

1993

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

Complainant and Respondent,

VS.

MAGNESIUM CORPORATION OF
AMERICA,

Respondent and Petitioner.

Case No. 930017-CA

Priority No. 7

BRIEF OF PETITIONER

Petition for review of the Order Granting Motion For Review entered by the Industrial Commission of Utah on December 17, 1992 and the Order Granting Motion For Extension Of Time issued by the Industrial Commission of Utah on October 20, 1993, after limited remand from the Court of Appeals.

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

VS.

Respondent and Petitioner.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann., § 78-2a-3(2)(a) (1992) and § 63-46b-16 (1988).

STATEMENT OF ISSUES PRESENTED FOR APPEAL AND STANDARD OF APPELLATE REVIEW

The relief that may be granted by the appellate court on review of final agency action resulting from formal adjudicative proceedings is governed by Utah Code Ann., § 63-46b-16(4) (1988). In addition to showing one or more of the many standards stated in § 63-46b-16(4), the parties seeking judicial review must show substantial prejudice.

A. Did the Industrial Commission have jurisdiction to consider UOSH's Motion For Review when the motion was filed more than thirty days after the issuance of the underlying order? This issue presents a general question of law which is reviewed under a correction of error standard, giving no deference to the agency's decision. Niederhauser Ornamental v. Tax Commission, 858 P.2d 1034 (Utah App. 1993); Krantz v. Utah Dept. of Commerce, 856 P.2d 369 (Utah App. 1993); King v. Industrial Commission, 850 P.2d 1281 (Utah App. 1993).

B. Did the Commission act without jurisdiction and err as a matter of law when it entered the Order Granting Motion For Extension Of Time on remand? This issue presents subsidiary questions of whether the Order Granting Motion For Extension Of

Time was an improper nunc pro tunc order, whether an extension of time was necessary, whether § 63-46b-1(9) authorizes an extension of time for filing a motion for review, whether UOSH established good cause or excusable neglect for an extension of time pursuant to Rules 6(b) and 81(d) and whether Dusty's v. Utah State Tax Commission applies retrospectively. In the broad view, the issue is one of whether the Commission acted without jurisdiction and it is therefore reviewed under a correction of error standard, giving no deference to the agency's decision. Niederhauser Ornamental, 858 P.2d 1034; Krantz, 856 P.2d 369; King, 850 P.2d 1281. The question of whether the Commission's Order Granting Motion For Extension Of Time was an improper nunc pro tunc order is similarly treated under a correction or error standard and falls into the purview of subsections (d), (e) and (h) (iv) of § 63-46b-16. Under subsection (h)(iv), the Commission's action is viewed for reasonableness. Maverick Country Stores v. Industrial Commission, 860 P.2d 944 (Utah App. 1993); La Sal Oil v. Dept. of Environmental Quality, 843 P.2d 1045 (Utah App. 1992). Those standards also apply to the issues of whether an extension of time was necessary, whether § 63-46b-1(9) authorized an extension of time, whether Rules 6(b) and 81(d) applied to require UOSH to establish excusable neglect or good cause and whether the decision in Dusty's v. Utah State Tax Commission, applies retrospectively.

C. Did the Commission err as a matter of law when it reversed the ALJ's order and entered summary judgment against

Magcorp? As an issue presenting a claim of arbitrary or capricious action, the Commission's action is reviewed for reasonableness. Maverick, 860 P.2d 944; La Sal Oil, 843 P.2d 1045. Under section 63-46b-16(d) and (e), a correction of error standard is applied. Niederhauser Ornamental, 858 P.2d 1034; Krantz, 856 P.2d 369; King, 850 P.2d 1281.

D. Did the Commission err as a matter of law when it ordered Magcorp to provide and pay for laundry services for its employees using protective coveralls exposed to Fiberfrax without first affording Magcorp notice and a hearing on the issue? As a question of general law viewed under §§ 63-46b-16(b), (d) and (e), a correction of error standard giving no deference to the Commission's decision is applied. The issue may also be reviewed under the arbitrary or capricious standard presented in subdivision (h)(iv) of § 63-46b-16 for reasonableness. Maverick, 860 P.2d 944; La Sal Oil, 843 P.2d 1045.

DETERMINATIVE AUTHORITIES

Statutes:

Utah Code Ann., § 35-9-12 (1989) (please see Addendum G for text)

Utah Code Ann., § 63-46b-12 (1988) (please see Addendum H for text)

Utah Code Ann., § 63-46b-16 (1988) (please see Addendum I for text)

Court Rules:

Rule 6(b), Utah Rules of Civil Procedure,
(please see Addendum J for text)

Rule 81(d), Utah Rules of Civil Procedure,
(please see Addendum K for text)

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This appeal is taken from the Order Granting Motion For Review entered by the Industrial Commission of Utah on December 17, 1992, the Interim Order Denying Motion To Dismiss that preceeded the Order Granting Motion For Review in which the Commission determined that it had jurisdiction to review the Order and Findings And Conclusions entered by the ALJ, and the Order Granting Motion For Extension Of Time issued by the Commission on October 20, 1993, after limited remand by the Court of Appeals.

B. COURSE OF PROCEEDINGS AND DISPOSITION BEFORE THE INDUSTRIAL COMMISSION OF UTAH.

Petitioner, Magnesium Corporation of America ("Magcorp"), contested a citation and notification of penalty that was issued by the Utah Occupational Safety and Health Division ("UOSH") on September 3, 1991. Magcorp's Motion For Summary Judgment was heard by the Honorable Donald L. George, Administrative Law Judge for the Industrial Commission of Utah ("ALJ"), on April 17, 1992. [R. 383-450]. The ALJ ruled that the abatement order contained in the UOSH citation requiring Magcorp to bear the cost of flame resistant coveralls purportedly required under 29 CFR 1910.132(a) was unenforceable and void as a matter of law and therefore granted partial summary judgment in favor of Magcorp on that issue. [R. 171, 173]. In addition, the ALJ found that disputed issues of material facts existed in regard to the issue of whether Magcorp

was in compliance with 29 CFR 1910.132(a) and for that reason denied summary judgment on that issue. [R. 171, 174]. Based on that ruling, Magcorp, on April 28, 1992, withdrew its objection to the penalty assessed in conjunction with the Citation And Notice Of Penalty and paid the amount UOSH had assessed. [R. 314].

On July 16, 1992, some thirty-six days after the ALJ's order was issued, UOSH filed its Motion For Review. [R. 177, 178-182]. Magcorp then filed its Motion To Dismiss, asserting that UOSH's Motion For Review was filed more than 30 days after the order sought to be reviewed was issued and that the Industrial Commission therefore lacked jurisdiction to consider the Motion For Review. [R. 208-209, 211-252]. On October 9, 1992, the Commission issued its Interim Order Denying Motion To Dismiss, ruling that UOSH's Motion For Review was timely filed based on the date indicated on the mailing certificate purportedly attached to the ALJ's Order on June 16, 1992, and directed Magcorp to respond to UOSH's Motion For Review. [R. 288-291]. The Commission issued its Order Granting Motion For Review on December 17, 1992. [R. 336-341]. Magcorp filed its Petition For Writ Of Review on January 14, 1993. [R. 344-45]. Magcorp filed its [First] Motion For Summary Disposition and supporting memorandum on February 26, 1993. [R. 471-472, 473-501].

Magcorp informed the court of appeals that the June 10, 1992 Order signed by the ALJ had been improperly altered, and the parties subsequently stipulated that the material error should be

corrected. [R. 507-508, 509, 510-512, 515, 521]. On April 29, 1993, the Utah Court of Appeals remanded the case to the Commission to allow UOSH to bring a motion for extension of time under Utah Code Ann., § 63-46b-1 (Supp. 1992). [R. 519]. The Commission did not rule on the UOSH Motion For Extension Of Time until October 20, 1993, when it issued its Order Granting Motion For Extension Of Time. [R. 533-538].

Magcorp filed its Second Motion For Summary Disposition and supporting Memorandum on or about November 30, 1993. [R. 542-574]. By Order dated December 17, 1993, the Utah Court of Appeals ordered that Magcorp's first and second motions for summary disposition were denied and the issues raised deferred pending plenary presentation and consideration of the case.

C. STATEMENT OF FACTS.

1. On August 17, 1991, subsequent to inspection number 105638639, the Utah Occupational Safety and Health Division ("UOSH") issued a Citation And Notification Of Penalty to the petitioner, Magnesium Corporation of America ("Magcorp"), alleging Magcorp failed to provide the use of flame resistant protective clothing in the electrolytic and reactor sections of Magcorp's plant in violation of 29 CFR 1910.132(a) and alleging violations of USGOR 500-405-558.2.7.[R. 001-002].

2. That citation was withdrawn and a second Citation And Notification Of Penalty was subsequently reissued to Magcorp on September 3, 1991. [R. 001-003].

3. As a result of the alleged violation, UOSH imposed a \$2,200.00 penalty, together with an abatement order requiring Magcorp to provide flame resistant clothing to all applicable employees at no cost or financial expense to the employees. [R. 002].

4. Magcorp contested the Citation And Notice Of Penalty and filed its Motion For Summary Judgment and supporting memorandum and affidavits on March 24, 1992. [R. 014-091].

5. Magcorp's Motion For Summary Judgment was heard by the Honorable Donald L. George, Administrative Law Judge for the Industrial Commission of Utah ("ALJ"), on April 17, 1992. [R. 124, 383-450].

6. At that hearing, counsel for both parties presented evidence and oral argument regarding two issues: 1) Whether Magcorp had violated 29 CFR 1910.132(a) by failing to provide flame resistant personal protective clothing to certain Magcorp employees engaging in duties in the areas known as the reactor and electrolytic sections of Magcorp's plant, and 2) Whether UOSH properly included in the Citation And Notification Of Penalty an abatement note requiring Magcorp to bear the costs of flame resistant personal protective clothing purportedly required under 29 CFR 1910.132(a) for its employees. [R. 394, 383-450].

7. The ALJ considered, inter alia, the August 9, 1985 Memorandum of Byron R. Chadwick, Regional Administrator of the U.S. Department of Labor, Occupational Safety and Health Administration,

that set forth guidelines to be followed by OSHA agencies in determining the allocation of cost for protective equipment required under 29 CFR 1910.132(a), [R. 90-91, 171, 315-316, 402-403, 410], the decision in The Budd Co. v. OSHRC, 513 F.2d 807 (3rd Cir. 1975), 2 OSCH 1698 (1975), [R. 171, 173, 402-403], and documents and affidavits addressing Magcorp's collective bargaining with the United Steelworkers of America regarding payment for protective equipment. [R. 44-48, 358-381, 382, 389, 395, 417-419, 425-428].

8. At the conclusion of the hearing, the ALJ ruled that the abatement note contained in the UOSH Citation And Notification Of Penalty requiring Magcorp to bear the costs of flame resistant personal protective clothing purportedly required under 29 CFR 1910.132(a) was unenforceable and void as a matter of law and therefore granted partial summary judgment in favor of Magcorp on that issue. [R. 170-171, 173, 446-449].

9. The ALJ also determined that disputed issues of material fact existed in regard to the issue whether Magcorp was in compliance with 29 CFR 1910.132(a) and for that reason denied summary judgment on that issue. [R. 170-171, 174].

10. Based on the ALJ's ruling, Magcorp, on April 28, 1992, withdrew its objection to the Citation And Notice Of Penalty issued in conjunction with the Citation and paid the \$2,200.00 penalty that UOSH had assessed. [R. 314].

11. That payment of penalty was based solely on the fact that

Magcorp did not require its employees to wear flame resistant personal protective clothing and was not an admission that Magcorp was required to provide the clothing at its own expense. [R.314].

12. Copies of the proposed Order and proposed Findings And Conclusions were provided to UOSH's counsel on approximately April 28, 1992, and May 27, 1992. [R. 168, 172, 222].

13. UOSH's counsel signed both documents "approved as to form." [R. 168, 172, 174, 222].

14. The Order, [R.173-174], and the Findings Of Fact And Conclusions Of Law ("Findings and Conclusions") [R.169-172], regarding the Motion For Summary Judgment were signed by the ALJ on June 10, 1992 in the presence of counsel for both parties. [R. 222, 223, 225, 269].

15. The Order and the Findings And Conclusions were passed by the Industrial Commission Of Utah ("Commission") on that same date. [R. 171, 174].

16. June A. Stoddard, a paralegal in the Industrial Commission Adjudication Division, filed the order on June 10, 1992. [R. 226].

17. Ms. Stoddard hand-delivered a certified copy to counsel for Magcorp and then placed a second certified copy in a box to be forwarded to counsel for UOSH. [R. 222, 225-226, 264].

18. On June 10, 1992, Magcorp's counsel offered UOSH's counsel a photocopy of the certified copy of the Order. [R. 222-225].

19. UOSH's counsel declined the offer and stated he had retained a copy of the Order that he had previously executed "approved as to form." [R. 168, 272].

20. On or about June 16, 1992, a certificate of mailing that was signed by Pilar Gorlinski, another Adjudication Division employee, for June A. Stoddard was attached to the Order. [R. 175, 264].

21. Neither of the parties nor their counsel received a copy of the Order as a result of the Order purportedly being mailed as was averred in the mailing certificate, and there is no credible evidence that the Order was properly mailed to the parties or their counsel on June 16, 1992. [R. 223, 226, 269].

22. On July 16, 1992, some 36 days after the ALJ's Order was issued, UOSH filed its Motion For Review, along with a supporting memorandum, pursuant to Utah Code Ann., § 63-46b-12 (1988), requesting that the Order entered by the ALJ be reversed and that the cause be remanded for a hearing on the merits. [R. 176-201].

23. In initial response to UOSH's Motion For Review, Magcorp filed its Motion To Dismiss, along with a supporting memorandum, on or about August 11, 1992, asserting that UOSH's Motion For Review was filed more than 30 days after the issuance of the Order UOSH sought to be reviewed. [R. 208-252].

24. The Commission, on October 9, 1992, issued its Interim Order Denying Motion To Dismiss, ruling that UOSH's Motion For Review was timely filed based on the date indicated on the June 16,

1992 mailing certificate purportedly attached to the ALJ's Order six days after its issuance and directed Magcorp to respond to UOSH's Motion For Review. [R. 175, 288-91, 507-508, 509, 510-512, 513, 515].

25. After the parties submitted memoranda addressing UOSH's Motion For Review, the Commission issued its Order Granting Motion For Review on December 17, 1992. [R. 177, 178-182, 293-316, 336-341].

26. The Commission's Order Granting Motion For Review was necessarily based on its earlier determination, as stated in the Interim Order Denying Motion To Dismiss, that it had jurisdiction to review the Order and the Findings And Conclusions previously entered by the ALJ. [R. 288-291, 336-341].

27. Magcorp filed its Petition For Writ Of Review on January 14, 1993, and its Docketing Statement on February 18, 1993. [R. 344-345, 451-470].

28. Magcorp filed its [First] Motion For Summary Disposition and supporting memorandum on February 26, 1993. [R. 471-501].

29. On or about April 7, 1993, Magcorp filed its Motion To Correct Record which was supported by the Stipulation of the parties in which the parties agreed that a date on the June 10, 1992 Order signed by the ALJ had been altered that page 174 of the Record should be corrected to indicate that the Industrial Commission's stamp appearing on that page should be dated the 10th day of June instead of the 16th and that the Order was "passed" by

the Commission on that date. [R. 507-508, 509, 510-512, 513-515, 521].

30. The counsel ordered the Industrial Commission to make the stipulated corrections to the record. [R. 521, 606-607].

31. On April 29, 1993 the Utah Court of Appeals remanded the case to the Commission "for the limited purpose of allowing respondent to bring a motion for an extension under Utah Code Ann., § 63-46b-1 (Supp. 1992). The Commission shall forward a copy of its order on the Motion to this court promptly." [R. 519].

32. The parties filed their respective memoranda addressing UOSH's Motion For Extension Of Time, and the Commission did not rule on the Motion For Extension Of Time until October 20, 1993, when it issued its Order Granting Motion For Extension of Time. [R. 522-523, 526-532, 533-538].

33. Magcorp's Second Motion For Summary Disposition was filed on November 30, 1993. [R. 542-543, 544-576].

34. By Order dated December 17, 1993, the Utah Court of Appeals denied the motions for summary disposition Magcorp had filed and deferred ruling on the issues raised therein pending plenary presentation and arbitration of the case.

SUMMARY OF ARGUMENTS

I. THE INDUSTRIAL COMMISSION LACKED JURISDICTION TO CONSIDER UOSH'S MOTION FOR REVIEW BECAUSE THE MOTION WAS FILED MORE THAN 30 DAYS AFTER THE ISSURANCE OF THE UNDERLYING ORDER.

The constellation of arguments subsumed under Magcorp's Point

I establish that the Commission lacked jurisdiction to consider UOSH's Motion For Review because the motion was filed more than 30 days after the issuance of the underlying Order made by the ALJ and issued by the Commission on June 16, 1992. Those issues were, in large part, raised in Magcorp's [First] Motion For Summary Disposition and Second Motion For Summary Disposition, and those issues have been deferred pending plenary presentation and consideration of this case. The Commission's Order Granting Motion For Extension Of Time entered after remand also suffers from the jurisdictional infirmity. That order was an improper nunc pro tunc order, and the Court of Appeal's remand did not revive the jurisdiction the Commission had lost. The Commission further erred when it determined that an extension of time was not necessary, that § 63-46b-1(9) allowed for an extension of time in which UOSH could file its motion for review, that UOSH established good cause for the extension and that excusable neglect was not the applicable standard to be applied, and in failing to give Dusty's v. Utah State Tax Commission retrospective application. All of the actions of the Commission, including those on remand, are null and void for lack of jurisdiction. The ALJ's June 10, 1992 Order should be recognized as and remain the final judgment in this case.

**II. THE COMMISSION ERRED AS A MATTER OF LAW WHEN
IT REVERSED THE ALJ'S ORDER AND ENTERED
SUMMARY JUDGMENT AGAINST MAGCORP.**

In its Order Granting Motion For Review, the Commission concluded that disputed issues of material facts existed but then

went on to reverse the ALJ's Order and enter summary judgment against Magcorp despite those disputed issues of fact. That action was clearly violative of Utah Rule of Civil Procedure, 56(c) and was arbitrary and capricious. If this court determines the Commission had jurisdiction to enter the Order Granting Motion For Review and accepts the Commission's conclusion that genuine issues of material facts exist, Magcorp requests that it be allowed a full hearing before the ALJ on the merits of the Citation And Notification Of Penalty.

III. THE COMMISSION ERRED AS A MATTER OF LAW WHEN IT ORDERED MAGCORP TO PROVIDE AND PAY FOR LAUNDRY SERVICES FOR ITS EMPLOYEES FOR PROTECTIVE COVERALLS EXPOSED TO FIBERFRAX WITHOUT FIRST AFFORDING MAGCORP NOTICE AND A HEARING ON THE ISSUE.

The Commission entertained issues that were not raised in the Citation And Notification Of Penalty that initiated this action and ordered Magcorp to provide and pay for laundry services for the protective coveralls. That action denied Magcorp due process and proper notice. This court should reverse the laundry services portion of the order of the Order Granting Motion For Review.

ARGUMENTS

I. THE INDUSTRIAL COMMISSION LACKED JURISDICTION TO CONSIDER UOSH'S MOTION FOR REVIEW BECAUSE THE MOTION WAS FILED MORE THAN 30 DAYS AFTER THE ISSUANCE OF THE UNDERLYING ORDER.

Magcorp's [First] Motion For Summary Disposition and Second Motion For Summary Disposition and supporting memoranda [R. 471-501, 542-574] were denied and the issues presented therein deferred

pending plenary presentation and consideration of the case by order of the Court of Appeals dated December 17, 1993. Magcorp submits that the Industrial Commission of Utah ("Commission") lacked jurisdiction, both initially and on remand, to consider UOSH's Motion For Review and UOSH's Motion For Extension Of Time.

A. UOSH's Motion For Review was filed more than 30 days after the Industrial Commission "issued" the Order.

The Order and the Findings Of Fact And Conclusions Of Law ("Findings And Conclusions") were signed by the ALJ and also issued by the Commission on June 10, 1992. Utah Code Ann., § 63-46b-12(1)(a) (1988), states:

If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of the 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 purpose by statute or rule.

The 30 day time limit for filing a motion for review is mandatory and is the jurisdictional linchpin upon which the reviewing tribunal's jurisdiction depends. See Bonded Bicycle v. Dept. of Employment Security, 844 P.2d 358, 359-60 (Utah App. 1992) (per curiam); Silva v. Dept. of Employment Security, 786 P.2d 246, 247 (Utah App. 1990) (per curiam); Varian-Eimac v. Lamoreaux, 767 P.2d 569, 571 (Utah App. 1989); Retherford v. Industrial Commission, 739 P.2d 767 (Utah App. 1987); Prowswood, Inc. v. Mountain Fuel Supply Co., 767 P.2d 952, 955 (Utah 1984). UOSH's Motion For Review was

not filed until July 16, 1992, six days after the termination of the 30 day time limit for filing a motion for review. [R. 177]. The Commission did not have jurisdiction to consider the motion and should have dismissed it as a matter of law. In considering the Motion For Review, the Commission clearly acted beyond the jurisdiction conferred upon it, erroneously interpreted and applied the law, engaged in an unlawful procedure and acted arbitrarily and capriciously, substantially prejudicing Magcorp. See Utah Code Ann., § 63-46b-16(4) (1988).

Subsection (1)(a) of § 63-46b-12 has not been amended since April 25, 1988,¹ and the date of an order's issuance has always been synonymous with the date the order bears on its face.

Support for that conclusion is found in the U.A.P.A. itself. Section 63-46b-21 governs agency action of declaratory orders. After receiving petitions for declaratory orders, agencies may *issue* written orders. Copies of all orders *issued* in response to requests for declaratory proceedings must be *mailed promptly* to petitioners or other parties. Inasmuch as declaratory orders have the same status and binding effect as any other orders *issued* in an adjudicative proceeding, it follows that the differentiation between *issuance* and *mailing* may not be limited to declaratory orders alone. (footnote omitted).

Dusty's v. Utah State Tax Commission, 842 P.2d 868, 870 (Utah 1992) (per curiam). The Utah Court of Appeals is "bound to follow the

¹ A previous version, Utah Code Ann., § 63-46b-12(1) (1987), provided for only "10 days" as the time in which the aggrieved party could file a written request for review. See Hi-Country Homeowners v. PSC of Utah, 779 P2d 682, 683 (Utah 1989).

rule of law as it has been pronounced by the Utah Supreme Court." Bonded Bicycle, 844 P.2d at 360.

It is undisputed that UOSH did not file its Motion For Review until July 16, 1992, some 36 days after the Order was issued. The 30 day period for filing the Motion For Review was not extended by a Commission decision rendered after the filing of a proper and timely motion for extension of time. Furthermore, UOSH cannot claim justifiable reliance on Wiggins v. Board of Review, 824 P.2d 1199 (Utah App. 1992), under the peculiar facts of this case as they repeatedly have done in responding to this issue. UOSH's primary argument was that it could rely on the June 16, 1992 mailing date stated on the mailing certificate purportedly attached to the order nearly a week after it was issued. [R. 175]. That argument is not only contrary to law, but in addition the mailing certificate provides no evidence of an actual or proper mailing because it did not result in actual receipt by any of the parties. [T. 223, 226, 269]. The June 16, 1992 date is not "accurately evidenced" by the mailing certificate. Wiggins, 824 P.2d at 1199. Notably, the Order appearing in the record of the proceedings is a photocopy [R. 173-174]² and no similar mailing certificate was attached to the Findings And Conclusions. [R. 169-172].

Copies of the proposed Order and proposed Findings And

² The previous page 174 of the record, which existed prior to the record being corrected [see e.g., R. 313], was also a photocopy. The original page of the document represented at page 174 of the record has never been part of the record of proceedings.

Conclusions were provided to UOSH's counsel on approximately April 28, 1992 and May 27, 1992. [R. 168, 172, 222]. Counsel for both parties were present when the ALJ signed the Order and the Findings And Conclusions, and UOSH's counsel had actual notice that the order was signed on June 10, 1992. [R. 222, 223, 225, 269]. UOSH's counsel had signed both documents "approved as to form". [R. 168, 174, 222]. On June 10, 1992, June Stoddard, a paralegal in the Commission's Adjudication Division, placed a copy of the Order in a box in her work area from which it was to be taken by another Adjudication Division employee and forwarded to UOSH's counsel. [R. 225-226, 264]. UOSH's counsel had actual notice that Magcorp's counsel received a certified copy of the Order, and Magcorp's counsel then personally offered to provide UOSH's counsel with a copy. [R. 222-225]. UOSH's counsel declined that offer and stated he had retained a copy of the Order that he previously executed "approved as to form." [R. 168, 222]. Most important, he declined personal service of a copy that same day when one was offered to him by Magcorp's counsel and stated he would rely on the copy he already had. [R. 168, 227]. In addition, UOSH was undoubtedly aware that the Order should have been entered no later than 30 days after the April 17, 1992 hearing. Utah Code Ann. § 35-9-12(3)(b) (1989).

On approximately June 16 or 17, 1992, UOSH's counsel informed June Stoddard that he had not received an executed copy of that order. [R. 226]. Ms. Stoddard indicated he should have received

one because she placed it in the box for mailing on June 10, 1992. [R. 226]. On or about approximately June 23 through June 26, 1992, UOSH's counsel again inquired of Ms. Stoddard why he had not received a copy of the order. [R. 226]. At that time, Ms. Stoddard personally went to the file cabinet which contained the file, pulled the Order, made a copy and hand-delivered the Order to UOSH's counsel. [R. 223]. Neither of the parties' counsel received a copy of the Order in the mail or by other mode of delivery as a result of the Order allegedly being mailed as was averred in the mailing certificate dated June 16, 1992. [R. 175, 223, 226, 269]. UOSH's counsel was unequivocally aware of the contents of the Order and the Findings and Conclusions and that they had both been signed by ALJ on June 10, 1992. He further had easy access to the Adjudication Division's file to check the date the Order was "passed" by the Commission.

UOSH's attempt to rely on the June 16, 1992 mailing certificate is questionable at best. The fact that the alleged June 16, 1992 mailing date coincides with the as of yet unexplained alteration of the date hand-written onto the Industrial Commission's stamp that appeared on the second page of the Order before the record was corrected calls UOSH's reliance into question. [R. 174, 507-508, 509, 510-512, 513-515, 521]. It is uncontroverted, however, that UOSH's counsel had a copy of and actual notice of the signing of the Order. "It would be improper to find that sloppy office procedures in some way expanded

jurisdiction beyond that conferred by the legislature. Subject matter jurisdiction cannot be expanded by waiver or consent." Varian-Eimac, 767 P.2d at 571 and n.3; Cf. 10/9/92 Interim Order Denying Motion To Dismiss at 2. [R. 289]. That rule is particularly applicable in cases such as this where UOSH is a division of the Commission, the Commission was the reviewing tribunal and the Commission's counsel has appeared to argue the case on the merits. See Memorandum In Opposition To Petitioner's Motion For Summary Disposition [R. 584-593]; Notice Of Correction Of Record [R. 605-607]; and see Notice Of Appearance Of Counsel in the Utah Court of Appeals dated September 23, 1993.

Because UOSH's Motion For Review was not timely filed, the Commission, inter alia, acted without jurisdiction by proceeding and entering adjudication on the merits of the case, Benchmark v. Salt Lake Valley Mental Health Board, Inc., 830 P.2d 218, 219 (Utah 1991); Thompson v. Jackson, 743 P.2d 1230, 1232 (Utah App. 1987), and substantially prejudiced Magcorp by denying it the benefit of the ALJ's ruling and also its right to proceed to a full hearing on the merits of the case. Both the Interim Order Denying Motion To Dismiss and the Order Granting Motion For Review were entered absent jurisdiction and are therefore null and void. Thompson, 943 P.2d at 1232. As a result, the ALJ's June 10, 1992 Order must remain the final agency order in this action.

B. The Commission's Order Granting Motion For Extension Of Time entered after remand was entered absent jurisdiction and is erroneous as a matter of law.

1.) The Commission's Order Granting Motion For Extension Of Time is an improper nunc pro tunc order.

Despite UOSH's awareness of Utah Code Ann., § 63-46b-1(9) (Supp. 1992), at the time Magcorp filed its Motion To Dismiss, it failed to make a formal motion for an extension in time in which to file its Motion For Review. [R. 257, 533]. Because UOSH did not properly raise or preserve its request for an extension of time, it should not have been allowed to advance that request on appeal. This court nonetheless remanded the case to the Commission "for the limited purpose of allowing respondent to bring a motion for an extension of time under Utah Code Ann., § 63-46b-1 (Supp. 1992)." The resulting Order Granting Motion For Extension Of Time is an improper nunc pro tunc order.

A nunc pro tunc order may be properly entered only "for the purpose of making the record reflect what actually was meant to happen at a prior time." Bagshaw v. Bagshaw, 788 P.2d 1057, 1061 (Utah App. 1990).

In Bagshaw, this court explained the principles of nunc pro tunc.

At common law, nunc pro tunc allowed a court to correct its earlier error or supply its omission so that the record accurately reflected that which in fact had taken place. Cases in which courts traditionally have applied the nunc pro tunc doctrine fall into two categories:

- (1) Those in which one of the parties died after the submission of the case to the lower court for its decision, but before the actual rendition of judgment; and
- (2) Those in which a judgment has in fact been rendered by the lower court, but the clerk has failed to perform the ministerial function of entry.

Bagshaw, 788 P.2d at 1060 (quoting 6A James W. Moore, *Moore's Federal Practice* § 58.08 (1989)) (citations omitted) (emphasis in original). Thus, nunc pro tunc orders are used to correct the court's omission or error. Further, any issue addressed in the order must have been previously submitted to the court. Moreover, nunc pro tunc orders cannot be used "'to revive the time for taking the required step in a legal proceeding after the statutory time for doing so [has] elapsed.'" *Diehl Lumber Transp., Inc. v. Mickelson*, 802 P.2d 739, 743 (Utah App. 1990) (quoting *Kettner v. Snow*, 13 Utah 2d 382, 375 P.2d 28, 30 (Utah 1962)).

Southwick v. Leone, 860 P.2d 973, 977-78 (Utah App. 1993). See also *Preece v. Preece*, 682 P.2d 298, 299 (Utah 1984). "The court cannot enter a nunc pro tunc order based on what it might or should have done had there been a motion or hearing...[;it cannot] bootstrap its authority to act simply by issuing a nunc pro tunc order relating back..." *Southwick*, 860 P.2d at 978. UOSH did not file a motion for extension of time prior to filing its Motion For Review with the Commission, and the Commission did not address the issue at the time. This court's remand Order did not change those facts and could not, by way of an anomalous procedural device, endow the Commission with the jurisdiction it otherwise did not have to consider the untimely Motion For Review or the clearly

unmeritorious Motion For Extension Of Time. UOSH should not have been allowed to resurrect a right forfeited by passage of time. The October 20, 1993 Order Granting Motion For Extension Of Time is therefore invalid.

2.) An extension of time was necessary.

The Commission's Order Granting Motion For Extension Of Time concludes "no extension of time was necessary." [R. 534-535]. That conclusion is erroneous as a matter of law. Even assuming the 30 day period for filing the Motion For Review could have been extended after the fact, extension could only be accomplished by the timely filing of a motion for extension of time. The fact that the Court of Appeals directed the Commission to address the issue establishes a motion was necessary in this case, although Magcorp disagrees with the procedural propriety of the remand. The Commission's conclusion to the contrary was based on an erroneous interpretation and application of the law, was an abuse of discretion and was arbitrary and capricious.

3.) Section 63-46b-1(9) does not expressly authorize an extension of time for filing a motion for review.

Utah Code Ann., § 63-46b-12(1)(a) (1988), provides "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 purpose by the statute or rule." Following UOSH's suggestion, the Commission concluded that Utah Code Ann., § 63-46b-1(9), allows the Commission to grant an extension of time

for filing a motion for review even after the 30 day period has elapsed. [R. 534]. The Commission relied on Maverick Country Stores v. Industrial Commission, 214 U.A.R. 34, 37, ____ P.2d ____ (Utah App. 1993),³ to support its conclusion. Maverick, however, did not specifically address the issue of whether § 63-46b-1(9) could be invoked after the statutory time period has elapsed to extend the time for filing a motion for review for good cause shown. UOSH's Motion For Extension Of Time was not filed until May 28, 1993, nearly eleven months after the fact. [R. 522]. Because the petitioner in Maverick filed a request for reconsideration, in which it made no attempt to show good cause, instead of a motion for extension of time, Maverick cannot be fairly stretched to support the propositions that a motion for extension of time can be filed *after* the 30 day time limit or that *good cause* is sufficient to support a motion for extension made after the expiration of the specified period.

Administrative agencies have no more power than that which is expressly or impliedly granted by statute. Nielsen v. Division of P.O.S.T., 851 P.2d 1201, 1204 (Utah App. 1993); Olympus Oil, Inc., v. Harrison, 778 P.2d 1008, 1010 (Utah App. 1989). See also Williams v. Public Service Commission, 754 P.2d 41, 50 (Utah 1988) (any reasonable doubt of the existence of agency power must be

³ That opinion was amended on September 7, 1993, prior to the issuance of the Commission's Order Granting Motion For Extension Of Time. Maverick Country Stores v. Industrial Commission, 860 P.2d 944 (Utah App. 1993).

resolved against the existence of such power); Bevans v. Industrial Commission, 790 P.2d 573, 578 (Utah App. 1990) ("The Industrial Commission is not free to 'legislate' in areas apparently overlooked by our lawmakers or to exercise power not expressly or impliedly granted to it by the legislature, even in the name of fairness."). The Commission failed to harmonize § 63-46b-12(1)(a) (1988) with § 63-46b-1(9) (Supp. 1992). If this court were to approve that approach, the result would be chaotic administrative and judicial appellate procedure. See e.g., Silva v. Dept. of Employment Security, 786 P.2d at 247; Isaacson v. Dorius, 669 P.2d 849, 851 (Utah 1983). The 30 day jurisdictional bar proscribed by § 63-46b-12(1)(a) is rendered illusory if the Commission at any later date and based merely on good cause may extend that 30 day time period.⁴ Nothing would prevent the Commission from granting its own Occupational Health and Safety Division's motion for an extension of time made months or even years after the statutory period had run, and the certainty that normally attaches to administrative decisions would be lost. See Silva, 786 P.2d at 247. The Commission adopted a notion that defies both common sense and jurisprudential reason; that § 63-46b-1(9) affords the Commission unlimited power to lengthen any time period if presented with a motion filed at any time after the proceedings are otherwise final. In adhering to that notion, the Commission acted beyond its

⁴ Cf. Utah R. App. P. 4(e); and see Prowswood, Inc., v. Mountain Fuel Supply Co., 767 P.2d 952, 959-61 (Utah App. 1987).

jurisdiction, misinterpreted and misapplied the law, abused its discretion and acted arbitrarily and capriciously.

4.) UOSH did not establish good cause or excusable neglect for an extension of time.

In response to UOSH's belated Motion For Extension Of Time, Magcorp argued that Rules 6(b) and 81(d), U.R.C.P., required UOSH to show excusable neglect before an extension of time could be granted. The Commission concluded that the Utah Rules of Civil Procedure did not apply and that a showing of excusable neglect was not required. [R. 535, 537]. The Commission failed to analyze the applicability of Rule 6(b), but instead reached its conclusion by setting up straw men in the form of Rule 6(e) and 81(a), and knocking them down with Maverick (214 U.A.R. 34) and Griffith v. Industrial Commission, 16 Utah 2d 264, 399 P.2d 204 (1965). The application of the individual subdivisions of each rule must be analyzed separately.

Rule 6(b), U.R.C.P., states:

When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), (d) and (e), 60(b) and

73(a) and (g), except to the extent and under the conditions stated in them. (emphasis added).

The Commission misinterpreted the remand to be for the purpose of "a determination whether UOSH showed good cause for an extension of time to file its motion for review...." [R. 533]. However, the Court of Appeals did not expressly or implicitly state that good cause was the applicable standard. "On remand the trial court has only such jurisdiction with respect to an issue appealed as is conferred by the opinion and mandate of the appellate court." Amax Magnesium v. Utah State Tax Commission, 848 P.2d 715, 718 (Utah App. 1993) (quoting Normand in re Normand v. Ray, 785 P.2d 743, 748-49 (N.M. 1990)). And, of course, the jurisdiction of the lower tribunal on remand doesn't exist at all if the appellate court has no jurisdiction to remand the question. Rule 6(b) U.R.C.P., requiring excusable neglect, is made applicable to this proceeding by Rule 81(d) U.R.C.P. which states:

These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules.

See, e.g., Utah Chiropractic Ass'n v. Equitable Life, 579 P.2d 1327, 1329 (Utah 1978). Applying Rule 6(b) to these proceedings does not conflict or operate inconsistently with the provisions of the Utah Administrative Procedures Act. Rule 6(b) actually supplies needed certainty with respect to the time for review. See

Silva, 786 P.2d at 247. If this court determines that a motion to enlarge time made after the expiration of the time period is permissible, it logically follows that the motion must be made in accord with rule 6(b) and that excusable neglect must be shown.

Pilcher v. Dept. of Social Services, 663 P.2d 450, 453 (Utah 1983) (addressing only rule 41(a)(1)), relied on by the Commission, was not intended to be and should not be blindly followed as a comprehensive discourse on the applicability of individual rules of civil procedure in administrative proceedings. Section 63-46b-1(9) provides only that "Nothing in this chapter may be interpreted to restrict a presiding officer,...." It is not a specific grant of authority to do anything, and it does not render rule 6(b) clearly inapplicable. Section 63-46b-1(1) (Supp. 1992), also fails to support the Commission's conclusion because it provides only that the Utah Administrative Procedures Act applies to these proceedings. It does not direct that the individual Utah Rules of Civil Procedure do not apply.

The facts detailed in point I.A., above, establish that UOSH did not demonstrate either good cause or excusable neglect for its failure to file the Motion For Review in time. "When the question of 'excusable neglect' arises in a jurisdictional context, as opposed to a nonjurisdictional context, the standard contemplated thereby is a necessarily strict one." Prowswood, 676 P.2d at 959 (citations omitted).

Inadvertence or mistake of counsel does not

constitute the type of unique or extraordinary circumstances contemplated by this strict standard.

The application of this rule is well illustrated in the following cases. In *Feltch v. General Rental Co.*, appellants sought to excuse the untimely filing of their notice of appeal on the basis of a mistake they had made in interpreting a rule of appellate procedure. In rejecting this excuse, the court noted the strict construction given the "excusable neglect" concept in federal forums, *supra*, and held: "A flat mistake of counsel about the meaning of a statute or rule may not justify relief: relief is not extended 'to cover any kind of garden variety oversight.'" (footnotes omitted) (emphasis added by underlining).

Prowswood, 676 P.2d at 960. UOSH's counsel indicated he had retained a copy of the Order that he had executed "approved as to form" prior to the ALJ signing it on June 10, 1992, in counsels' presence [R. 168, 172, 174, 222]. UOSH's failure to act upon the knowledge he had at that time does not meet the excusable neglect standard. See Mini Spas, Inc. v. Industrial Commission of Utah, 733 P.2d 130, 132 (Utah 1987); Utah Code Ann., § 35-9-12(3)(c) (1989). Even the failure to receive a copy of the order from the Commission because it was not mailed does not constitute excusable neglect. See In Re: Bundy's Estate, 121 Utah 299, 241 P.2d 462, 467 (Utah 1952).

The thirty-day time period to file an appeal may not be extended because the agency's decision was mailed to petitioner or was not received by petitioner until days after its service. To allow time for appeal to be extended because of receipt in the mail is contrary to the statutory language and would render uncertain a time for appeal in

virtually every case. The appeal time commences when the final agency order issues and not when allegedly received by a party. Nor can the thirty-day time period be extended because the agency mailed a copy to the petitioner.

Silva, 786 P.2d at 247. "[I]f during [the] period he is aware or should be aware of a reason for delay, then to ignore the time period and later claim excusable neglect, without filing for an extension of time, is, in our opinion, no foundation for objection." Nunley v. Stan Katz Real Estate, Inc., 15 Utah 2d 126, 388 P.2d 798, 801 (1964). There is no legal or factual support for the Commission's post-eleventh hour grant of extended time for UOSH to file its Motion For Review, that in actual effect unlawfully revived the Commission's jurisdiction over this case.

5.) Dusty's v. Utah State Tax Commission
applies retrospectively.

In what was apparently a convenient sidestep of the retrospective application of Dusty's, the Commission's Order Granting Motion For Extension Of Time contains at least four references to the concept of "the law in effect at the time," that law being Wiggins v. Board of Review, 824 P.2d 1199 (Utah App. 1992), to support the conclusion that UOSH showed good cause for an extension of time to file the Motion For Review. The Commission cited to neither a case law nor other authority to support its "law in effect at the time" concept. Clearly, the "law in effect at the time" was no different than the law as it exists today. Dusty's, 842 P.2d at 870 ("...argument that the date of issue is ambiguous

and subject to several inconsistent interpretations is not persuasive.")

"In the vast majority of cases, the stated law of a decision is effective both prospectively and retrospectively, even a decision which overrules prior law." Heslop v. Bank of Utah, 839 P.2d 828, 835 (Utah 1992) (footnote omitted).

This court has developed a sound theoretical framework for determining when a new rule of law in a civil case will be applied retroactively. In Van Dyke v. Chappel, we noted that retroactive or prospective operation is not a question of judicial power but instead depends "solely upon an appraisal of the relevant judicial policies to be advanced." We stated that in making the determination,

we look to the impact retroactive application would have on those affected. When we conclude that there has been justifiable reliance on the prior state of the law or that the retroactive application of the new law may otherwise create an undue burden, the court may order that a decision apply only prospectively. (footnotes omitted).

Kennecott Corp. v. State Tax Commission, 862 P.2d 1348, 1352 (Utah 1993). As is demonstrated above in point I.A. and I.B.5., UOSH cannot claim justifiable reliance on any contrary prior law under the facts of this case to escape retrospective application of Dusty's.

In addition, retrospective application of Dusty's cannot pose an undue burden upon UOSH where it had actual notice of and possession of the ALJ's order. See Dusty's, 842 P.2d at 870. No small measure of suspicion should accompany this court's

examination of the suggestion that the alleged June 16, 1992 mailing certificate date is the "issue" date when that date coincides only with what the parties have agreed is an improperly altered date hand-written upon the Commission's stamp appearing on the second page of the June 10, 1992 Order. [R. 510-512].

Furthermore, even under Wiggins, "issuance" includes the date the agency order is "personally served". Wiggins, 824 P.2d at 1199. For all purposes and effect, UOSH's counsel was served on June 10, 1992. UOSH's counsel declined personal service of a certified copy on June 10, 1992, when one was offered to him by Magcorp's counsel and he stated he would rely on the copy he already had. [R. 222]. Therefore, personal service upon UOSH was plainly completed on June 10, 1992, pursuant to Rule 4(j), U.R.C.P., which provides "If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof." In addition, a copy of the Order was dedicated to him and placed by an Adjudication Division paralegal in a box to be forwarded to him. [R. 226]. In light of those facts, it is wholly unreasonable that UOSH would be permitted to manipulate and extend the commencement of the time within which a motion for review could be filed simply by declining to accept service of a copy of the Order.

Dusty's v. Utah State Tax Commission has not been limited to only prospective application, see Maverick, 860 P.2d 944 (Utah App.

1993); Bonded Bicycle v. Dept. of Employment Security, 844 P.2d 358 (Utah App. 1992) (per curiam), and the Commission's Order Granting Motion For Extension Of Time was entered without jurisdiction and is erroneous as a matter of law.

Magcorp submits that its [First] Motion For Summary Disposition and Second Motion For Summary Disposition call for the correct resolution of this case. The Commission lacked jurisdiction to consider UOSH's Motion For Review because the motion was filed more than 30 days after the issuance of the underlying order. The case became final and unreviewable and unappealable some six days prior to the filing of the Motion For Review. As a result, all subsequent proceedings, including those before this court and before the Commission on remand, are null and void. The ALJ's June 10, 1992 Order should be recognized as and remain the final judgment in this case.

The imbricate subarguments presented above establish that the Commission acted beyond the jurisdiction conferred upon it by statute and also violated Utah Code Ann., § 63-46b-16(4)(d) and (e), and (h)(i) and (iv) when it considered and relied on UOSH's Motion For Review and again when it issued the belated Order Granting Motion For Extension Of Time. The prejudice Magcorp has suffered as a result is manifest. Magcorp was deprived of the summary judgment ruling granted by the ALJ and was denied the finality that order acquired after the statutory thirty days had elapsed. Magcorp requests this court to reverse the Commission and

to reinstate the Order and Findings And Conclusions entered by the ALJ on June 10, 1992.

**II. THE COMMISSION ERRED AS A MATTER OF LAW WHEN
IT REVERSED THE ALJ'S ORDER AND ENTERED
SUMMARY JUDGMENT AGAINST MAGCORP.**

The effect of the Order Granting Motion For Review issued by the Commission was to reverse the ALJ's decision and to enter summary judgment against Magcorp. The Commission addressed the question of whether the flame resistant coveralls required by UOSH were "uniquely personal" to the wearer and determined that they were not. [R. 338-340]. It arrived at that conclusion without the benefit of the actual hands-on examination of the coveralls that the ALJ performed. [R. 441-445]. The Commission then determined that the cost of the coveralls should be properly born by Magcorp. [R. 339-340].

The inescapable truth is that the Commission determined that there were disputed issues of fact that prevented the ALJ from entering summary judgment in this case:

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.
(emphasis added).

Order Granting Motion For Review at 4. [R. 0339]. What the Commission failed to explain was what authority enabled it, after less deliberation than the ALJ engaged in, to summarily rule against Magcorp.

If indeed disputed issues of material facts existed, it was clearly improper for the Commission to reverse the ALJ's Order and enter summary judgment against Magcorp when disputed issues of material facts were recognized by the Commission. Utah Rule of Civil Procedure 56(c) provides, in pertinent 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.
(emphasis added).

The Commission also erred because it is clear from the Findings And Conclusions and the Order entered by the ALJ that the only issues of disputed fact that existed related only to the question of whether Magcorp violated 29 CFR 1910.132(a), by not requiring the use of flame resistant protective clothing in the electrolytic and reactor sections of the facility. [R. 170-171, 174]. The ALJ properly denied summary judgment on that issue as requested by UOSH. [R. 171, 174]. Based on that ruling, Magcorp, on April 28, 1992, withdrew its objection to the notice of penalty issued in conjunction with the citation and paid the \$2,200.00

penalty that UOSH had assessed. [R. 314]. This payment of penalty was based solely on the fact that Magcorp did not require its employees to wear flame resistant personal protective clothing and was not an admission that Magcorp was required to provide the clothing at its expense. [R. 314]. As a practical matter, the cost of defending the allegation far exceeded the financial penalty. The ALJ's decision was legally sound and supported by The Budd Co. v. OSHRC, 513 F.2d 807 (3rd Cir. 1975), 2 OSCH 1698 (1975).

The Order Granting Motion For Review is confusing and does not strictly comply with Utah Code Ann., § 63-46b-12(6)(c) (1988). "An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review." Adams v. Board of Review, 821 P.2d 1, 4 (Utah App. 1991); see also La Sal Oil v. Dept. of Environmental Quality, 843 P.2d 1047-48 (Utah App. 1992).

It is also essential that the Commission make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached. See generally, Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979). Without such findings, this Court cannot perform its duty of reviewing the Commission's order in accordance with established legal principles and of protecting the parties and public from

arbitrary and capricious administrative action.

Milne Truck Lines v. Public Service Commission, 720 P.2d 1373, 1378 (Utah 1986); see also Vali Convalescent & Care Inst. v. Division of Health Care Fin., 797 P.2d 438, 448 (Utah App. 1990) (noting "the importance of adequate findings supporting agency decisions"). The proper remedy, assuming arguendo that this court has jurisdiction, is remand. But because the Commission has already concluded that genuine issues of material facts exist, this court should remand the case to the Commission with specific direction that they return the case to the ALJ for a full hearing addressing the merits of the Citation And Notification Of Penalty. No purpose would be served by a remand to the Commission to formulate more adequate findings in support of, and to more fully articulate the reasons for their decision.

The most glaring error is the fact that the Commission went beyond UOSH's prayer for relief that requested the ALJ's decision be reversed and the case remanded for a full hearing on the merits. [R. 182]. At most, the Commission had authority to remand the case back to the ALJ for a full hearing on the merits as UOSH requested. Utah Code Ann., § 63-46b-12(6)(c)(vi) (1988). There is no legal authority to support the Commission's action in first finding disputed issues of material facts and then summarily reversing the ALJ's Order in entering judgment against Magcorp.

The Commission's actions with respect to its reversal of the

ALJ's partial summary judgment order and entry of summary judgment against Magcorp manifestly arbitrary and capricious. The Commission acted beyond its authority, engaged in an unlawful decision making process, based its decision on facts either disputed or not supported by substantial evidence, and clearly abused its discretion. If this court accepts the Commission's conclusion that genuine issues of material facts exist, Magcorp requests that it be allowed a full hearing on the merits of the Citation And Notification Of Penalty before the ALJ.

III. THE COMMISSION ERRED AS A MATTER OF LAW WHEN IT ORDERED MAGCORP TO PROVIDE AND PAY FOR LAUNDRY SERVICES FOR ITS EMPLOYEES FOR PROTECTIVE COVERALLS EXPOSED TO FIBERFRAX WITHOUT FIRST AFFORDING MAGCORP NOTICE AND A HEARING ON THE ISSUE.

Magcorp was denied due process and proper notice when the Commission considered the issue of who should pay for laundry service for the coveralls and the related question of Fiberfrax contamination. [R. 338-340]. The Commission ordered "that the employers 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." Order Granting Motion For Review at 5 [R. 340]. These were issues that were not plead in the September 3, 1991 Citation And Notification Of Penalty that initiated this action. [R. 001-003].

In Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733, 736 (Utah 1984), the Utah Supreme Court stated:

It is error to adjudicate issues not raised before or during trial and unsupported by the record. *Curran v. Mount*, Ala., 657 P.2d 389 (1980). The trial court is not privileged to determine matters outside the issues of the case, and if he does, his findings will have no force and effect. *Brantley v. Carlsbad Irr. Dist.*, 92 N.M. 280, 587 P.2d 427 (1978). In law or in equity, a judgment must be responsive to the issues framed by the pleadings, and a trial court has no authority to render a decision on issues not presented for determination. Any findings rendered outside the issues are a nullity. *Matter of Estate of Hurlbutt*, 36 Or.App. 721, 585 P.2d 724 (1978); *Credit Investment and Loan Co. v. Guaranty Bank and Trust Co.*, 166 Colo. 471, 444 P.2d 633 (1980). A court may not grant judgment for relief which is neither requested by the pleadings nor within the theory on which the case was tried, whether that theory was expressly stated or implied by the proof adduced. *Leonard Farms v. Carlsbad Riverside Terrace*, 90 N.M. 34, 559 P.2d 411 (1977). Parties may limit the scope of the litigation if they choose, and if an issue is clearly withheld, the court cannot nevertheless adjudicate it and grant corresponding relief. *Wineglass Ranches, Inc. v. Campbell*, 12 Ariz. App. 571, 473 P.2d 496 (1970); *La Bellman v. Gleason & Sanders, Inc.*, Okl., 418 P.2d 949 (1980).

The principals stated in Combe are equally applicable to a reviewing tribunal such as the Commission.

The Commission clearly embraced issues that were not raised in the Citation And Notification Of Penalty. The laundry services portion of the Order Granting Motion For Review was apparently based on the Material Safety Data Sheet ("MSDS") submitted via affidavit to the ALJ prior to the hearing. [R. 116, 423-424]. However, no material evidence was presented that Fiberfrax in any

quantity was present in areas where it was exposed to temperatures in excess of 1800 degrees fahrenheit, the point at which the material could undergo partial conversion to crystobalite, requiring special caution in conjunction with their use. [R. 148-49, 121]. The ALJ, if he considered that evidence at all, considered it only as it related to the coveralls being "uniquely personal." The Commission should not have decided the issue unless it had been properly raised and the ALJ had the first opportunity to address it. Smith v. Iverson, 848 P.2d 677, 677 (Utah 1982).

The Commission's order that Magcorp pay for laundry service for the protective coveralls is completely without authority and reason. It admits to not even a modicum of propriety.

Sua Sponte decisions ... are inconsistent with the notion of due process when parties are not provided advance notice that the court is considering a given course of action, and the losing party is not allowed to be heard thereon. "The right to prior notice and an opportunity to be heard is a critical part of our judicial system. ...A method of resolving cases that by passes this requirement can not be accepted as a fair, neutral, and rational process." Rubins, 813 P.2d at 780 (citing Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011 (1970); see also Nelson v. Jacobson, 669 P.2d 1207, 1211 (Utah 1983) ("Timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness"). (footnote omitted).

Jenkins v. Weis, 230 U.A.R. 25, 31, ____ P.2d ____ (Utah App. 1994).

The Commission's laundry services payment decision was an eggregious example of arbitrary and capricious action and otherwise

ran afoul of Utah Code Ann., § 63-46b-16(4). Magcorp requests this court to reverse the laundry services portion of the Order Granting Motion For Review.

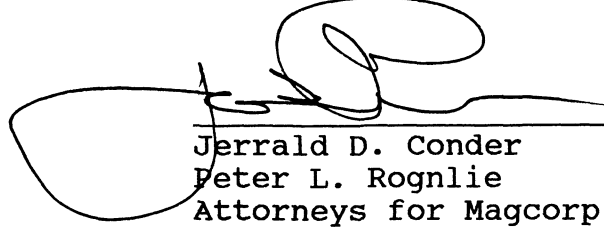
CONCLUSION

The Industrial Commission lacked jurisdiction to consider UOSH's Motion For Review because the motion was filed more than 30 days after the Order and Findings And Conclusions were signed by the ALJ and issued by the Commission on June 10, 1992. Accordingly, the Order Granting Motion For Review entered by the Industrial Commission on December 17, 1992, and the Interim Order Denying Motion To Dismiss are null and void. In addition, the Commission's Order Granting Extension Of Time entered after remand was similarly entered without jurisdiction and erroneous as a matter of law. Magcorp requests that those orders be declared void for lack of jurisdiction and that the ALJ's June 10, 1992 order be declared and remain the final judgment in this case.

In the alternative, should the court determine that the Commission properly exercised jurisdiction over this matter when it issued its Interim Order Denying Motion To Dismiss and Order Granting Motion For Review as well as the belated Order Granting Motion For Extension Of Time on remand, Magcorp requests that the case be remanded back to the ALJ to afford Magcorp a full hearing on the merits of the issues raised in the Citation And Notification Of Penalty and that the Commission's laundry services payment decision that denied Magcorp notice and due process be reversed.

RESPECTFULLY submitted this 28 day of February, 1994.

CONDER, WANGSGARD & TSAKALOS



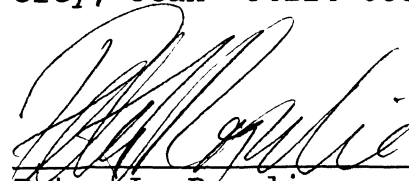
Jerrald D. Conder
Peter L. Rognlie
Attorneys for Magcorp

CERTIFICATE OF MAILING

I, Peter L. Rognlie, certify that on the 28th day of February, 1994, I served 2 copies of the attached Brief of Appellee, upon Thomas C. Sturdy, counsel for the Occupational Safety and Health Division and Sharon J. Eblen, counsel for the Industrial Commission of Utah, by mailing the copies to them by first-class mail, with sufficient postage prepaid, to the following address:

Thomas C. Sturdy, Esq.
Occupational Safety and Health Division
160 East 300 South, Third Floor
P. O. Box 146650
Salt Lake City, Utah 84114-6650

Sharon J. Eblen, Esq.
Industrial Commission of Utah
160 East 300 South, Third Floor
P. O. Box 146600
Salt Lake City, Utah 84114-6600



Peter L. Rognlie
Attorney for Magcorp

ADDENDUM

TABLE OF CONTENTS:

Document

**Opinions, findings of fact, conclusions of law
delivered by the ALJ and the Industrial Commission:**

Citation and Notification of Penalty (9/3/91). . . . .	.A
Findings Of Fact And Conclusions Of Law (6/10/92). . . . .	.B
Order (6/10/92) . . . . .	.C
Interim Order Denying Motion To Dismiss (10/9/92). . . . .	.D
Order Granting Motion For Review (12/17/92). . . . .	.E
Order Granting Motion For Extension Of Time. . . . .	.F

Determinative authorities:

<u>Utah Code Ann.</u> , § 35-9-12 (1989).	G
<u>Utah Code Ann.</u> , § 63-46b-12 (1988).	H
<u>Utah Code Ann.</u> , § 63-46b-16 (1988).	I
Rule 6(b), <u>Utah Rules of Civil Procedure</u>	J
Rule 81(d), <u>Utah Rules of Civil Procedure</u>. . . . .	.K

Tab 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.

Description	Date Violation Must Be Abated	Penalty
<p>The following are violations of the Utah Administrative Code and the provisions of 29 CFR 1910 or 1926 which are incorporated by reference, Utah specific standards begin with Utah General Safety Orders (UGSO)</p> <p>The citation issued 8/27/91 is withdrawn and reissued as follows:</p> <p>SERIOUS 1 29CFR 1910.132(a)</p> <p>Protective equipment, including personal protective equipment 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.</p> <p>NOTE: NFPA 480-2-1.6 requires operators in melting and casting areas shall wear flame-resistant clothing, high foundry shoes, and adequate face protection.</p> <p>(A) Employees at Magnesium Corp., such as but not limited to the Pot Hauler (CB), RAFO (Reactor Auxillary Feed Operator), Reactor Helper, Smutters, Cell Service, Brickies, working with and in the vicinity of molten material, were not wearing flame resistive clothing.</p> <p>(B) Employees at Magnesium Corp., were working with and around molten material and not wearing flame resistive clothing. Most of these employees had burn holes in their coveralls from the material splashing, and some of them had on coveralls that were brittle from the radiant heat. The coveralls they were wearing were made of 65% cotton and 35% polyester.</p> <p><u>ABATEMENT NOTE:</u> Flame resistive clothing shall be provided and maintained by the employer at no cost or financial expense to the employee. The Penalty of \$2,700 will be waived provided the penalty is used towards the purchase of protective clothing, and documentation is provided to UOSH.</p>	<p>30 days from receipt of citation</p>	<p>\$2,200</p>

00 10.7
3.51

Description	Date Violation Must Be Abated	Penalty
<p>OTHER 1 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. McKen</i></u> Date: <u>19-5-91</u></p>	<p>Penalty</p>	<p>\$2,700</p>

Tab B

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.

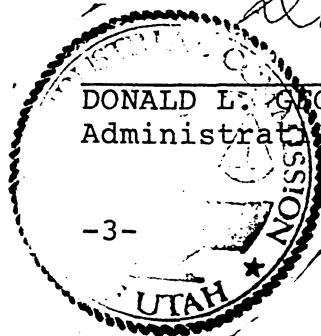
4. That the Abatement Order contained in the UOSHA citation to Magcorp requiring Magcorp to bear the cost of flame resistant coveralls purportedly required under 29 CFR 1910.132(a) is unenforceable and void as a matter of law.

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.

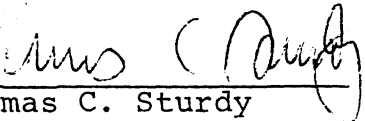
Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this

10th day of June, 1992.
ATTEST:
Patricia P. Ashby
Commission Secretary



Donald L. George
DONALD L. GEORGE
Administrative Law Judge

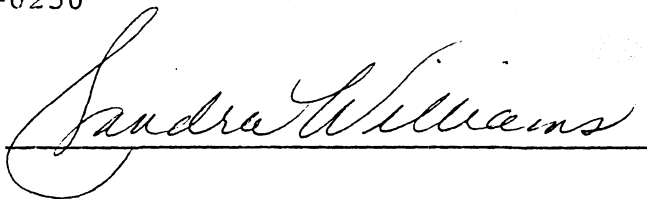
Approved as to Form:


Thomas C. Sturdy

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



Tab C

JERRALD D. CONDER (#0709)
of CONDER & WANGSGARD
Attorneys for Respondent
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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

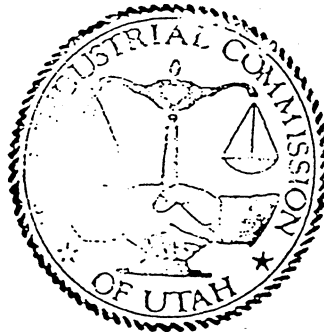
10th day of June, 1992.

ATTEST:

Patricia O. Ashby
Commission Secretary

APPROVED AS TO FORM:

Thomas C. Sturdy
Thomas C. Sturdy



Tab 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

Magnesium Corporation of America
Order
Page two

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.

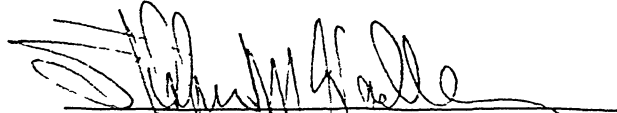
In this case, the confusion over the date of issuance stems from the adjudication division's failure to properly prepare a certificate of mailing and place its order in the mail on the date the order was hand delivered to the respondent. However, to rule that the order was issued on June 10, 1992 when 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).


Magnesium Corporation of America
Order
Page three

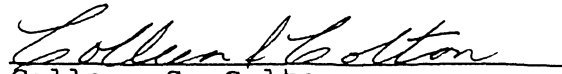
ORDER:

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



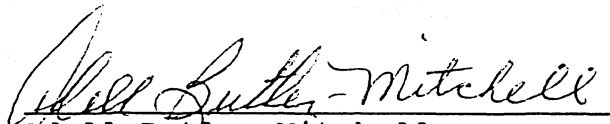
CERTIFICATE OF MAILING

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

Tab 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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Magnesium Corp. of America
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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.


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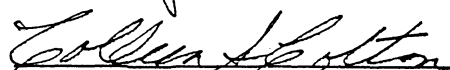
ORDER:

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.

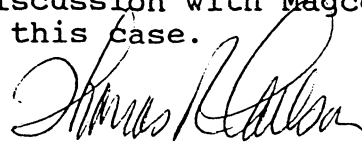
IT IS FURTHER ORDERED that the employer shall provide, at no cost to its employees, laundry service for the protective coveralls that have been exposed to Fiberfrax as specified in the Material Safety Data Sheet.

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.

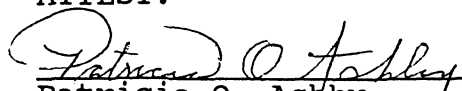

Stephen M. Hadley
Chairman


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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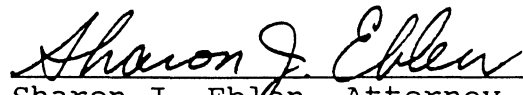
CERTIFICATE OF MAILING

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. Eblen, Attorney
Industrial Commission of Utah

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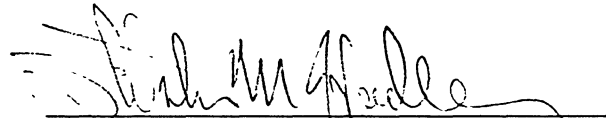
We conclude that the Utah Rules of Civil Procedure do not apply to agency actions under UAPA unless expressly adopted under UAPA. Therefore, UOSH must merely show good cause for an extension under UAPA and does not need to meet the requirements of Rule 6 of the Utah Rules of Civil Procedure.


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 30th 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

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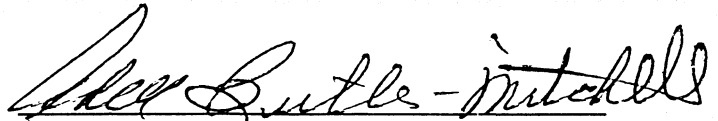
CERTIFICATE OF MAILING

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

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Tab G

35-9-12. Procedure for review of order entered by administrative law judge — Continuing jurisdiction of commission.

- (1) The functions and duties of the commission shall be those quasi-judicial functions listed in this chapter.
- (2) Every official act of the commission shall be entered of record and its hearings and records shall be open to the public.
- (3) (a) Administrative law judges appointed by the commission shall hear and determine any proceeding assigned to them by the commission.
(b) The administrative law judge shall enter his findings of fact, conclusions of law, and order not later than 30 days after final receipt of all matters concerned in the hearing.
(c) The findings of fact, conclusions of law, and order of the administrative law judge shall become the final order of the commission unless objections are made in accordance with Subsection (4).
- (4) (a) Any party of interest who is dissatisfied with the order entered by an administrative law judge may obtain a review by the commission, by filing a motion for review with the commission in accordance with Section 63-46b-12.
(b) The commission may affirm, modify, remand, or overrule the order of the administrative law judge.
(c) The decision of the commission is final unless judicial review is requested in accordance with Section 63-46b-14.
(d) To the extent that new facts are provided, the commission has continuing jurisdiction to amend, reverse, or enhance prior orders.

History: L. 1973, ch. 69, § 12; 1981, ch. 1, § 4; 1985, ch. 161, § 6; 1987, ch. 161, § 116; 1989, ch. 265, § 4.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, deleted former Subsections (1) to (3) relating to the creation, offices and meetings, and personnel of the Utah Occupational Safety and Health Review Commission and redesignated former Subsections (4) to (7) as Subsections (1) to (4); deleted "review" before "commission" throughout the section; deleted former Subsection (5)(b) which read "The review commission may adopt rules for the orderly conduct of business that are consistent with the Industrial Commission's Rules"; substituted "the commission" for "a review commissioner" at the end of Subsection

(3)(a); substituted "enter" for "transmit" and "order" for "a recommended order to the review commission" in Subsection (3)(b); deleted "recommended" before "order" and substituted "administrative law judge" for "hearing examiner" and "Subsection (4)" for "Subsection 7" in Subsection (3)(c); substituted "commission" in accordance with Section 63-46b-12" for "secretary of the review commission" at the end of Subsection (4)(a); rewrote Subsection (4)(b) which read "The review commission may adopt the recommended order, modify the order, or refer the matter to the hearing examiner for further proceedings"; added "in accordance with Section 63-46b-14" to Subsection (4)(c); and added Subsection (4)(d).

Tab H

63-46b-12. Agency review — Procedure.

(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 purpose by the statute or rule.

(b) The request shall:

- (i) be signed by the party seeking review;
- (ii) state the grounds for review and the relief requested;
- (iii) state the date upon which it was mailed; and
- (iv) be sent by mail to the presiding officer and to each party.

(2) Within 10 days of the mailing date of the request for review, or within the time period provided by agency rule, whichever is longer, any party may file a response with the person designated by statute or rule to receive the response. One copy of the response shall be sent by mail to each of the parties and to the presiding officer.

(3) If a statute or the agency's rules require review of an order by the agency or a superior agency, the agency or superior agency shall review the order within a reasonable time or within the time required by statute or the agency's rules.

(4) To assist in review, the agency or superior agency may by order or rule permit the parties to file briefs or other papers, or to conduct oral argument.

(5) Notice of hearings on review shall be mailed to all parties.

(6) (a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review.

(b) The order on review shall be signed by the agency head or by a person designated by the agency for that purpose and shall be mailed to each party.

(c) The order on review shall contain:

- (i) a designation of the statute or rule permitting or requiring review;
- (ii) a statement of the issues reviewed;
- (iii) findings of fact as to each of the issues reviewed;
- (iv) conclusions of law as to each of the issues reviewed;
- (v) the reasons for the disposition;
- (vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded;
- (vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties; and
- (viii) the time limits applicable to any appeal or review.

Tab I

63-46b-16. Judicial review — Formal adjudicative proceedings.

(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.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(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.

History: C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

Cross-References. — Review of proceed-

ings before State Tax Commission, jurisdiction and standard, §§ 59-1-601, 59-1-610.

Tab J

Rule 6. Time.

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b) and 73(a) and (g), except to the extent and under the conditions stated in them.

(c) **Unaffected by expiration of term.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) **For motions — Affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Tab K

Rule 81. Applicability of rules in general.

(a) **Special statutory proceedings.** These rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable. Where a statute provides for procedure by reference to any part of the former Code of Civil Procedure, such procedure shall be in accordance with these rules.

(b) **Probate and guardianship.** These rules shall not apply to proceedings in uncontested probate and guardianship matters, but shall apply to all proceedings subsequent to the joinder of issue therein, including the enforcement of any judgment or order entered.

(c) **Procedure in city courts and justice courts.** These rules shall apply to civil actions commenced in the city or justice courts, except insofar as such rules are by their nature clearly inapplicable to such courts or proceedings therein.

(d) **On appeal from or review of a ruling or order of an administrative board or agency.** These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules.

(e) **Application in criminal proceedings.** These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement.