

1993

Magnesium Corporation of America v. Industrial Commission of Utah by and through the Occupational Health and Safety Division : Brief of Respondent

Utah Court of Appeals

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Jerrald D. Conder; Peter L. Rognlie; Conder, Wangsgard, & Tsaklos; Attorneys for Petitioner.
Alan L. Hennebold; Sharon J. Eblen; Industrial Commission; Attorneys for Respondent.

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IN THE UTAH COURT OF APPEALS

MAGNESIUM CORPORATION OF
AMERICA,

Respondent & Petitioner,

vs.

INDUSTRIAL COMMISSION OF UTAH
BY & THROUGH THE OCCUPATIONAL
HEALTH AND SAFETY DIVISION,

Complainant & Respondent,

APPELLATE CASE NO: 930017-CA

Priority 7

BRIEF OF RESPONDENT INDUSTRIAL COMMISSION OF UTAH

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ATTORNEYS FOR RESPONDENT
INDUSTRIAL COMMISSION OF UTAH

IN THE UTAH COURT OF APPEALS

MAGNESIUM CORPORATION OF
AMERICA,

Respondent & Petitioner,

vs.

INDUSTRIAL COMMISSION OF UTAH
BY & THROUGH THE OCCUPATIONAL
HEALTH AND SAFETY DIVISION,

Complainant & Respondent,

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APPELLATE CASE NO: 930017-CA

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**COURT OF APPEALS
STATE OF UTAH**

**MAGNESIUM CORPORATION OF
AMERICA,**

Respondent & Petitioner,

vs.

**INDUSTRIAL COMMISSION OF UTAH
BY & THROUGH THE OCCUPATIONAL
HEALTH AND SAFETY DIVISION,**

Complainant & Respondent.

*
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* **BRIEF OF RESPONDENT INDUSTRIAL**
* **COMMISSION OF UTAH**
*
* **APPELLATE CASE NO: 930017-CA**
*
*
* **PRIORITY NO. 7**
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JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §78-2a-3(2)(a) and §63-46b-16(1).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

A. Did the Industrial Commission of Utah ("the Commission") err when it issued a final decision in favor of the Utah Occupational Safety Division ("UOSH"), in view of the fact that the only issue before the Commission was the Magnesium Corporation of America's ("Magcorp") Motion For Summary Judgment? This issue

involves the Commission's adherence to proper decision making procedures and is reviewed under a "correction of error" standard pursuant to Utah Code Ann. §63-46b-16(4)(e).

B. If the Commission's decision in this matter is procedurally defective, should the Court remand the matter to the Commission for correction of the procedural error. This issue is a question of general law, subject to this Court's plenary authority. King v. Industrial Commission of Utah, 850 P.2d 1281, 1285 (Utah App. 1993).

C. As to Magcorp's challenge of the Commission's jurisdiction, was the Commission's extension of the period in which UOSH was required to file its Motion For Review supported by the evidence and permitted by applicable law? The question of the Commission's jurisdiction is one of general law, reviewed under a correction of error standard pursuant to Utah Code Ann. §63-46b-16(4)(b).

APPLICABLE STATUTORY PROVISIONS

Utah Code Ann. §63-46b-1(9):

(9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review.

Utah Code Ann. §63-46b-8:

(1) Except as provided in Subsections 63-46b-3(d)(i)

and (ii), in all formal adjudicative proceedings, a hearing shall be conducted as follows:

.

(d) The presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.

Utah Code Ann. §63-46b-12(1):

(1)(a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purposes by the statute or rule.

Utah Code Ann. §63-46b-16(1):

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

Utah Code Ann. §63-46b-16(4):

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
- (b) the agency has acted beyond the jurisdiction conferred by any statute;
- (c) the agency has not decided all of the issues requiring resolution;
- (d) the agency has erroneously interpreted or applied the law;
- (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

- (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
- (h) the agency action is:
- (i) an abuse of the discretion delegated to the agency by statute;
- (ii) contrary to a rule of the agency;
- (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
- (iv) otherwise arbitrary or capricious.

Utah Code Ann. §63-46b-17(b):

- (b) In granting relief, the court may:
- (i) order agency action required by law;
- (ii) order the agency to exercise its discretion as required by law;
- (iii) set aside or modify agency action;
- (iv) enjoin or stay the effective date of agency action;
- or
- (v) remand the matter to the agency for further proceedings.

Utah Code Ann. §78-2a-3(2)(a):

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

**NATURE OF THE CASE, PROCEEDINGS BEFORE THE COMMISSION
AND STATEMENT OF FACTS**

Magcorp's brief correctly sets forth the proceedings before the Commission, as well as the facts and the nature of this case. For ease of reference, a summary of the facts that are particularly significant to the Commission's position are set forth below:

UOSH cited Magcorp for certain safety violations. (R. 00001) Magcorp contested the citations (R. 00006) and the dispute was referred to an ALJ for adjudication. Magcorp filed a Motion For Summary Judgment asking the ALJ to dismiss the citations. (R. 00014) On June 10, 1992, the ALJ signed an Order granting Magcorp's Motion For Summary Judgment with respect to one of the citations. (R. 00169) Magcorp then withdrew its opposition to the other citation. (R. 00314)

Both Magcorp and UOSH were aware that the ALJ had signed his Order granting Magcorp's Motion For Summary Judgment on June 10, 1992. (R. 00286) However, counsel for UOSH did not receive a copy of that Order. After several days, UOSH's counsel obtained a copy of the Order from the file. (R. 00226) The copy of the Order so obtained carried a Certificate of Mailing dated June 16, 1992. (R. 00175)

On July 16, 1992, 30 days after the date on the Order's mailing certificate, UOSH filed its Motion For Review asking the

Commission to reverse the ALJ's Order and to deny Magcorp's Motion For Summary Judgment. (R. 00177) Ultimately, the Commission issued an Order that not only denied Magcorp's Motion For Summary Judgment, but also affirmed the citations that had been imposed by UOSH against Magcorp. (R. 00336 to 340)

SUMMARY OF ARGUMENT

The Industrial Commission of Utah ("the Commission") concedes that its decision in this matter is in error in some respects.

In particular, the Commission erred in deciding the merits of this case when the only issue before it was Magcorp's Motion For Summary Judgment. While the Commission believes it properly denied summary judgment, it acknowledges that it should not have considered the underlying merits of the case. Instead, the Commission should have remanded the case to an ALJ for a full evidentiary hearing.

The appropriate remedy for the Commission's error is remand of the case to the Commission for an evidentiary hearing and final decision.

With respect to Magcorp's challenge to the Commission's jurisdiction, the Commission properly found that UOSH had good cause for its delay in filing its Motion For Review. For that reason, the Commission extended the period for filing, as permitted

by Utah's Administrative Procedures Act. The Commission therefore had jurisdiction to act upon the Motion For Review.

ARGUMENT

POINT ONE

THE COMMISSION ERRED IN ISSUING A FINAL DECISION IN THIS MATTER.

At the time the Commission issued its final decision, the only issue before it was UOSH's Motion For Review, arguing that the ALJ had erred when he granted Magcorp's Motion For Summary Judgment.

In considering UOSH's Motion For Review, the Commission concluded that Magcorp was not entitled to summary judgment. Having made that determination, the Commission should have remanded the case to the ALJ for a full evidentiary hearing on the merits. Unfortunately, instead of remanding for further hearing, the Commission proceeded to consider and decide the underlying merits of the case.

Utah Code Ann. §63-46b-8 sets forth minimum requirements for hearings in formal adjudications. Among those requirements are the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence. The procedure followed in this case did not afford such opportunities to either party. As a result, neither Magcorp nor UOSH had an opportunity to fully

present its case to the initial decision maker or develop a record sufficient for judicial review.

Under the foregoing circumstances, the parties have been substantially prejudiced by the Commission's decision, which should be set aside by this Court. D.B. v. Div. of Occupational Professional Licensing, 779 P.2d 1145, 1149 (Utah App. 1989).

POINT TWO

THE COURT SHOULD REMAND THIS MATTER TO THE COMMISSION FOR EVIDENTIARY HEARING.

Utah Code Ann. §63-46b-17(b) sets forth the types of relief which may be granted by this Court on judicial review of agency orders:

- (b) In granting relief, the court may:
 - (1) order agency action required by law;
 - (2) order the agency to exercise its discretion as required by law;
 - (3) set aside or modify agency action;
 - (4) enjoin or stay the effective date of agency action; or
 - (5) remand the matter to the agency for further proceedings.

In this case, disputed questions of fact require an evidentiary hearing for resolution. The proceeding should therefore be remanded to the Commission for such a hearing, pursuant to §17(b)(5), above.

POINT THREE

THE COURT SHOULD CONCLUDE THAT THE COMMISSION DOES HAVE JURISDICTION IN THIS MATTER.

This case presents a peculiar situation where the interplay of human error and a change in the law caused UOSH to file its Motion For Review beyond the 30 day period usually allowed for such filings by Utah Code Ann. §63-46b-12(a)(a).

At the time this dispute arose, in June 1992, this Court had held that an administrative agency's order was "issued" when mailed.

We hold that "issue" as used in section 63-46b-14(3)(a) means the date the agency action is properly mailed, as accurately evidenced by the certificate of mailing, or personally served. Wiggins v. Board of Review, 824 P.2d 1199 (Utah App. 1992).

Although UOSH knew that the ALJ had signed his Order on June 10, 1992, the mailing certificate on the copy of the Order which UOSH finally obtained showed a date of June 16, 1992. In fact, the Order was never mailed at all. However, based on Wiggins, UOSH concluded that it had until July 16, 1992 to file its Motion For Review. UOSH met that deadline.

In light of the foregoing, UOSH exercised reasonable care and diligence in filing its Motion For Review. While the ALJ's staff may have mishandled the issuance of the ALJ's Order and may have erred in dating the Order's mailing certificate, UOSH had no

control or knowledge of those errors. It had a right to rely on the date of indicated on the Order's mailing certificate.

In a similar vein, UOSH reasonably relied on this Court's definition of "issued" in Wiggins and concluded that the ALJ's Order had been issued on June 16, 1992. Several months later, the Utah Supreme Court issued its decision in Dusty's, Inc. v. Utah State Tax Comm'n, 842 P.2d 868 (Utah 1992) (per curiam). The Dusty's decision held that the date of issuance of an administrative agency order was not the date of mailing, but rather, the date on which it was signed.

Under the definition of "issued" announced in Dusty's, UOSH should have filed its Motion For Review within 30 days of the date on which the ALJ signed his Order, instead of 30 days from the date on the Order's mailing certificate. However, if the Dusty's definition of "issued" is applied retroactively to the facts of this case, UOSH's actions will be judged according to a standard that did not exist at the time those actions were taken.

Utah Code Ann. §63-46b-1(9) allows the Commission to extend the period for filing motions for review upon a showing of good cause. The Commission was cognizant of the foregoing circumstances when it concluded that UOSH had shown good cause for an extension of the filing deadline. The Court should likewise conclude that

good cause exists for extension of the filing deadline for UOSH's Motion For Review.

As a final point, Magcorp argues that the Commission irrevocably lost jurisdiction to consider UOSH's Motion For Review when UOSH failed to file a request for extension of the filing period within 30 days of the date on the ALJ's Order. Magcorp's argument is not supported by the plain language of Utah Code Ann. §63-46b-1(9), which states:

Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time limits established for judicial review.

Nothing in §63-46b-1(9) compels a conclusion that requests for extension must be filed within a particular time. In many cases, including the case at issue, the party who ultimately seeks an extension does not know that the extension is required until after the initial filing period is expired.

The foregoing issue was implicit in Maverik v. Industrial Commission, 860 P.2d 944 (Utah App. 1993). There, a party filed a Motion For Review with the Commission 31 days after the ALJ's Order--one day after the 30 day period for filing such Motions had expired. The Commission concluded that the party did not have good cause for missing the filing deadline and therefore refused to extend the filing deadline. The party then raised the issue on

appeal to this Court, arguing that the Commission had erred in not extending the filing deadline.

The Maverik case is instructive to with respect to Magcorp's argument here. If, as Magcorp contends, a request for an extension of a filing period must be made during the original filing period, then the Court in Maverik would simply have dismissed Maverik's argument, since Maverik did not request an extension during the original filing period. However, this Court did not so rule. Instead, the Court considered the merits of Maverik's claim for good cause for an extension, and concluded Maverik had not shown good cause. Such an analysis would be unnecessary if Magcorp's argument were correct.

Based on the foregoing, the Commission believes it properly considered and granted Magcorp's request for an extension.

CONCLUSION

In summary, while the Commission believes it acted properly in denying Magcorp's Motion For Summary Judgment, the Commission erred in also deciding the merits of this case. The case should be remanded for full evidentiary hearing and decision.

As to the Commission's jurisdiction, Utah Code Ann. §63-46b-1(9) allows the Commission to extend the period for filing motions for review, if good cause for extension is shown. Based on the

unusual circumstances of this case, the Commission properly extended the period for UOSH to file its Motion For Review. The Commission therefore had jurisdiction to rule on the Motion For Review.

Dated this 7th day of May, 1994.

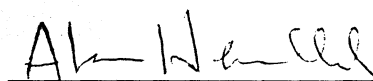
By A. Hennebold
Alan Hennebold, General Counsel
Industrial Commission of Utah

CERTIFICATE OF SERVICE

I hereby certify that I caused 2 true and correct copies of BRIEF OF RESPONDENT INDUSTRIAL COMMISSION OF UTAH to be served upon Petitioner MAGNESIUM CORPORATION OF AMERICA by causing to be placed in an envelope addressed to the following:

Jerrald D. Conder
Attorney at Law
4059 South 4000 West
West Valley City, Utah 84120

and said envelope was then deposited, sealed, with first class postage prepaid thereon, in the United States mail at Salt Lake City, Utah on the 2nd day of May, 1994.



Alan Hennebold
General Counsel
Industrial Commission of Utah

ADDENDUM A

CITATION AND NOTIFICATION OF PENALTY

Douglas J. McVey, Administrator
Industrial Commission of Utah
Occupational Safety and Health Division
160 East 300 South
P.O. Box 519870
Salt Lake City, UT 84151-0870
(801)530-6901 - Fax 530-6804

Issuance Date :9/3/91
Inspection Number :105638639
CSHO I.D. :H4844
Inspection Date :7/30/91 - 8/9/91
Inspection Site :Rowley, 84029
:

To: Magnesium Corp. of America
238 North 2200 West
Salt Lake City, UT. 84116

CITATION AND NOTIFICATION OF PENALTY: The violation(s) described in this Citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated in the description given below. This citation (or copy) must be posted at or near the location of alleged violation. The citation must be posted until the violation is corrected or abated or for 3 working days, whichever is longer. Assessed penalties are payable to the Industrial Commission unless a notice of contest is mailed to the Administrator as indicated below.

CONTESTS AND APPEALS: Employers may request an informal review by the UOSH Administrator of any citation, proposed penalty or abatement period. Employees may request an informal review of the abatement period granted to the employer. Informal reviews do not stay the 30 days in which an employer must file a contest for a formal hearing before the Industrial Commission.

The Industrial Commission will provide an adjudicative hearing if an employer files a written notice of contest with the Administrator within 30 days of receipt of the Citation or Proposed Penalties. Upon expiration of the 30 day period the Citation and Proposed Penalties are final and not subject to review by any court or agency.

EMPLOYEE RIGHTS: Any employee or representative of employees who believes that the periods of time fixed for correction or abatement of a violation is unreasonable has the right to contest the periods of time by submitting a letter to the Administrator within 30 days of issuance of the citation.

No person shall discharge or in any manner discriminate against any employee because the employee filed a complaint with the division, instituted any proceeding with the division, conversed with a division representative, or testified in any proceeding or exercised any right afforded under the act, standards or rules of the division. Any employee who suffers adverse working conditions based on the above must contact the Administrator within 30 days.

CITED ITEMS BEGIN ON FOLLOWING PAGE, AUTHORIZED SIGNATURE AND TOTAL PENALTIES APPEAR ON FINAL PAGE.

06 101

Description	Date Violation Must Be Abated	Penalty
<p>OTHER</p> <p>1</p> <p>UGSO R500-405-558.2.7</p> <p>Solid decking shall be provided where a hazard exists of free flowing hot material falling from one floor to another.</p> <p>(A) Floor decking at Mag. Corp. such as, but not limited to the reactor building around the launder, where molten material could fall from floor to floor was not solid decking to eliminate the hazard of free flowing hot material</p>	<p>30 days from receipt of citation</p>	<p>\$ 500</p>
<p>Authorized signature: <u><i>Douglas J. McKey</i></u></p> <p>Date: <u>19-5-91</u></p>	<p>Penalty</p>	<p>\$2,700</p>

ADDENDUM B & C

JERRALD D. CONDER (#0709)
of CONDER & WANGSGARD
Attorneys for Respondent
4059 South 4000 West
West Valley City, Utah 84120
Telephone: (801) 967-5500
Fax: (801) 967-5563

THE INDUSTRIAL COMMISSION OF UTAH

UOSH Inspection Number 105638639

INDUSTRIAL COMMISSION OF UTAH)	
BY AND THROUGH THE)	FINDINGS OF FACT AND
OCCUPATIONAL SAFETY AND)	CONCLUSIONS OF LAW
HEALTH DIVISION,)	
)	
Complainant,)	
)	
vs.)	
)	Administrative Judge:
MAGNESIUM CORPORATION OF)	Donald L. George
AMERICA,)	
)	
Respondent.)	

Magnesium Corporation of America's (Magcorp) Motion for Summary Judgment came on regularly for hearing on the 17th day of April, 1992, the Honorable Donald L. George presiding. Magcorp was represented by counsel, Jerrald D. Conder and Michelle J. Ivie. Thomas C. Sturdy appeared on behalf of the Utah Occupational Safety and Health Commission. Having reviewed the pleadings on file regarding the above-referenced motion and the Court having heard argument from each of the parties thereon, and being fully advised in the premises, now makes its Finding of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. That on August 27, 1991 Magcorp received a citation and notice of penalty for failure to require the use of flame resistant protective clothing in the electrolytic and reactor sections of the facility in violation of 29 CFR 1910.132.

2. That the citation and notice of penalty contained the following note:

NOTE: NFPA 480-2-1.6 requires operators in melting and casting areas shall wear flame resistant clothing, non-foundry shoes and adequate face protection.

3. That UOSHA agreed that NFPA 480-2-1.6 has not been codified into the Utah Administrative Code or other UOSHA regulations pertaining to personal protective equipment.

4. A material issue of disputed fact exists with regard to whether Magcorp violated 29 CFR 1910.132 by not requiring the use of flame resistant protective clothing in the electrolytic and reactor sections of the facility.

5. That the citation received by Magcorp contained an abatement order requiring Magcorp to bear the cost of flame resistant protective equipment required under the citation and notice of penalty.

6. That the personal protective equipment at issue herein, to wit, coveralls, are uniquely personal to each individual employee at Magcorp since the coveralls are individually fitted

to the employee, many bear the name of the individual employee, and the coveralls are the type of garment that may be used by employees away from the Magcorp facility.

CONCLUSIONS OF LAW

1. That this court has jurisdiction over the parties in the above-entitled matter.

2. That disputed material issues of fact exist with regard to whether Magcorp is in compliance with the requirements of 29 CFR 1910.132(a) and Summary Judgment on that issue is therefore denied.

3. That based upon the holding in Budd Co. v. OSHRC and Federal OSHA Mandate, UOSHA has no legal or other authority to impose the cost of uniquely personal protective equipment, such as the coveralls at issue herein, upon Magcorp.

4. That the Abatement Order contained in the UOSHA citation to Magcorp requiring Magcorp to bear the cost of flame resistant coveralls purportedly required under 29 CFR 1910.132(a) is unenforceable and void as a matter of law.

5. Summary Judgment is granted in favor of Magcorp on the issue of cost allocation under 29 CFR 1910.132(a).

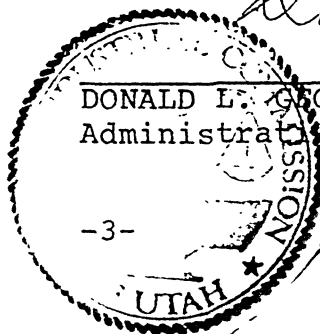
DATED this 10th day of June, 1992.

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

10th day of June, 1992.

ATTEST:

Patricia C. Ashby
Commission Secretary



Donald L. George
DONALD L. GEORGE
Administrative Law Judge

-3-

00171

Approved as to Form:

Thomas C. Sturdy (Signature)

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of May, 1992, I caused to be mailed, first-class, postage prepaid, a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to the following:

Thomas C. Sturdy
Industrial Commission of Utah
Division of Legal Affairs
160 East 300 South
Salt Lake City, Utah 84151-0250

Sandra Williams (Signature)

JERRALD D. CONDER (#0709)
of CONDER & WANGSGARD
Attorneys for Respondent
4059 South 4000 West
West Valley City, Utah 84120
Telephone: (801) 967-5500
Fax: (801) 967-5563

THE INDUSTRIAL COMMISSION OF UTAH

UOSH Inspection Number 105638639

INDUSTRIAL COMMISSION OF UTAH)	
BY AND THROUGH THE)	O R D E R
OCCUPATIONAL SAFETY AND)	
HEALTH DIVISION,)	
)	
Complainant,)	
)	
vs.)	
)	Administrative Judge:
MAGNESIUM CORPORATION OF)	Donald L. George
AMERICA,)	
)	
Respondent.)	

Based upon the findings of fact and conclusions of law entered herein, and for good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That Magcorp's Motion for Summary Judgment is granted on the issue of cost allocation for personal protective equipment required under 29 CFR 1910.132, and the abatement note contained in the citation and notice of penalty issued in connection with inspection no. 105638639, which required Magcorp to provide flame resistant coveralls to Magcorp employees at no cost or financial expense to the employees is void and unenforceable as a matter of law.

2. That disputed issues of material fact exist with regard to whether Magcorp violated 29 CFR 1910.132 and summary judgment on this issue is denied.

DATED this 10th day of June, 1992.

BY THE COURT:

Donald A. George

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

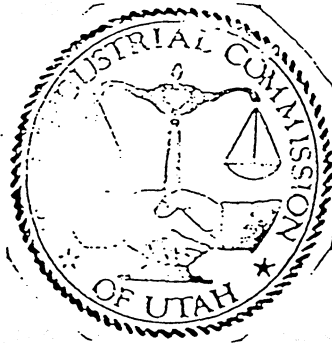
10th day of June, 1992.

ATTEST:

Patricia O. Ashby
Commission Secretary

APPROVED AS TO FORM:

Thomas C. Sturdy
Thomas C. Sturdy



ADDENDUM D

THE INDUSTRIAL COMMISSION OF UTAH
UOSH Inspection No. 105638639

Industrial Commission of Utah	*	
by and through the Occupational	*	
Health and Safety Division,	*	
	*	
Complainant,	*	INTERIM ORDER
vs.	*	DENYING MOTION
	*	TO DISMISS
	*	
	*	
Magnesium Corporation of	*	
America,	*	
Respondent.	*	

The Industrial Commission of Utah (commission) reviews the Respondent's Motion to Dismiss the Complainant's Motion for Review of the administrative law judge's (ALJ) order dated June 10, 1992. The authority for review is conferred by U.C.A. Section 35-9-12, and Section 63-46b-12.

An ALJ of the Industrial Commission issued an order dated June 10, 1992 granting summary judgment in favor of Magnesium Corporation of America (respondent or Magcorp) on the issue of whether the Occupational Health and Safety Division of the Industrial Commission of Utah (UOSH) could place the cost of providing flame resistant coveralls for its employees on the respondent. The citation and notice of penalty issued by the UOSH required the respondent to provide flame resistant coveralls to its employees at no cost. The ALJ issued an order of summary judgment finding that the citation was void and unenforceable as a matter of law. The ALJ further found that there were disputed issues of material fact on the issue of whether the respondent violated 29 CFR 1910.132 for its failure to require the use of flame resistant protective clothing in the electrolytic and reactor sections of its facility.

Although the order of the ALJ was signed on June 10, 1992, the mailing certificate shows that the order was mailed on June 16, 1992. The UOSH filed a motion for review on July 16, 1992 pursuant to 63-46b-12 seeking review of the order of summary judgment. The respondent filed a motion to dismiss UOSH's motion for review for untimeliness.

The respondent asserts that the ALJ's order was "issued" on June 10, 1992 because the order was executed in front of the party's attorneys and because Mr. Conder, attorney for Magcorp was personally served a copy of the order on that date. Mr. Conder then offered a copy of the order to Mr. Sturdy, counsel for UOSH. Mr. Sturdy declined Mr. Conder's offer of a copy of the order. No certificate of service was executed on June 10, 1992 when the order was delivered to Mr. Conder.

As of June 16, 1992, Mr. Sturdy had not received a copy of the

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order and requested a copy from the adjudication division. He received his copy of the order and a mailing certificate was executed on June 16, 1992. Subsequently, UOSH filed its motion for review on July 16, 1992. The respondent asserts that the motion for review was untimely filed and asks that it be dismissed.

The Utah Court of Appeals has addressed the question of when an order constituting final agency action is issued. Wiggins v. Board of Review, 178 Utah Adv. Rep. 29 (Ut. Ct. App. 1992). In Wiggins, the court held that "'issue' as used in section 63-46b-14(3)(a) means the date the agency action is properly mailed as accurately evidenced by the certificate of mailing, or personally served." This definition of "issue" can legitimately be applied to 63-46b-12, the section of the Utah Administrative Procedures Act which governs agency review of adjudicative proceedings.

This case involves an agency order which was signed and personally delivered to the respondent on June 10, 1992 without preparation of a mailing certificate. The complainant received the order with a mailing certificate which shows an issuance date of June 16, 1992. The date of issuance of an agency decision must be certain, otherwise the jurisdiction of the agency or court to review an agency order will be uncertain.

In this case, the confusion over the date of issuance stems from the adjudication division's failure to properly prepare a certificate of mailing and place its order in the mail on the date the order was hand delivered to the respondent. However, to rule that the order was issued on June 10, 1992 when the certificate of mailing shows that the order was mailed on June 16, 1992 will unfairly prejudice the complainant who relied on the date on the mailing certificate in submitting its motion for review. The normal practice of the commission is to issue its orders by mail, therefore, we believe that the order was not properly "issued" on June 10, 1992 even though it was hand delivered to the respondent on that date. An order of the commission will not be considered to have been "issued" until the date it is mailed or hand delivered to the parties accompanied by a properly executed mailing certificate or certificate of service. The date on the mailing certificate or certificate of service will be considered to be the date the order was "issued" by the commission. We believe that this approach is consistent with the recent opinion of the Utah Court of Appeals in Wiggins v. Board of Review, 178 Utah Adv. Rep. 29 (Ut. Ct. App. 1992).


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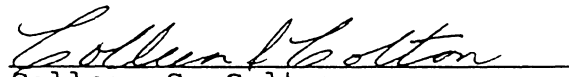
ORDER:

IT IS ORDERED that the motion for review of the complainant in this matter was timely filed based upon the date of issuance of the order as reflected on the mailing certificate.

IT IS FURTHER ORDERED that the respondent shall be given 15 days from the date of mailing of this order to file a response to the complainant's motion for review, pursuant to Utah Code Annotated section 63-46b-12.



Stephen M. Hadley
Chairman

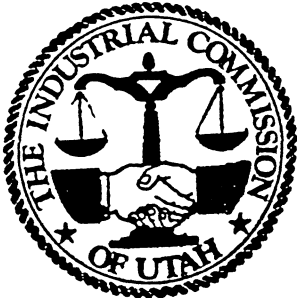

Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

Certified this 9th day of October 1992.

ATTEST:


Patricia O. Ashby
Commission Secretary



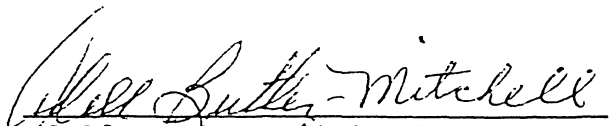
CERTIFICATE OF MAILING

I, Adell Butler-Mitchell, certify that I did mail by prepaid first class postage, except as noted below, a copy of the INTERIAM ORDER DENYING MOTION TO DISMISS in the case of Industrial Commission of Utah BY AND THROUGH THE OCCUPATIONAL SAFETY AND HEALTH DIVISION vs MAGNESIUM CORPORATION OF AMERICA, Case Number 105638369, on 9th day of October, 1972 to the following:

JERRALD D. CONDER, ATTORNEY
4057 SOUTH 4000 WEST
WEST VALLEY CITY UTAH 84120

THOMAS STURDY, ATTORNEY
INDUSTRIAL COMMISSION OF UTAH
OCCUPATIONAL SAFETY AND HEALTH DIVISION
(intra-office mail)

DONALD L. GEORGE
ADMINISTRATIVE LAW JUDGE
(intra-office mail)
JAY W. BAGLEY
OCCUPATIONAL SAFETY AND HEALTH DIVISION
(intra-office mail)


Adell Butler-Mitchell
Paralegal
General Counsel's Office
Industrial Commission of Utah

ADDENDUM E

THE INDUSTRIAL COMMISSION OF UTAH
UOSH Inspection No. 105638639

Utah Occupational	*	
Health and Safety Division,	*	
	*	ORDER GRANTING
Complainant,	*	MOTION FOR
vs.	*	REVIEW
	*	
	*	
Magnesium Corporation of	*	
America,	*	
Respondent.	*	

The Industrial Commission of Utah (commission) reviews the Complainant's Motion for Review of the administrative law judge's (ALJ) Findings of Fact, Conclusions of Law and Order dated June 10, 1992. The authority for review is conferred by U.C.A. Section 35-9-12, and Section 63-46b-12.

An ALJ of the Industrial Commission issued an order dated June 10, 1992 granting summary judgment in favor of Magnesium Corporation of America ("respondent" or "Magcorp") on the issue of whether the Occupational Health and Safety Division of the Industrial Commission of Utah ("UOSH") could place the cost of providing flame resistant coveralls for its employees on the respondent. The citation and notice of penalty issued by the UOSH required the respondent to provide flame resistant coveralls to its employees at no cost. The ALJ issued an order granting the respondent's motion for summary judgment finding that the citation was void and unenforceable as a matter of law. On April 28, 1992, Magcorp withdrew its objection to the citation and tendered payment of the penalty due under the citation. Respondent's Memorandum of Points and Authorities, Exhibit C.

The Utah Occupational Safety and Health Act ("UOSHA") provides that the commission is "empowered to administer all laws and lawful orders to ensure that every employee in this state has a workplace free of recognized hazards." U.C.A. sec. 35-9-4 (1988). The commission has the "authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer charged, the gravity of the violation, the good faith of the employer, and the history of any previous violations by the employer."

I. WAS THE COST OF THE PERSONAL PROTECTIVE EQUIPMENT
REQUIRED BY UOSH PROPERLY ALLOCATED TO THE
RESPONDENT'S EMPLOYEES?

The ALJ relied on Budd Co. v. OSHRC, 513 F.2d 201 (1975) in ruling that the UOSH has no "legal or other authority to impose the cost of uniquely personal equipment, such as the coveralls herein,

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upon Magcorp." Findings of Fact and Conclusions of Law, p.3, June 10, 1992. Budd held that 29 CFR 1910.132(a) did not mandate that employers bear the cost of protective footwear required by the regulation.

29 CFR 1910.132(a) provides that:

Protective equipment, including personal protective equipment ["PPE"] for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact (emphasis added).

29 CFR sec. 1910.132.

Subpart (b) provides that "where employees provide their own protective equipment, the employer shall be responsible to assure its adequacy, including proper maintenance, and sanitation of such equipment." Id. In a footnote, the OSH Commission noted:

We do not imply that an employer is not obliged to bear the cost of things such as capital equipment which it is ordinarily his responsibility to assume. We are here considering the cost allocation of personal equipment. . . . Thus, the most universally used type of protection [steel toed shoes] is uniquely personal and may be used by the employee when he is away from the job (emphasis added).

Id. n. 5.

A U.S. Department of Labor memorandum dated August 9, 1985, discussed the issue of cost allocation for PPE. The memorandum stated that it will be the position of the Occupational Safety and Health Administration that 29 CFR 1910.132 will be interpreted as follows:

PPE that is uniquely personal, and which the employees may well use away from the job, is the type that an employer may require employees to pay for. Exactly who pays for this kind of PPE is a question to be resolved between the employer and his employees--it is an appropriate subject for collective bargaining. . . . as a broad guideline, we can conclude that an employee may

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be required to pay for PPE that he alone will use, is of a personal nature, and may be used away from the job.

OSHA Memorandum, August 9, 1985.

Thus, the question at issue is whether the flame resistant coveralls required by UOSH are the type of PPE which is uniquely personal to the wearer.

The UOSH asserts that the coveralls at issue are not uniquely personal to the wearer as are the steel toed shoes in Budd. The coveralls are sized like men's suits, i.e. 40, 42, etc., and many bear the employee's name. The UOSH asserts that the coveralls are contaminated with Fiberfrax, a carcinogenic ceramic fiber and should not be worn home prior to being laundered. The Material Safety Data Sheet ("MSDS") for Fiberfrax specifies in relevant part that:

. . . ceramic fiber should be handled with caution. The handling practices described in this MSDS must be strictly followed . . . It is recommended that full body clothing should be worn to reduce the possibility of skin irritation. Washable or disposable clothing may be used. Do not take unwashed work clothing home. Work clothes should be washed separately from other clothing. Rinse washing machine thoroughly after use. If clothing is to be laundered by someone else, inform launderer of proper procedure clothes and street clothes should be kept separate to prevent contamination (emphasis added).

MSDS at 6.

The UOSH argues that the coveralls in question are not safe to be taken home or stored with other clothes without having first been laundered and therefore are not appropriate to be worn away from work. We agree that the MSDS requirements for laundering and sequestering contaminated clothing, make the coveralls more unique to the workplace than the individual employee. Magcorp has made coin operated laundry facilities available to its employees in order to address this concern. We believe that this response is inadequate to properly provide for the safety of Magcorp employees.

The sizing of the coveralls in this case can be distinguished from the sizing of the shoes in Budd. Shoes, by their nature adjust and conform to the foot of the wearer becoming "uniquely personal" to the wearer. Coveralls, do not generally become "broken in" like a pair of shoes. The fit of a pair of coveralls is much less personal and unique than a pair of steel toed shoes. The coveralls may not be worn away from the workplace in the same manner as steel toed shoes because they are contaminated with

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carcinogenic ceramic fibers. Due to the contamination, the coveralls must be laundered separately from other clothing and must be laundered before taking them home. We believe that PPE which an employee cannot readily wear home cannot realistically be considered "uniquely personal" to the employee.

The fact that the coveralls have the employee's name embroidered on them does not, in and of itself, make the coveralls uniquely personal to the wearer. Names on uniforms and work clothes can easily and inexpensively be changed to identify a new wearer. We do not believe that the sizing of the coveralls makes them unique to the wearer. Coveralls sized like men's suits could easily be shared among several employees as long as they are of the approximate same size. We therefore find that the flame resistant coveralls required by UOSH in Magcorp's "hot end" are not uniquely personal and that the cost of the coveralls should properly be borne by the employer.

II. WAS SUMMARY JUDGMENT PROPER IN THIS CASE?

Rule 56 of the Utah Rules of Civil Procedure provides in relevant part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(c) U.R.C.P.

In the present case, the ALJ held a hearing on Magcorp's motion for summary judgment, heard argument and examined the coveralls at issue. The ALJ then found that the coveralls were uniquely personal protective equipment and concluded as a matter of law that the cost of the coveralls could be placed on the employees under the reasoning in Budd. The ALJ then issued findings of fact, conclusions of law and an order granting Magcorp's motion for summary judgment.

We don't believe that the order in this case should properly be classified as one of summary judgment because there were disputed questions of fact argued before the judge.

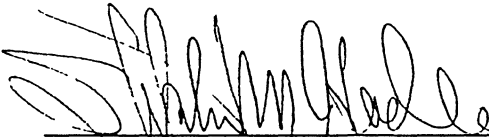
Magnesium Corp. of America
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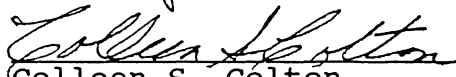
ORDER:

IT IS THEREFORE ORDERED that the motion for review of the complainant in this matter is hereby granted. For the reasons stated above, we find that the cost of the flame resistant coveralls required by UOSH should properly be allocated to the employer.

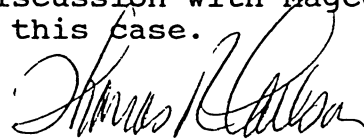
IT IS FURTHER ORDERED that the employer shall provide, at no cost to its employees, laundry service for the protective coveralls that have been exposed to Fiberfrax as specified in the Material Safety Data Sheet.

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Section 63-46b-16. The requesting party shall bear all costs for preparing a transcript for appeals purposes.

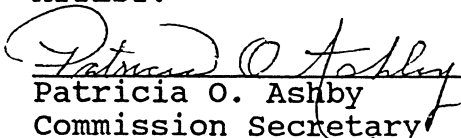

Stephen M. Hadley
Chairman


Colleen S. Colton
Commissioner

I abstain because of prior discussion with Magcorp officials possibly related to the issues in this case.


Thomas R. Carlson
Commissioner

Certified this 17th day of December 1992.
ATTEST:


Patricia O. Ashby
Commission Secretary



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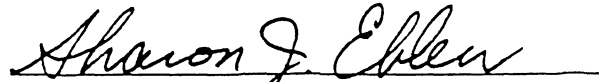
CERTIFICATE OF MAILING

I certify that on December 17, 1992, I mailed the attached Order Granting Motion for Review in the case of Utah Occupational Health and Safety Division v. Magnesium Corporation of America first class postage prepaid, to the following:

Jerrald D. Conder, Esq.
CONDER & WANGSGARD
Attorney for Magcorp
4059 South 4000 West
West Valley City, Utah 84120

Thomas C. Sturdy, Esq.
Attorney for UOSH
(hand delivered)

Donald L. George, Esq.
Administrative Law Judge
(hand delivered)


Sharon J. Eby, Attorney
Industrial Commission of Utah

ADDENDUM F

THE INDUSTRIAL COMMISSION OF UTAH
UOSH Inspection No. 105638639

Industrial Commission of Utah	*	
by and through the Occupational	*	
Health and Safety Division,	*	
	*	ORDER GRANTING
Complainant,	*	MOTION FOR
vs.	*	EXTENSION OF TIME
	*	
	*	
Magnesium Corporation of	*	
America,	*	
Respondent.	*	

The Industrial Commission of Utah ("Commission") reviews the Complainant's Motion for Extension of Time pursuant to the limited order of remand issued by the Court of Appeals on April 29, 1993.

On June 10, 1992 Judge Donald L. George ("ALJ") issued an order dismissing a citation issued by the Utah Occupational Safety and Health Division ("UOSH") in connection with UOSH inspection number 105638639. The citation assessed a fine for the Respondent's failure to provide flame retardant coveralls pursuant to 29 CFR 1910.132. At the time of the citation, the respondent required its employees to pay for flame retardant coveralls to be used in the workplace. The ALJ found that the citation was void and unenforceable as a matter of law. On Motion for Review, the Commission reversed the ALJ and ruled that the employer should provide the flame retardant coveralls.

The Commission's Order was appealed to the Utah Court of Appeals. The Court remanded the matter to the Commission for a determination whether UOSH showed good cause for an extension of time to file its motion for review pursuant to U.C.A. § 63-46b-1(9). Our prior orders have not addressed the issue of good cause for an extension of time because no extension was originally requested. Under the law in existence at the time UOSH filed its motion for review, the motion was timely filed.

DISCUSSION

1. GOOD CAUSE

UOSH asserts that it relied in good faith on Wiggins v. Board of Review¹ when it filed its motion for review. UOSH further asserts that both Dusty's Inc. v. State Tax Comm'n² and Bonded

¹ 824 P.2d 1199 (Ut. App. 1992).

² 199 Utah Adv. Rep. 7, 9 (Utah 1992).

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Bicycle Couriers v. Dept. of Empl. Sec.,³ were decided after UOSH filed its motion for review on July 16, 1992.

The UOSH motion for review was filed thirty days from the date the ALJ's Order was mailed relying upon the January 23, 1992 decision of the Court of Appeals in Wiggins. Wiggins held that the date an agency order is issued is the date the order is mailed as evidenced by the mailing certificate. On October 30, 1992, the Utah Supreme Court held that an agency order is issued on the date the order bears on its face, and not the date of mailing. Dusty's at 9. On December 4, 1992, the Court of Appeals in Bicycle Couriers, held that Dusty's overruled Wiggins.

Magcorp asserts that UOSH has not shown good cause to justify an extension of time under the Utah Administrative Procedures Act ("UAPA"). Magcorp further asserts that the time for filing a motion for review is jurisdictional under Varian Eimac v. Lamoreaux⁴ and that there is no specific statutory provision which allows the Commission to extend the time for filing a motion for review.

We believe that U.C.A. § 63-46b-1(9) clearly authorizes the Commission to grant an extension of time for filing a motion for review for good cause shown. Maverik Country Stores v. Industrial Commission.⁵ UAPA provides that an "aggrieved party may file a written request for review within 30 days after the issuance of an order..."⁶ and that an agency may extend the time limits provided for good cause shown.⁷ Maverik filed a motion for Commission review of an administrative order one day late. The Court of Appeals recognized that, "*absent a showing of good cause for an extension, the term filing as used in section 63-46b-12 requires, as a prerequisite to the agency taking jurisdiction over a review, actual delivery of the necessary documents to the agency within the thirty day time period.*" Maverik at 37. (emphasis added).

We conclude that the UOSH motion for review was timely filed under the law in effect at the time of filing and that no extension

³ 201 Ut. Adv. Rep. (Ct. App. 1992).

⁴ 767 P.2d 569, 570 (Utah App. 1989),

⁵ 214 Ut. Adv. Rep. 34, 37 (Ct. App. 1993).

⁶ U.C.A. § 63-46b-12(1)(a).

⁷ The agency may extend "any time period prescribed in this chapter, except those time periods prescribed for judicial review." U.C.A. § 63-46b-1(9).

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of time was necessary. However, we also hold that if an extension of time is required then the subsequent change in the law constitutes good cause for an extension of time.

2. APPLICABILITY OF UTAH RULES OF CIVIL PROCEDURE

Magcorp asserts that Rule 6 U.R.C.P. applies to the equation pursuant to Rule 81(d) U.R.C.P., and requires that UOSH show excusable neglect before an extension of time may be granted by the Commission. A showing of excusable neglect is not required. UOSH relied on the law in effect at the time of filing, so it is not necessary to show excusable neglect.

We believe that the Utah Rules of Civil Procedure do not apply to agency actions under UAPA unless UAPA provides otherwise. In Griffith v. Industrial Commission, 300 P.2d 204 (Utah 1965), the Utah Supreme Court held that Rule 6(e) and Rule 81(a) U.R.C.P. could be applied to administrative procedures "except insofar as such rules are by their nature clearly inapplicable." The Griffith Court held that Rule 6(e) U.R.C.P. applied to extend the time for filing a petition for rehearing when the notice was served by mail. Although footnote 1 in Lamoreaux opines that Rule 6(e) U.R.C.P. applies to extend the time for filing a motion for review, this position was discarded by the Court of Appeals in Maverik.⁸

In 1983, the Utah Supreme Court noted that "[w]hile the mode of procedure before administrative bodies may conform to the Utah Rules of Civil Procedure, the rules governing civil procedure in the trial courts are not necessarily applicable to administrative proceedings. See e.g. Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28 (7th Cir. 1977) Thus, administrative proceedings are not subject to the Utah Rules of Civil Procedure unless the governing statute or regulations so provide." Pilcher v. Dep't of Social Services, 663 P.2d 450 (Utah 1983) (emphasis added). We believe that the rule articulated in Pilcher correctly determines the applicability of the U.R.C.P. to administrative proceedings in Utah.

The UAPA provides in relevant part, "except as otherwise provided by a statute superseding provisions of this chapter by specific reference to this chapter, the provisions of this chapter apply to every agency of the state of Utah..." U.C.A. § 63-46b-1(1) (1989) (emphasis added). The UAPA does not generally state that the Utah Rules of Civil Procedure apply to all administrative proceedings. To the contrary, the UAPA contains only limited,

⁸ 214 Ut. Adv. Rep. 34, 36-37 (Ct. App. 1993).

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specific references to the Utah Rules of Civil Procedure⁹.

FINDINGS OF FACT

1. The ALJ's Order was issued on June 10, 1992 and mailed to the parties on June 16, 1992.

2. The Utah Division of Occupational Safety and Health (UOSH) Motion for Review was filed with the Commission on July 16, 1992.

3. Under the January 23, 1992 order in Wiggins v. Board of Review, 824 P.2d 1199 (Ut. App. 1992), an agency order was considered issued on the date it was mailed.

4. The Commission relied on the Wiggins decision in its Interim Order of October 9, 1992 which held that the UOSH motion for review was timely filed.

5. The law regarding the issuance of agency orders was changed by the October 30, 1992 Order of the Utah Supreme Court in Dusty's Inc. v. State Tax Comm'n, 199 Utah Adv. Rep. 7, 9 (Utah 1992). Under Dusty's, an order is considered issued on the date the order bears on its face.

6. The UOSH relied in good faith on the Wiggins decision in filing its motion for review on July 16, 1992.

CONCLUSIONS OF LAW

Wiggins was the law in effect at the time UOSH filed its motion for review. We believe that UOSH's reliance on the law at the time of filing is good cause to support the grant of an extension of time for filing.

⁹ See U.C.A. § 63-46b-1(4)(b) (providing that Rules 12(b) and 56 U.R.C.P. apply to motions to dismiss or for summary judgment except to the extent that those rules are modified by UAPA); U.C.A. § 63-46b-7 (providing that the rules of discovery under the U.R.C.P. apply if the agency has not enacted rules for discovery); U.C.A. § 63-46b-11(3) (providing that a defaulted party may file a motion to set aside a default order under the procedures outlined in the U.R.C.P.); U.C.A. § 63-46b-15(2) (providing that a petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the U.R.C.P. and that all other pleadings and proceedings in the district court are governed by the U.R.C.P.); U.C.A. § 63-46b-19(1)(c) (providing that the venue for proceedings to enforce agency orders is governed by the requirements of the U.R.C.P.).

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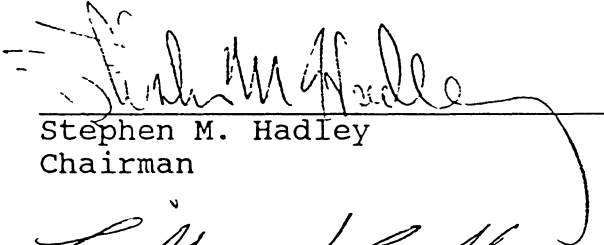
We conclude that the Utah Rules of Civil Procedure do not apply to agency actions under UAPA unless expressly adopted under UAPA. Therefore, UOSH must merely show good cause for an extension under UAPA and does not need to meet the requirements of Rule 6 of the Utah Rules of Civil Procedure.

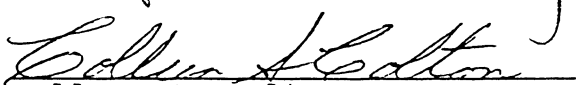
ORDER:

IT IS THEREFORE ORDERED that the complainant in this matter is hereby granted an extension of time in which to file a motion for review of the June 10, 1992 order of the administrative law judge.


DATED this 20th day of October, 1993.




Stephen M. Hadley
Chairman


Colleen S. Colton
Commissioner

I abstain because of prior discussion with Magcorp officials possibly related to the issues in this case.


Thomas R. Carlson
Commissioner

00537

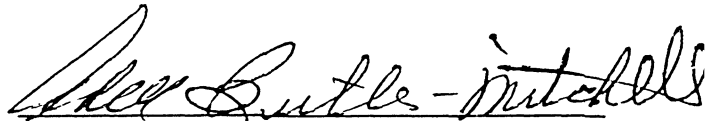
CERTIFICATE OF MAILING

I, Adell Butler-Mitchell, certify that I did mail by prepaid first class postage, except as noted below, a copy of the ORDER GRANTING MOTION FOR EXTENSION OF TIME in the case of MAGNESIUM CORPORATION, Case Number 105638639, on 20 day of October 1993 to the following:

THOMAS C. STURDY, ATTORNEY FOR
UTAH OCCUPATIONAL SAFETY AND HEALTH DIVISION
INDUSTRIAL COMMISSION OF UTAH

JERRALD D. CONDER
PETER L. ROGNLIE
CONDER & WANGSGARD
4059 SOUTH 4000 WEST
WEST VALLEY CITY, UTAH 84120

DONALD L. GEORGE
ADMINISTRATIVE LAW JUDGE



Adell Butler-Mitchell
Paralegal
General Counsel's Office
Industrial Commission of Utah