

1969

Kennecott Copper Corporation v. The Industrial Commission of Utah, and Ina R. Johnson : Defendant'S Brief

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In The Supreme Court of the State of Utah

KENNECOTT COPPER CORPORATION,

Plaintiff,

-vs-

**THE INDUSTRIAL COMMISSION OF
UTAH, and INA R. JOHNSON,**

Defendants.

DEFENDANT'S BRIEF

Original Proceedings To Review the
of the Industrial Commission

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In The Supreme Court of the State of Utah

KENNECOTT COPPER CORPORATION,
Plaintiff,

-vs-

THE INDUSTRIAL COMMISSION OF
UTAH, and INA R. JOHNSON,
Defendants.

Civil No.
11645

DEFENDANT'S BRIEF

STATEMENT OF NATURE OF CASE

This case comes before the Supreme Court of the State of Utah by way of a statutorily granted right of review into awards made by the Industrial Commission of Utah. Section 35-2-37, Utah Code Annotated, 1953, as amended by Laws of Utah, 1965. Pursuant to an administrative hearing, **Applicant vs. Kennecott Copper Corporation** (defendant) Claim No. 6587, the Industrial Commission of Utah found in favor of applicant, Ina R. Johnson, widow of Richard Herbert Johnson, and said award was dated March 14, 1969, and finalized on April 21, 1969. The claim set forth in this proceeding by the plaintiff herein, Kennecott Copper Corporation, (hereinafter Kennecott) is to have the decision of

the Industrial Commission of the State of Utah over turned.

DISPOSITION BY INDUSTRIAL COMMISSION OF UTAH

On March 14, 1969, after the conclusion of a fair hearing on the matter in question, the Hearing Examiner for the Industrial Commission of Utah entered an order and award that Kennecott Copper Corporation pay all medical and hospital expenses incurred, together with the statutory burial allowance of \$525.00, that it pay to Applicant compensation benefits at the rate of \$45.60 per week beginning December 28, 1965, and continuing until a total of \$14,727.40 has been paid, and that it pay Thomas A. Duffin the sum of \$1,400.00 for his legal services in connection with the proceedings, the same to be deducted from the accrued compensation. Kennecott filed with the Industrial Commission of Utah a Motion for Review of Hearing Examiner's Award on April 3, 1969. Acting within the statutorily granted discretion given it, the Commission denied Kennecott's motion for review by order of the Industrial Commission of Utah, dated April 21, 1969.

Relief Sought on Review

Defendant, Ina R. Johnson, contends that the award granted by the Industrial Commission of Utah dated March 14, 1969, was the result of a fair hearing; was supported by clear and convincing evidence; and the hearing was conducted in conformity with the procedural rules for such a hearing

as set forth by the Industrial Commission of the State of Utah and the Utah Laws, and therefore the defendant seeks to have the award upheld by the Supreme Court of Utah.

STATEMENT OF FACTS

Factors Giving Rise to Claim

Richard Herbert Johnson, the deceased husband of defendant, Ina R. Johnson, was employed as a carpenter by Kennecott for 15 years prior to his untimely demise on December 28, 1965. Having observed her husband's condition upon returning home from work for about two weeks prior to his death and especially aroused by his worsening condition immediately prior to his passing, Mrs. Johnson felt, as well she should, that the cause of her husband's untimely death may have been a result of conditions encountered at work **and hence she filed a claim with the Industrial Commission of Utah to have the matter resolved by a fair hearing.** Her claim was that her husband died of edema of the larynx, throat and lungs as a result of injuries sustained while employed by Kennecott, (R. 2). Said claim was filed January 26, 1966, and Kennecott filed its denial of Mrs. Johnson's claim on February 15, 1966, (R. 4).

Proceedings Before the Industrial Commission and Determination of the Case

On September 6, 1966, a hearing was held before Commissioner Otto A. Wiesley (R. 23-143). At

the conclusion of the hearing Commissioner Wiesley obviously aware of the conflicting evidence that each side was able to elicit, informed the parties that the medical issue as to the cause of Richard Herbert Johnson's death would be referred to an independent occupational disease panel, (R. 142). The panel was composed of five qualified doctors: Dr. Elmer Kilpatrick, chairman of the panel, Dr. Angus K. Wiilisoini, Dr. John F. Waldo, Dr. John Newton, and Dr. Dean Moffat, the latter two not participating inasmuch as only three members of the panel are required to formulate a decision, (R. 199). **The Report of Medical Panel — Death Cases was submitted to the commission on January 28, 1967, above the signatures of doctors Kilpatrick, Wilson and Waldo, and with the following statement of findings under the heading of "Name of Occupational Disease" — "Asphyxia and death due to laryngeal edema and obstruction, accompanying allergic angioneurotic edema and dermatitis, due to exposure to epoxy compounds". (R. 186)**

Knowing full well that the record had clearly established that Mr. Johnson had been in close proximity with epoxy based paints and other various paints and the resulting fumes of such paints while engaged in employment with Kennecott (R. 58), and confronted with the independent determination of causation as set forth in the Report of Medical Panel, the plaintiff, Kennecott, had little or no alternative than to file objections to the report of the medical panel, which plaintiff did in fact file on February 24, 1967, (R. 189-190). On May 3, 1967, further hear-

ings were conducted before hearing examiner, Robert J. Shaughnessy, (R. 193-296). The hearing at that time resulted in further parrying between sides as each produced conflicting evidence via the elicitation of expert testimony of various medical practitioners. The results of this hearing merely indicated the need for **unbiased independent** medical examination as was provided by the Medical Panel. On September 13, 1967, a further hearing was held before Referee Shaughnessy (R. 306-357) for the purpose of examining the doctors engaged in performing the autopsy on Richard Herbert Johnson. After receipt of briefs presented by both sides the Hearing Examiner on March 14, 1969, issued **Findings of Fact, Conclusions of Law and Award** by which he found from the greater weight of evidence that "Richard Herbert Johnson, died as a result of exposure to paint or similar fumes while in the employ of the defendant". (A. 396- "defendant"—referring to Kennecott.)

ARGUMENT

POINT NO. I

FROM THE GREATER WEIGHT OF THE EVIDENCE THE FOLLOWING FACTORS EMERGE: (1) RICHARD HERBERT JOHNSON DIED AS A RESULT OF SUFFOCATION DUE TO LARYNGAL EDEMA, AND, (2) THAT SAID EDEMA WAS PRECIPATED FROM EXPOSURE TO EPOXY AND SIMILAR PAINT FUMES WHILE RICHARD HERBERT JOHNSON WAS IN THE EMPLOY OF KENNECOTT COPPER CORPORATION.

In any case brought under the Title 35, Chapter 2, of the Utah Code Annotated, 1953, which is entitled "Occupational Disease Disability Compensation" there are essentially three basic issues to be resolved before the granting of an award is made. These issues permeate the statutes, which reduced to their simplest form and in context of the present case are:

1. What was the cause of the injury or death? Utah Code Annotated, 1953, Section 35-2-27, sets forth enumerated occupational diseases and injuries which are deemed to be of an occupational origin.

2. Is there a direct causal connection between conditions under which the work is performed and the occupational disease? Utah Code Annotated, 1953, Section 35-2-26.

3. Does the Applicant qualify under the law for benefits pursuant to the statutes?

The third issue above was not questioned in the litigation at the hearing of this matter and hence is not a proper question for this review. However, the first two issues formed the crux of the case as presented before the Industrial Commission of Utah. It is the defendant's contention that the evidence presented at the hearing of this matter was more than sufficient to support the award issued by the Commission, in that the evidence, with admitted conflict, as the present advocacy system is bound to produce, did however by the greater weight of said evidence show that Richard Herbert Johnson died of laryngeal edema as the proximate result of ex-

posure to epoxy paint fumes and similar paint fumes while engaged in the employ of Kennecott.

Before taking a cursory look at the evidence upon which the Commission based its award it would be wise to ask what standard of proof or burden of proof is required in a proceeding under the "Utah Occupational Disease Disability Law." This type of proceeding is not criminal in nature but is strictly civil. There are no criminal sanctions or similar criminal appurtenances in this law. In fact the law itself is quite clear that the Common Law Rules of evidence and the statutory rules of civil procedure, are applicable in a proceeding before the Commission, Utah Code Annotated, (1953), Sections 35-2-40 and 35-2-42. There then can be no doubt that the burden of proof is not the higher more restrictive burden required in criminal actions of "proof beyond a reasonable doubt," but the burden is simply "a showing by the preponderance of the evidence" or "by the greater weight of the evidence". The defendant, Ina R. Johnson contends that this burden was met in the confines of a fair hearing before the Industrial Commission of Utah not in a minimal fashion but in a **substantial and compelling** manner producing the natural result of an award being issued to her by the Commission.

A. The evidence clearly shows that Richard Herbert Johnson died of suffocation due to angioneurotic edema.

Although there were minor variances in the description of the condition known as angioneurotic

edema as given by the report of an expert medical witnesses at the hearing, the following description given by Dr. Ludvic Peric-Golia was representative and quite succinctly enunciated:

“. . . it's a swelling of the skin—or mucous membranes adjacent to it, or elsewhere—that might occur, due to a wide variety of reasons.”
(R. 32)

The following factors established that Richard Herbert Johnson died of angioneurotic edema as defined above. Each factor alone does not firmly support such a finding, but all factors considered together support the finding within the bounds of reasonable medical and logical certainty.

1. Angioneurotic edema can occur almost anywhere on the human anatomy, but because some areas of the body are more susceptible to the vast array of irritants that may cause edema these areas will generally give first indication of irritants present in one's environment. Richard Johnson was observed to have swelling in the areas surrounding the facial sinus and under his arms for a period beginning two weeks prior to his death. This condition was reported by both Mrs. Johnson (R. 111) and Mr. Johnson's co-workers, one in particular, Mr. Arvil Carter, described Mr. Johnson's appearance on the day before he died thusly,

“He was all puffed up in his cheeks and around his face. His eyes were puffed up; his forehead was puffed up.” (R. 95)

This strongly evidences the fact that Richard Johnson was suffering from the observable symptoms of angioneurotic edema.

2. Because edema is often associated with allergic reactions or conditions this issue was pressed at the hearing. Mrs. Johnson testified that to her knowledge her husband had no allergic condition whatsoever, (R. 111). There was some testimony that Richard Johnson suffered from hayfever, but such evidence was not conclusive and certainly insufficient to establish such an acute hayfever condition that would ultimately result in death.

3. While at work on December 27, 1965, **Richard Johnson's condition became so progressively serious he sought help from Kennecott's own plant physician, Dr. Milton A. Newman.** Dr. Newman was acquainted with Mr. Johnson and it is therefore not illogical to assume that Dr. Newman's diagnosis of Mr. Johnson's condition as one of angioneurotic edema of the face was based not only upon his own medical expertise, but also upon his personal knowledge of the history of his client, (R. 40). It was only 8-10 hours after Dr. Newman's diagnosis that Richard Johnson died.

The Hearing Examiner gave a reasonable amount of credence to the fact that Kennecott's own physician had made a diagnosis that the deceased suffered angioneurotic edema only hours before death occurred. There is good reason for such reliance. Dr. Newman was the last qualified physician to have examined the deceased prior to his death;

Dr. Newman had the opportunity to observe the deceased while the latter was at the height of suffering from the condition that led to death; and it is clear that Dr. Newman's diagnosis was motivated only by Mr. Johnson's immediate need for medical assistance and not with an eye to possible legal problems that may eventually grow from such a diagnosis. This tends to give Dr. Newman's testimony greater veracity.

4. Shortly after Johnson's death his body was embalmed by Larkin Mortuary of Salt Lake City. This gave rise to vigorous debate between Applicant and Kennecott as to the effect the embalming fluids would have on the autopsy performed by Dr. Perkins and Dr. Coulson, (R. 144-148). Nevertheless the record shows that the pathological diagnosis (autopsy report) of Dr. Coulson was:

- “1. History of angioneurotic edema of the face.
2. Laryngeal edema.”

Dr. Peric-Golia participated in the autopsy to the extent of microscopically examining slides of tissues of the deceased's larynx and lungs. Dr. Peric-Golia unequivocally concluded from his examination that the diagnosis of laryngeal edema was correct, (R. 30-31) Dr. Coulson further testified at the third hearing that based upon his personal examination of Mr. Johnson's organs and the slides taken **from said organs that he was able to conclude with reasonable medical certainty that "he probably died from laryngeal edema, complicating angioneurotic edema".** (R. 343)

5. It is almost an **automatic** reaction today that when a man dies of non-violent causes the topic of "heart-attack" arises. It is well to note that: (1) Richard Johnson had no prior history of heart problems; (2) he was generally described as healthy; and (3) the unbiased report of the doctors performing the examination of Mr. Johnson's heart and circulatory system in conjunction with the autopsy concluded that Mr. Johnson's heart was very normal (R. 146). Kennecott elicited speculation as to possible heart-attack but such evidence was merely an effort to introduce the collateral issue as a reaction to the "automatic response" mentioned above.

The myth of heart-attack was laid to rest for all intents and purposes by the testimony of Dr. Peric-Golia, Dr. Coulson, and Dr. Perkins all of whom described the great detail that was given to the examination of Mr. Johnson's heart and circulatory system. The heart was meticulously scrutinized by the aforementioned doctors and their conclusions were unanimous—the deceased's heart was very normal, in fact for his age it was better than normal.

6. Mrs. Johnson testified that her husband died in bed where he lay next to her. Her description of the events just prior to the death of her husband were to the effect that the deceased was snoring loudly or making such noises as would reasonably be expected from a person having a hard time getting enough air to breathe. Mrs. Johnson said her husband sounded like "he was just sobbing in his sleep.", (R. 120). This again is not the normal reaction

of one having a heart-attack but indicates a condition where one is unable to get air through his larynx and hence suffocation results.

7. Defendant, Ina R. Johnson, contends that the death of her husband was attributed to angioneurotic edema of the larynx and face and that said determination was not the result of negative inferences but was the reasonable conclusion supported by actual positive inferences drawn from the evidence by qualified medical practitioners. It would appear that plaintiff, Kennecott, would have us believe that the Medical Panel's determination of cause of death was premised on a method of reducing possible alternative explanations. **This could not be further from the truth.** The diagnosis and explanations as to the cause of death given by the various doctors were based on observation, experience and scientific experimentation.

There was not other established basis for cause of death than the one offered by the Medical Panel, i.e., "death due to laryngeal edema and obstruction".

Considering the above disjointed facts along with their counterparts the independent Medical Panel with Dr. Elmer M. Kilpatrick as its chairman made the following conclusion, "Name of occupational disease—asphyxia and death due to laryngeal edema and obstruction, accompanying allergic angioneurotic edema and dermatitis, — ." (R. 186) Was this conclusion an absolute irrefutable truism? No! It was neither intended nor expected that the

Medical Panel would be able to make such a decision. The charge given to the Medical Panel was to examine the record and the evidence and then within the limits of reasonable medical certainty and within the bounds of possible human discearnment to arrive at a decision as to the cause of Richard Herbert Johnson's death. The Medical Panel therefore made the above noted determination in accordance with reasonable medical certainty as supported by the evidence produced at the hearing on the case. Can we really expect any more from human endeavor? What other possible rational conclusion can be made when an otherwise healthy man dies following extreme pain and suffering from swelling of the face and swelling of the tissues of the larynx?

B. The evidence conclusively shows that Richard Herbert Johnson's demise due to angioneurotic edema of the larynx was a proximate result of exposure to epoxy paints and similar paint fumes while employed at Kennecott Copper Corporation.

It is not the defendant, Ina R. Johnson's position to set forth herein all factors presented at the hearing concerning the causal connection between her husband's death and the reasons or factors leading to death. It would be totally presumptuous to assume that all factors that defendant produced were conclusively in support of the Commission's award and that all factors and evidence elicited by Kennecott were of nil substantive value. However as to the issue under discussion here, (was there direct causal connection between Richard Herbert Johnson's em-

ployment with Kennecott and his untimely death) it is of extreme importance to point out at the outset that there was no other reasonable alternative offered at the hearing as to the causation of Mr. Johnson's death, assuming, as we contend by the evidence enumerated above is a valid assumption, that Richard Herbert Johnson died of edema of the larynx and face.

Again we present factors we believe meet the statutory requirements of causal connection and also contend would and did lead the Commission to the **reasonable** conclusion that the deceased contacted the disease that led to his death while at work with Kennecott.

Assuming, but not admitting that the occupational disease in the present case would come under the classification of Utah Code Annotated, 1953, 35-2-27 (28), with its 6 requisites for a finding of causal connection it might be wlel to analyze those catagories individually. The reason for not admitting the applicability of paragraph (28) is because the Commission did not so specify the occupational disease and it would be just as easy to assume that their determination might have been based upon paragraph (24), dermatitis, or even (23) "gastrointestinal disorders due to contact with petroleum products and their fumes . . ." That however, is not material because the essence of the causal connection requirements as set otu in (28) are identical to the basic requirements in Utah Code Annotated, 1953, 35-2-26. Having reached the conclusion that Richard

Herbert Johnson died of a swelling and ultimate closing of the larynx and incorporating the generally accepted testimony that any number of irritants may cause such a swelling the questions we are then confronted with are:

- (1) Is there any positive proof or evidence that unusual or abnormal conditions existed at the deceased's station of employment at Kennecott that could reasonably precipitate the disease known as angioneurotic edema?
- (2) By way of positive proof or evidence is there even a scintilla of evidence showing that the deceased's illness was contracted at another locale than at his employment station with Kennecott?

Utah Code Annotated, 1953, 35-2-27 (28):

"Such other diseases or injuries to health which directly arise as a natural incident of the exposure occasioned by the employment, provided however, that such a disease or injury to health shall be compensable only in those instances where it is shown by the employee or his dependents that all of the following named circumstances were present: (1) a direct causal connection between the conditions under which the work is performed and the disease or injury to health;"

Mr. Paul Shaw a co-worker of the deceased, described the conditions under which he and the deceased labored, (R. 55-78). Essentially the facts were that Mr. Johnson worked in the same building in the

Garfield Refinery of Kennecott where various integrated services of Kennecott's Maintenance operations were located, i.e., painting, carpentry, electric shop and warehouse; that Mr. Johnson had the unfortunate condition of having his bench located in a close juxtaposition to the paint shop, that although the paint shop was a separate enclosure there existed a considerable amount of overspray and escape of paint fumes that permeated the entire area; that Kennecott had in the past used epoxy based paint for their rust inhibitive qualities, and although some confusion existed as to the use of certain paints at the time of Mr. Johnson's death there exists substantial evidence that such paints were in fact used during the period immediately proceeding Mr. Johnson's death. There is however, no question that paints in general and epoxy based paints other than Carbo-line were being used by Kennecott on the day prior to Mr. Johnson's death. But these factors beg the next questions. What is the effect of inhalation of epoxy based fumes, and, to what degree was the deceased exposed to these fumes?

The testimony of Mr. John W. Holmes is very beneficial in answering the first question. As a paint chemist for Bennett's Paint and Glass Co. of Salt Lake City, with over 27 years of experience Mr. Holmes' testimony was highly reputable and totally uncontradicted. From the recorded testimony we have the following description of the effect of exposure to epoxy paint fumes:

“Q. I see. And do you have an opinion—as a paint expert—that if a person were breath-

ing the fumes from these epoxy paints, without any protection at all, whether that would be dangerous?

A. Most of them have a disagreeable odor, which he would be unable to stand the danger level.

Q. I see. Now could you tell us, from your training and knowledge in the paint industry—any of the particular symptoms if any, which arises from the component parts, if you know?

A. The solvent's general class—if they reach above the allowable level—will generally cause drowsiness, or a narcosis type of feeling, and dermatitis, and in severe cases liver troubles and kidney troubles. And generally all of them, in the higher concentrations, affect the eyes and the mucous membranes.

Q. I see. And do you know what reaction they will cause in the mucous membranes?

A. Ats an inflammation type of thing. A lacrimation arounds the eyes." (R. 80-86).

With the above description in mind consider the condition of the deceased just prior to his death. Dr. Peric-Golia said the deceased suffered "a swelling of the skin—or mucous membranes adjacent to it," (R. 32) Dr. Milton Newman, Kennecott's plant doctor described the deceased as he had chance to examine him just shortly before his death, thusly, "at that time Mr. Johnson had swelling of the face—mostily in the upper portion of the face—that had caused partial closing of the eyes," (R. 39) Mrs. John-

son described her husband as having a great deal of swelling and inflammation about his facial area. Those who worked with the deceased also noticed the condition of the deceased.

(Of important note is the fact that Kennecott was well aware of the invidious propensities of the epoxy based paints.) The painters in the paint room when spraying with the epoxy paints were fully clothed in protective gear including head gear with respirators to supply air. Yet despite such precautions even those men occasioned rashes and inflammation from contact with the epoxy fumes. Mr. Shaw indicated that a probable cause for the paint fumes accumulating to such an extent as to infect those painters in the paint room and to overspray or infiltrate into the adjacent areas was because of inadequate exhaust facilities in the paint room. Mr. Shaw also testified that four out of the five men who work with him in the paint shop had suffered inflammation when exposed to vapors and overspray of the epoxy paint fumes. **If these men, who were supposedly protected from the effects of the paint fumes suffered when in contact with the vapors or fumes is it any wonder that Richard Herbert Johnson who did not have such protection but worked in an area so close to the paint room that the air was almost constantly putrified by the epoxy paint fumes should eventually be stricken by the infectious fumes?**

Mr. Arvil Carter, a fellow carpenter of the deceased, described the condition in the adjacent areas to the paint shop:

“Q. You said this smell was offensive to you.

What did it smell like?

A. Well, it was just like strong.

Q. Like a skunk?

A. Well, yes, you could say that. It's very offensive, and gives you a headache. It always nauseated me.

Q. Does it smell as bad as a silver refinery?

A. Worse than that, because it's more contained, I would say.” (R. 94)

That leads us to the second question asked above; to what degree was the deceased exposed to these fumes? It is difficult to make any comparative analysis as between Mr. Johnson's exposure as compared to others who worked as carpenters in the same vicinity as the deceased because Mr. Johnson was the sole occupant of the room immediately adjacent to the paint room. However, Mr. Shaw, (R. 65) and Mr. Carter, who worked in the main carpentry shop, both testified that the paint smell in the room where the deceased labored was extremely strong at time and never totally void of the smell of fumes, (R. 89). There was also testimony that Mr. Johnson was in the habit of climbing upon a lumber pile immediately adjacent to the painting room and taking a nap during his lunch break. The testimony of Mr. Jack Wallace, a carpenter with Kennecott, was to the effect that the transite partition that separated the higher elevations of the paint room from the adjacent areas did not fit tightly to the wall or ceiling.

He said that **air could pass freely between the paint room and the room that Mr. Johnson occupied due to the gap between the transite partition and the brick portion of the wall, (R. 102).** There was also substantial evidence to the effect that due to the elevated position of the lumber pile, when a fellow worker would climb up to awaken Mr. Johnson they would be perceptive to the greater degree of concentration of the paint fumes and in keeping with Mr. Holmes' description of the effects of inhalation of the fumes these workers expressed their frequent inability to awaken Mr. Johnson from his nap describing his condition as one of extended drowsiness or deep sleep.

In conclusion of the analysis of requisite number (1) the above factors substantially evidence the fact that the deceased had a great deal of contact with an agent known to produce the effects of the injury or disease from which the deceased eventually died. Also the fact that it is uncontested that such contact was encountered while engaged in the employ of plaintiff, Kennecott Copper Corporation.

To continue an analysis of the statutory prerequisites:

"(2) The disease or injury to health can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the employment."

This requisite seems to ask the questions, is it probable that exposure to epoxy paint fumes and other paint fumes in general, could result in angio-

neurotic edema? And was it probable that Mr. Johnson's position in the employment scheme of Kenne-cott would be of some impetus to the death or injury causing elements?

The effects on the human body of exposure to epoxy paint fumes has already been outlined. There were essentially two basic epoxy paints being used at this time both produced by the Carboline Company of St. Louis, Missouri. These paints were denoted as Carboline 186 and 372. The instructions given by Carboline Company to users of these epoxy paints stated that persons using said paints should use air respirators, thus indicating that inhalation of the paint fumes could have deleterious effects on the users health, (R. 153). This coupled with the testimony of Mr. Holmes surely establishes the premises that Mr. Johnson's condition of angio-neurotic edema can be seen to have followed as a **natural result** of his exposure to the epoxy paint fumes.

“(3) The disease or injury to health can be fairly traced to the employment as to the proximate cause.”

This requisite asks the question asked above in this brief concerning any possible alternative to which the disease or injury may be traced.

This question was put directly to Mrs. Johnson at the hearing and in response she stated that she was not aware of any work her husband had engaged in for months prior to his death that would

have caused him to come into contact with any unusual elements. Her testimony was in fact that her husband was **not** engaged in any activities other than his normal course of employment at Kennecott, (R. 112). There was no effort to establish at the hearing any evidence of a collateral source of irritants that could be traced to Mr. Johnson's death.

“(4) The disease or injury to health is not of a character to which the employee may have had substantial exposure outside of the employment.”

It cannot be argued that inhalation of epoxy paint fumes was the only possible cause of the deceased's angioneurotic edema for many witnesses testified that there are potentially many irritants that may cause this disease in a susceptible person. **However, this particular requisite only requires a showing that the deceased did not have "substantial exposure outside the employment" to any elements giving rise to the disease.** Therefore, again, as in (3) above the testimony given was to the effect that Mr. Johnson had never had an allergy condition and he had not come into contact immediately prior to his death with any unusual material or elements that he had not been confronted with during his entire life. The **only** conflicting evidence was to hypothesize various causation factors none of which were supported by one iota of evidence and were so highly conjectural to be almost entirely ignored by the Commission.

“(5) The disease or injury to health is incidental to the character of the business and not independent of the relation of the employer and employee.”

Mr. Johnson was hired by Kennecott as a carpenter in what may be termed as an integrated maintenance facility. All major repair work was conducted under one roof; painting, electrical work, wood work, etc. Merely because Mr. Johnson was hired as a carpenter and not a painter does not mean that inhalation of paint fumes was not a condition he was subject to by his employment when he was placed in a general maintenance building where all facets of repair including painting were taking place.

“and, (6) the disease or injury to health must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before discovery.”

There can be **little** doubt at this point as to the **risk creating potential** that the epoxy paints had when such came ino contact with any one working, with or near them. Kennecott realized the danger and protected those who came into direct contact with the paints with some degree of success, but to one who was exposed, as was the deceased, to the overspray and fumes of the epoxy paints, Kennecott took no precautions, until the creation of the risk had culminated in its natural end—injury and

death. There is some indication that Kennecott was so disturbed by the effects of the epoxy paints that they sent for a Carboline Company representative in an effort to rectify the problems but eventually terminated use of one of the epoxy paints, and the record does not indicate whether continued use of the other Carboline paint was being conducted by Kennecott after the death of Mr. Johnson.

The only other requisite in paragraph (28), although not numbered, is that the exposure causing death was not of the type the public is generally subjected to. Mr. Johnson's death was not caused by subjection to air pollutants, dust or other everyday irritants. It was the proximate result, however, of long exposure to epoxy paint fumes and other similar paint fumes which a paint chemist explained would be very harmful if the public was exposed to them let alone exposure to those who are somewhat protected. (R. 82-86).

We contend in conclusion from the analysis above that the defendant, Ina R. Johnson, did show by the greater weight of the evidence that her husband died as a proximate cause of extensive exposure to the potentially dangerous fumes of epoxy paints while engaged in the employ of Kennecott Copper Corporation. The word "proximate" indicates **reasonable probaiblity** and when the question was put to Dr. Kilpatrick as to the proximate cause of Mr. Johnson's death we see in the answer a mental process of weighing factors, evaluating in light of his experience and endeavoring to make a decision from what is before him.

"Q. And from the record were you able to determine in this case whether Mr. Johnson became, in probability, susceptible to these allergents which were present on his work and occupation?

A. In probability, Yes. And in the absence of other definite information leading otherwise." (R. 205)

And in further response to questioning on proximate cause Dr. Kilpatrick said, speaking for the Medical Panel:

"A. We felt that, from the evidence we had available, and the general nature of this type of disorder, that there was a direct connection with his work exposures leading to his demise." (R. 210)

We, therefore, feel constrained to set forth the further conclusions of fact as drawn by the Industrial Commission:

"The Hearing Examiner is more impressed by the undisputed fact that (1) the deceased was exposed to fumes on the day prior to his death, (2) the company physician diagnosed angioneurotic edema, and (3) the deceased expired 12 hours later. No testimony was produced as to what else could have caused the death but suffocation from the edema produced in the deceased.

Accordingly, the Hearing Examiner finds that the deceased, Richard Herbert Johnson, died as a result of exposure to paint or similar fumes in the employ of the defendant. (Kennecott)." (R. 396)

POINT NO. II

BY JUDICIAL PRECEDENT AND UTAH SUPREME COURT POLICY THE FINDINGS AND AWARDS OF THE INDUSTRIAL COMMISSION SHOULD BE UPHOLD IF THERE APPEARS TO BE ANY EVIDENCE WHATSOEVER TO SUPPORT SAID DETERMINATIONS.

The Utah Legislature recognized the need for a degree of Administrative isolation from the Judiciary and so set forth in Utah Code Annotated, (1953), 35-2-28, the permissible grounds upon which the Supreme Court may modify or set aside an award by the Industrial Commission. These grounds are:

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

The Utah Supreme Court has consistently defined their reviewing policy of Administrative agency decisions to be one of extreme caution and the common enunciation of such policy is that if there appears to be **any evidence** upon which the agency can rationally base its decision then the Supreme Court will not disturb that decision. The most recent reported enunciation of that policy is found in **Garner vs. Hecla Mining Company**, 19 U 2d. 367, 431 P. 2d 794, (1967) in which Chief Justice Crockett stated in the majority opinion:

“ . . . It is the duty of this court to survey the evidence in the light most favorable to the

findings and order; and we cannot reverse and compel an award unless there is credible evidence without substantial contradiction which points so clearly and persuasively in plaintiff's favor that failure to so find must be regarded as capricious and arbitrary. Conversely, if there is any reasonable basis in the evidence, or from the lack of evidence, which will justify the refusal to so find, we must affirm."

Although the above case dealt with a denial of an award the same policy undoubtedly applies whenever an Industrial Commission decision is challenged. If there is **any** evidence in the record upon which to support the award, the court must affirm. In another case, **Vause vs. Industrial Commission**, 17 Utah 2d 217, 407 P.2d 1006 (1965) Justice Crockett made it even more clear that the Supreme Court would not reverse the Commission's decision if any evidence could support said decision:

"This court cannot properly reverse the Commission and compel an award unless there is credible evidence without substantial contradiction which points so clearly and persuasively in plaintiff's favor that failure to so find would justify the conclusion that the Commission acted capriciously, arbitrarily or unreasonably in disregarding or refusing to believe the evidence."

The Court has gone **even further** in the cases of **Moray vs. Industrial Commission**, 53 U. 404, 119 P. 1023 and **Western Contracting vs. Industrial Commission**, 15 Utah 2d 208, 390 P. 2d 125 (1964), and

stated that the court will not endeavor to review findings of fact on conflicting evidence, if the findings are supported by competent evidence. In the latter case the court upheld an award by the Commission holding:

“Whether the injury resulted in total blindness to the eye was within the prerogative of the Industrial Commission to determine. They having so found under the evidence in the instant case, we are not persuaded that they acted capriciously, arbitrarily, or unreasonably, in which event the award must be affirmed.”

The defendant, Ina R. Johnson, contends that pursuant to the discretion given it, the Industrial Commission made an award to defendant that was supported by substantial and compelling evidence and said decision could in no manner be denoted as acting capriciously, arbitrarily, or unreasonably.

CONCLUSION

Defendant respectfully submits that the award of the Industrial Commission dated March 14, 1969, in favor of Ina R. Johnson **was supported by the preponderance of the evidence.** The record indicates to the casual reader that the greater weight of evidence is that Richard Herbert Johnson died of laryngeal edema as a proximate result of his exposure to epoxy based paints and other similar paint fumes while employed at Kennecott. The record was more easily interpreted by the expertise of the medical panel. This independent panel found the evi-

dence of such magnitude that they were able to conclude with reasonable medical certainty that the cause of death was laryngeal edema resulting from exposure to epoxy and similar paint fumes. We contend that the findings of the Medical Panel and the decisions of the Industrial Commission are supported by the "best evidence" and therefore the award granted by the Commission should be affirmed by this court.

Respectfully submitted,

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