived to cause* the herniation of the cervical intervertebral disc giving rise to nerve root pain” (R. 95) (Emphasis added).

Webster's New International Dictionary, Second Edition, Unabridged, page 552, gives the following definitions of conceive:

“2. To take into one's mind; as, to conceive a dislike; to formulate, to devise, form a conception of, or imagine.

“3. To apprehend by reason or imagination; to comprehend; to understand.

“4. To think or suppose; to be of the opinion; as, whatever.”

Synonyms given are: “Think, suppose, fancy, suspect.”

It appears conceive is something similar to possible, but much less than probable.

It appears that in the minds of the Medical Panel, there was very grave doubt that the incident of May 16, 1964 caused the herniation of the disc. The Commission, basing its award to Markus, appears to have done so upon surmise, conjecture of the likelihood, or at the most, the possibility that the incident of May 16, 1964 caused the herniation of the disc.

Although the case of *Sugar v. Industrial Commission*, decided January 24, 1938, 94 Utah 56, 75 P. 2d 311 involved a question of whether or not a gun shot causing death was self inflicted and therefore not in the course of employment, while in this case the question is whether or not a particular condition resulted from an incident in the course of employment, the language of Justice Ephraim Hanson is relevant. Justice Hanson said:

“Where the Commission is driven to surmise or conjecture, the injured person or his dependents cannot recover. This is too well settled to require citation” (94 Utah 59, 75 P. 2d 312).

In the case of *General Mills v. Industrial Commission*, decided December 19, 1941, 101 Utah 214, 120 P. 2d 279, which was a second decision setting aside an award by the Commission, the question considered was which of two accidents caused the death of an employee. He had one accident on March 17, 1938 while in the course of his employment and another on March 20, 1938, not in the course of his employment. The Commission on the original hearing

found that death resulted from the first injury. On first review by the Supreme Court, award was set aside. On second hearing before the Commission where additional evidence was received, it again granted compensation. The Supreme Court reversed the amended award.

Citing earlier cases, Justice Wolfe, speaking for the court, said:

“Mere surmise, conjecture, guess or speculation is insufficient. Further, the burden is on the complainant to prove that the injury is compensable” (120 P. 2d 280, 101 Utah 217).

The record is sufficient to show that Markus, on May 16, 1964 after getting out from under the wheels of the car, had some pain and that he went to Kennecott's clinic and saw a doctor on the following day. The doctor diagnosed it as a sprain (R. 15). Assuming, but not admitting, that there was an injury received by Markus on May 16, 1964 while working for plaintiff, he suffered no disability therefrom. In addition to the proof of the injury, he had the further burden to show by competent evidence that this accident caused the condition for which he was operated on by Dr. Holbrook and from which he suffered disability. No competent evidence is in the record to show this.

The conduct of Markus after May 16, 1964 is inconsistent with his later contentions after he had had his operation on June 25, 1964 that he had received a herniated disc as a result of the incident of May 16, 1964. He gave notice to his employer that he was terminating his employment at the end of his vacation time which he had accumu-

lated or on about June 7, 1964. He worked at his regular job with plaintiff every day he was scheduled to work after the incident to and including May 29, 1964. He did not, after May 17, 1964, seek any medical attention from his employer or its doctors. He applied to Travelers Insurance Company for benefits which might be due him for a non-industrial disability. It was not until after he had been operated on by Dr. Holbrook that he applied for workmen's compensation benefits. He had had back and neck troubles for years which were apparently corrected by Dr. Holbrook but which were not the result of the incident of May 16, 1964.

Plaintiff respectively submits that the award of the Industrial Commission of Utah dated December 14, 1965 in favor of Markus is not justified by the record of the proceedings and evidence before the Commission, that said award is arbitrary and that this court should reverse and annul it.

Respectfully submitted,

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