

1966

# Kennecott Copper Corporation v. the Industrial Commission of Utah and Robert E. Markus : Defendant's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH — FILED

KENNECOTT COPPER CORPO-  
RATION,

MAY 6 - 1966

*Plaintiff,* Supreme Court, Utah

vs.

Case No.  
10534

THE INDUSTRIAL COMMIS-  
SION OF UTAH and ROBERT  
E. MARKUS,

*Defendants.*

UNIVERSITY OF UTAH

DEFENDANTS' BRIEF SEP 30 1966

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Original Proceedings to Review an Award of the  
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## DEFENDANTS' BRIEF

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### 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

The Industrial Commission of Utah, on December 14, 1965, upon rehearing to consider the medical panel's report, ordered that Kennecott Copper Corporation pay Robert E. Markus temporary total compensation from June 7, 1964 until Mr. Markus was released by his physician; that Kennecott Copper Corporation pay all medical and hospital expenses, but not in excess of the Commission medical fee schedule; that Kennecott Copper Corporation pay Mr. Markus permanent partial disability for 10% loss of bodily function, or 20 weeks at \$51.40 per week for a total of \$1,0278.00; and further ordered that Matt Baljanic be awarded \$150.00 attorney's fees.

The Commission then denied a Motion for Review filed by Kennecott Copper Corporation on January 13, 1966.

## RELIEF SOUGHT ON REVIEW

Robert E. Markus seeks to have the award of the Industrial Commission of December 14, 1965 sustained by the Supreme Court of Utah.

## STATEMENT OF FACTS

Mr. Markus, on the 16th day of May, 1964, at or about 10:00 o'clock A.M., was underneath the wheels of a derailed train car for the purpose of rerailling said

train car. This was part of his duties as a brakeman and was done in the course of his employment (R. 33).

Mr. Markus testified that he received a sharp pain between his shoulder blades while he was pushing a frog up under the wheels of the train in order to rerail said train car (R. 32). A frog is an instrument used to rerail train cars and weighs between 50 and 100 pounds (R. 33). This process of rerailling requires the operator to lie on his back while raising up and pushing the frog and thus putting great strain on the upper part of the body. Mr. Marcus complained of the injury to his engineer on the day he received the injury (R. 35). However, it was not until the following Monday, May 18, 1964 that he could see a Kennecott Copper doctor (R. 34).

The doctor told him that it was just a muscle sprain and for Mr. Marcus to come back if it got worse. No x-rays or other examinations were taken (R. 34-35). The applicant continued to work, but continued to do so with considerable pain.

On or about June 1, 1964 Mr. Markus went on vacation to California; while in California the pain became so severe he was required to go to a clinic for treatment at Compton, California. Upon the advice of the clinic Mr. Marcus saw a neurosurgeon in Downey, California and, upon the complete examination by the neurosurgeon, was advised that he should be hospitalized for further treatment (R. 36), whereupon Mr. Markus decided to come back to Salt Lake City where

he was examined by Dr. Wayne M. Hebertson (R. 36). Upon Dr. Hebertson's advice, Mr. Markus was hospitalized and put in traction for approximately one week. Tests were taken and upon the finding of three discs out of place, Dr. Hebertson called in Dr. Boyd G. Holbrook and Dr. Thomas D. Noonan to perform an operation upon Mr. Markus.

Mr. Markus filed a claim with the Industrial Commission of Utah on August 26, 1964 (R. 4). A hearing was held on December 7, 1964 at which no medical testimony was allowed (R. 11). On February 17, 1965 the Commission denied Mr. Markus' claim (R. 83). A Petition for Rehearing was filed with the Commission on March 8, 1965 (R. 84-86). The Commission, by a general order, denied the Petition for Rehearing on March 12, 1965.

On or about April 8, 1965, the attorney for the applicant prepared a Writ of Certiorari to have the Commission's Order of March 13, 1965 reviewed by the Supreme Court. Prior to filing the Writ of Certiorari on the above mentioned date, the attorney for the applicant was informed by Commissioner Otto Wisley that the Order dated March 12, 1965 would be vacated; that as a matter of law the Commission did not have the right to prevent the introduction of medical testimony by the applicant. *Ruth Griffith v. The Industrial Commission*, 16 U. 2d 264, 399 P.2d 204, 1965.

Attorney for the applicant, relying on the representations of Commissioner Wiesley that the Industrial

Commission would vacate its Order of March 12, 1965, well within the statutory time for appeal, did not file the Writ of Certiorari with the court.

On the 13th day of April, 1965 the Industrial Commission vacated its Order of March 12, 1965 and granted to the applicant a rehearing of the matter to allow introduction of competent medical testimony on behalf of the applicant.

On the 12th day of July, 1965, a rehearing was held to allow the introduction of competent medical testimony. Subsequent to the rehearing, the medical testimony and issues were submitted to a medical panel. After examination of the applicant by the medical panel appointed by the Commission, a report was filed (R. 94). The findings were as follows:

- (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.
- (2) The surgery performed was indicated and successfully relieved the majority of the individual's symptoms.
- (3) Resulting limitation of motion in the neck and the atrophy and weakness in the right arm would give rise to a 10 percent permanent partial disability of the body as a whole. (R. 95).

There were no objections filed as to this medical report (R. 96).



The Commission, on December 14, 1965, granted an award to the applicant of permanent partial disability for 10% loss of bodily function or 20 weeks at \$51.40 for a total of \$1,028.00, and further ordered that plaintiff pay applicant's attorney the sum of \$150.00 for legal services on behalf of the applicant.

Kennecott Copper Corporation then filed a Motion for Review which was denied January 13, 1966.

## ARGUMENT

### POINT I

THE INDUSTRIAL COMMISSION OF UTAH HAD JURISDICTION TO ISSUE THE ORDER OF APRIL 13, 1965 GRANTING THE PETITION FOR REHEARING.

It is the defendant's contention that the Industrial Commission had jurisdiction to issue its Order of April 13, 1965 granting the Petition for Rehearing in that:

(1) The Industrial Commission never lost jurisdiction in the matter as a full hearing had never been granted.

(2) By virtue of Section 35-1-78 U.C.A. 1953 as amended, the Industrial Commission had continuing jurisdiction over the case and was acting within its powers under that Section.

Defendant further claims that as Kennecott Copper Corporation was present at the rehearing granted

by the Industrial Commission, it had submitted itself to the jurisdiction of the Industrial Commission and, therefore, has no right to now argue the Commission's lack of jurisdiction.

The Industrial Commission in its first hearing of the case, allowed absolutely no medical evidence to be introduced into the record. The defendant was prepared to introduce medical testimony corroborating his testimony as to the injury resulting from an accident on the job. The exclusion of the medical testimony was prejudicial to the defendant in that the issue of an internal injury can only be answered by proper inquiry by a medical panel competent to determine whether or not such an injury could be caused by the facts as alleged by the applicant. It is the contention of the applicant that because of the denial of introduction of medical testimony the applicant was denied a complete hearing as contended by the Legislature under our Workman's Compensation statutes. The Supreme Court has clearly followed this contention in a recent case, *Ruth Griffith v. The Industrial Commission*, 16 U.2d 264, 299 P.2d 204-206, 1965.

"Where the injury complained of affects the internal anatomy, by what means but through medical testimony can petitioner prove that her ailments were caused by the accident?"

It is this fact that establishes the proposition that the Industrial Commission had not relinquished its jurisdiction over the matter. By granting a rehearing, the Industrial Commission was correcting an error

on its part. This correction was intended to save an unnecessary appeal to the Supreme Court of Utah. As Mr. Biljanic, attorney for applicant, stated at the rehearing, the basis for defendant's Petition for Rehearing was to put medical testimony into the record, a right that had previously been denied (R. 99), and it is significant to note that the Order of the Commission denying recovery to the applicant of February 17, 1965 states that the Commission denied recovery on the basis that there was no competent medical testimony of record (R. 83). This writer would like to point out that it was by the Commission's own act that competent medical testimony was refused by the Commission and that as stated elsewhere in the defendant's Brief, the Commission represented to applicant's attorney that it was vacating the Order of March 12, 1965 at which a rehearing was denied to the applicant on the basis of *Griffith v. The Industrial Commission*, supra, and that this action would be accomplished within the statutory time for appeal.

The Industrial Commission, because it had not given a complete hearing as demanded by law, corrected the error and had the jurisdictional power to do so.

Defendant further contends that under Section 35-1-78, U.C.A. 1953 as amended, the Industrial Commission, when it granted the Order for Rehearing, would have jurisdiction of this case. Section 35-1-78 U.C.A. 1953 as amended, gives the Industrial Commission continuing jurisdiction over each case with the

power to modify or change previous orders or findings as in its opinion seem justified. The purpose of this Section is to take care of changed conditions or developments of any kind in order to do justice to the injured party. This court has stated in *Carter v. Industrial Commission*, 76 U. 520, 433, 290 P. 776:

“The continuing jurisdiction of industrial commission is not limited to consideration of changes in physical condition of workmen, but is extended to right to rescind, alter, or amend orders, decisions, or awards on good cause appearing therefor. In other words, the commission under this section has a wide discretion in the exercise of its continuing jurisdiction conferred upon it, and doctrine of *res adjudicata* and other common-law doctrines do not apply.”

The Commission, failing to hear medical testimony in this case, and by virtue of Section 35-1-78 U.C.A. 1953 as amended, had the jurisdiction to correct its error and allow the rehearing.

In light of the court's recent decision in *Griffith v. Industrial Commission*, *supra*, it would seem that the plaintiff's arguments that the defendant failed to file a Writ of Certiorari to the Supreme Court of Utah within the 30 days after denial of the rehearing dated March 12, 1965 and, therefore, exhausted his remedy, is purely academic and has no merit. In the case *Griffith vs. Industrial Commission*, *supra*, the court stated:

“When service of notice is made by mail, Rule 6(e), U.R.C.P. allows three days additional to file. . . . We believe and hold that Rule 6(e),

not inconsistent and not clearly inapplicable with procedure of the Commission, supplements the procedure of the Commission.”

As the Industrial Commission's Order denying rehearing was mailed to the defendant, and applying the court's reasoning, the Commission's Order of April 13, 1965 granting the Petition of Rehearing came out before the defendant's time had expired to petition the Supreme Court. The Order denying the Petition for Rehearing was dated March 12, 1965; an extra three days was given under Rule 6(e) U.R.C.P.; the defendants had until April 14, 1965 to file its Writ of Certiorari for the purpose of having the Commission's Orders denying compensation and rehearing refused.

It is further contended that the plaintiff submitted to the jurisdiction of the Industrial Commission at the time of rehearing. If the plaintiff were going to raise a question of jurisdiction, that would have been the proper time, rather than after the hearing and the awarding contrary to plaintiff's desires.

The procedure the plaintiff has chosen here is one of seeking to have a determination by the Commission in its favor, then to have the Supreme Court review this determination on the basis or lack of jurisdiction in the event said final award was in favor of defendant. This clearly is not what the Legislature intended in passing the act. The purpose of the Workman's Compensation Act is to protect workmen within the limits procured by the Act and thus the Act must be con-

strued liberally in order to make such legislative intent effectual. Considering the intent of the Legislature, the injured party should not be penalized or barred from recovery because of technicalities and rigid interpretation of the laws.

## POINT II

### THERE WERE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND EVIDENCE TO SUPPORT THE AWARD OF THE INDUSTRIAL COMMISSION.

The Plaintiff in its Brief recognizes that the Industrial Commission is vested with the exclusive power and responsibility of deciding questions of fact. A reading of the record of this matter would certainly indicate that the Commission was justified in awarding the recovery to the applicant and that the award is certainly based upon material, substantial and competent legal evidence. The applicant, Mr. Robert E. Markus, on cross examination by Mr. Evans, the attorney for Kennecott Copper Corporation, testified as follows:

Q. And to put that frog in place you would push it up by the wheel, wouldn't you?

A. No. It's practically impossible to push it on the rocks. Because the rocks hang up on this little gadget under the frog. So you have to lift and push at the same time. Otherwise, you can't get it over the rocks. It's hard to slide through rocks or dirt.

Q. But in any event you were sliding this frog and you weren't lifting the whole weight of the frog to get it up in place, were you?

A. I was straining and lifting as much as I possibly could to get it up there, because there is no such thing as just being able to push it. Because it's practically impossible to do it that way. (R. 40-41).

In the Plaintiff's Brief, plaintiff goes to great length to make a distinction between lifting and pushing. This writer will not belabor the point; however the testimony is clear that the applicant was both lifting and pushing as mentioned hereinabove.

The Commission, in its Order dated February 17, 1965, states that the attorney for the applicant suggested lifting (R. 83). The above cited testimony indicates that these facts were established by the attorney for Kennecott Copper Corporation.

Again, on redirect examination, the applicant reiterated that he was lifting the rerailing device known as the frog (R. 49). Witnesses, Mr. Asay and Mr. Strand, who testified at the first hearing that on the day of the alleged accident the applicant appeared to be alright in the morning, but after the train was rerailed, Mr. Strand said:

"... he was going around like an old man that was hurt." (R. 57).

Dr. Boyd Holbrook testified that the applicant's history as related to him was that the applicant had been under the wheels of a derailed train car and was

lifting and developed a sudden pain between his shoulder blades (R. 102). He further testified that a myelogram performed by Dr. Hebertson showed a large defect on the right side of the lower neck (R. 103). Plaintiff, in its Brief, states that the hypothetical question proposed to Dr. Holbrook by applicant's attorney was not based on facts that were in evidence; therefore, he contends that the opinion of Dr. Holbrook was improper. Mr. Biljanic, attorney for the applicant at the rehearing, proposed the following hypothetical question to Dr. Holbrook:

"... Assume if you will an injury on January 12, 1963, as elicited by Mr. Evans. Assume further that an individual over a year later is situated under a railroad car, and raising, lifting and pushing a 75-Pound object over and away from his body, under a railroad car. Can you give an opinion as to the likelihood of one suffering an injury such as the one as Mr. Marcus sustained?" (R. 106).

The facts in the hypothetical question proposed by applicant's attorney are based upon facts and evidence which are clearly a part of the testimony and record. Dr. Holbrook, in response to the above hypothetical question, testified that it was likely that the applicant sustained an injury at the time he was rerailing the train car (R. 107-108).

The Industrial Commission appointed a medical panel consisting of Norman R. Beck, M.D., Chairman; Sherman S. Coleman, M.D.; and Samuel Taylor, M.D., which met on August 27, 1965. Mr. Markus was ex-



amined by the panel at the time of said meeting. Up to the conclusion of the medical examination the panel made the following finding:

- (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.
- (2) The surgery performed was indicated and successfully relieved the majority of the individual's symptoms.
- (3) Resulting limitation of motion in the neck and the atrophy and weakness in the right arm would give rise to 10 percent permanent partial disability of the body as a whole.

The Commission, after review of all the material substantial and competent evidence and testimony introduced at the time of the hearings on this matter, on December 14, 1965 made a finding that there had been an accident and that the applicant was entitled to recovery (R. 115). The Commission's award was certainly based upon competent evidence and testimony as mentioned above. The medical panel found the extent of the injury and the type of injury claimed by the applicant could have been caused by the activities and maneuvers that Mr. Markus alleged caused his injury.

## CONCLUSION

This writer in several instances has pointed out competent evidence and testimony introduced at the time of the hearings in this matter contained in the

record and transcripts. It should be noted that the Industrial Commission is sole Judge of the credibility of witnesses, weight of evidence and facts, and their decision thereon is final if there is any substantial evidence to sustain it. *Chief Consol. Min. Co. v. Industrial Commission*, 70 U. 333, 260 P. 271. Defendant respectfully submits that the award of the Industrial Commission of Utah dated December 14, 1965, be sustained in favor of defendant Markus in that it was justified by the record of the proceedings and evidence before the Commission properly weighed the evidence and the credibility of the witnesses.

Respectfully submitted,

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