

2000

# John M. McPhie v. United States Steel Corporation, The Industrial Commission of Utah : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

A Wally Sandack; Sandack & Sandack; Attorney for Plaintiff.

Vernon B Romney; Attorney General; Erie V Boorman; Parsons, Behle & Latimer; Attorneys for Defendants.

---

## Recommended Citation

Brief of Appellant, *John M. McPhie v. United States Steel Corporation, The Industrial Commission of Utah*, No. 14364.00 (Utah Supreme Court, 2000).

[https://digitalcommons.law.byu.edu/byu\\_sc2/251](https://digitalcommons.law.byu.edu/byu_sc2/251)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

**BRIEF.**

RECEIVED  
LAW LIBRARY

SEP 17 1976

**BRIGHAM YOUNG UNIVERSITY**  
**J. Reuben Clark Law School**

IN THE SUPREME COURT OF THE STATE OF UTAH

\* \* \*

JOHN M. MCPHIE,

Plaintiff,

**vs.**

UNITED STATES STEEL CORPORA-  
TION and THE INDUSTRIAL  
COMMISSION OF UTAH,

Defendants.

\* \* \*

Case No. 14364

ACTION FOR REVIEW OF  
FINAL ORDER OF INDUSTRIAL COMMISSION

\* \* \*

BRIEF OF PLAINTIFF, JOHN M. McPHIE

Vernon B. Romney

Attorney General of Utah  
263 State Capitol Building  
Salt Lake City, Utah 84114

Attorney for Defendant, The  
Industrial Commission of Utah

Erie V. Boorman

Parsons, Behle & Latimer  
79 South State Street  
Salt Lake City, Utah 84111

Attorney for Defendant, United  
States Steel Corporation

A. Wally Sandack

Sandack & Sandack  
370 East Fifth South  
Salt Lake City, Utah 84111

Attorney for Plaintiff, John  
M. McPhie

FILED

FEB 6 1976

Next Supreme Court, Wash.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	2
DISPOSITION BELOW.....	2
RELIEF SOUGHT.....	2
STATEMENT OF FACTS.....	3
ARGUMENT:	
POINT I: THE STATUTORY BACKGROUND.....	11
POINT II: THE COMMISSION ERRED BY BASING ITS ORDER ON ARBITRARY GUIDELINES, CONTRARY TO LAW.....	15
CONCLUSION.....	22
APPENDIX.....	23

# CASES CITED

	Page
<u>Balash v. Harper</u> , 70 A.2d 747.....	20
<u>Duaine Brown Chevrolet Co. v. Ind.</u> <u>Comm'n. of Utah</u> , 29 U.2d 478.....	11
<u>Columbia Coal Co. v. Griffie</u> , 425 S.W.2d 759.....	20
<u>Davis v. Conger Life Ins. Co.</u> , 201 So.2d 727.....	20
<u>Hafer's, Inc. v. Ind. Comm'n. of Utah</u> , 526 P.2d 1088....	11
<u>Halvorsen, Inc. v. Williams</u> , 19 U.2d 113, 426 P.2d 1019.....	11
<u>Nielson v. Ind. Comm'n.</u> , 120 U 526, 236 P.2d 346.....	11
<u>Reliance Ins. Co. v. Watts</u> , 293 A.2d 469....	20
<u>Special Indemnity Fund v. Simpson</u> , 349 P.2d 635.....	20
<u>Special Indemnity Fund v. Wilbanks</u> , 340 P.2d 469.....	20
<u>Spencer v. Ind. Comm'n.</u> , 87 U 336, 40 P.2d 188.....	20
<u>Standard Coal Co. v. Ind. Comm'n.</u> , 69 U 83, 252 P.2d 292.....	11
<u>Subsequent Injuries Fund v. Ind. Acc. Comm'n</u> 348 P.2d 193.....	20

STATUTES CITED

	Page
California Labor Code, Section 4751.....	13
Section 31-1-68(1) UCA 1953, as amended.....	12

MISCELLANEOUS

	Page
Larson, Workmans Compensation, Section 59.31 n. 49.....	12
Larson, Workmans Compensation, Section 59.31 n. 51.....	12
Larson, Workmans Compensation, Section 59.31 n. 53.....	13
Larson, Workmans Compensation, Section 95.31.....	11

IN THE SUPREME COURT OF THE STATE OF UTAH

\* \* \*

JOHN M. McPHIE,

Plaintiff,

vs.

UNITED STATES STEEL CORPORA-  
TION and THE INDUSTRIAL COM-  
MISSION OF UTAH,

Defendants.

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

Case No. 14364

\* \* \*

ACTION FOR REVIEW OF  
FINAL ORDER OF INDUSTRIAL COMMISSION

\* \* \*

BRIEF OF PLAINTIFF, JOHN M. McPHIE

---

Vernon B. Romney

Attorney General of Utah  
263 State Capitol Building  
Salt Lake City, Utah 84114

Attorney for Defendant, The  
Industrial Commission of Utah

Erie V. Boorman

Parsons, Behle & Latimer  
79 South State Street  
Salt Lake City, Utah 84111

Attorney for Defendant, United  
States Steel Corporation

A. Wally Sandack

Sandack & Sandack  
370 East Fifth South  
Salt Lake City, Utah 84111

Attorney for Plaintiff, John  
M. McPhie

#### STATEMENT OF THE CASE

This is an action to review a final order of the Industrial Commission of Utah denying Plaintiff workmen's compensation benefits under the statutory Combined Special Injury Fund.

#### DISPOSITION BELOW

After a finding and award by the Commission holding Plaintiff has a 100% permanent impairment of his body and mind resulting from all causes and conditions, including a 15% permanent partial loss of body function attributable to injuries sustained by Plaintiff in an industrial accident, in the course of employment, at Geneva Steel Plant July 23, 1972, the Commission ruled that Plaintiff's 15% disability does not entitle him to Combined Special Injury Fund benefits even though Plaintiff was found to be 100% permanently and totally disabled.

#### RELIEF SOUGHT

Plaintiff filed this Writ of Review seeking reversal of the Commission's Order and a ruling by this Court that Plaintiff is entitled to the benefits established by the Combined Special Injury Fund.

### STATEMENT OF FACTS

The Plaintiff was employed by United States Steel at its Geneva Plant, Orem, Utah, as a locomotive engineer since 1946. He had no industrial accidents or lost time until 1966. He had no complaints referable to his neck or back prior to 1966.

On January 24, 1966, Plaintiff was operating a locomotive engine on a slag train and collided with a yard engine which another employee (C. Painter) was operating. Painter was reprimanded and held responsible for this accident (Exhibit A-8, R. 179).

Plaintiff's head was out the window and he hit the window frame. He noted a stiffness and discomfort in his back and neck. He was treated conservatively at the Company dispensary January 31, 1966 for pain in the neck and on several occurrences thereafter.

Plaintiff's condition became progressively worse and on August 31, 1971 (R. 206) he had a cervical fusion at C-4 to C-6 level of his spine. Post operatively, he improved and was released to return to his usual duties as a locomotive engineer on February 15, 1972 (R. 207). Plaintiff successfully performed as a

locomotive engineer from February 15, 1972 until the industrial accident of July 23, 1972 (R. 207) when three heavy run-away railroad cars filled with flue dust collided with a locomotive engine of a train being driven by Plaintiff. This impact threw him against the window, out of the seat, the back of his neck hit the control panel of the cab (R. 80, 81, 206, 211, 212).

Thereafter Plaintiff reported severe and chronic pain in the right occipital area of the skull, in the right dorsal portion of the neck, in the right scapular portion of the back, in the right arm, and the wrist, and some pain in the low back and down the right lower extremity (R. 206). Plaintiff put in eight hours on August 2, 1972 (R. 86) but was not able to ever work again for the Company. Plaintiff's condition worsened. He had episodes of tremulousness, reported functional and personality disorders, wore a cervical collar, used a cane, had a Parkinson-type tremor in the right hand (R 206), and after consultation with five or six specialists, was returned to hospital. On May 21, 1973, Dr. Ted Bauman performed a spinal cervical fusion (R.193, 176, 177).

Dr. Bauman saw the Plaintiff after discharge May 30, 1973 about five times, the last on November 2, 1973 (R. 193). Plaintiff was admitted to the hospital again in September, 1973, and in October, 1973 (R. 49).

Plaintiff's application for benefits was heard by the Commission November 5, 1973. An award came down October 25, 1974 (R. 225-230). The award was based upon a Medical Panel Report finding: (R. 202, 203)

"1. The applicant's condition stabilized sufficiently, so that the question of permanent partial disability can be determined, six months following his surgery.

2. The applicant has 100% permanent impairment of the body and the mind resulting from all causes, including the injury sustained in the accident of July 23, 1972.

3. There is 15% permanent loss of body function directly attributable to the accident of July 23, 1972.

4. The remaining permanent physical impairment is attributed to previously existing, co-existing and subsequent conditions.

5. Total temporary disability as a result of this accident started when he first missed work following July 23, 1972 and continued until six months following the surgery performed by Dr. Bauman with the exclusion of the minimal amount of work that he returned to prior to surgery.

6. He relates all of his complaints as being due to the injury sustained July 23, 1972 and indicates he was in excellent condition following his first operation and had no problems. From a definite determinable degree, the Panel is able to only assess 15% body impairment to the multiple complaints that are impossible to separate into distinct entities because of the significant functional impairment.

7. Mr. McPhie does have a significant functional component to his problem at the present time.

8. No further surgery is indicated.

9. Psychiatric treatment would probably be beneficial in helping him co-exist and adapt to his environment and surroundings, and to function better as a person, but would not be expected to make him employable.

10. The only other medical treatment that might be considered would be occasional examination and follow-up by his attending physician, Dr. Bauman, whom he trusts. This would be more in a manner of moral support and emotional support, as well as symptomatic treatment inasmuch as no specific medical treatment, as such, is necessary.

11. The applicant indicates, at the present time, that he is unable to engage in any types of activity. He should be able to engage in a wider degree of activities with further time, elimination of the controversial matters and supportive therapy."

The Commission adopted the Panel's report and made, among others, the following Finding of Fact: (R. 227)

"8. Claimant has 100% permanent impairment of his body and mind and resulting from all causes

and conditions, including the 15% permanent partial loss of body function attributable to the injury sustained by Claimant in the industrial accident of July 23, 1972. The difference between the 15% permanent loss of body function and the 100% permanent impairment of body and mind is attributable to previously existing, co-existing and subsequent conditions either due to accidental injury, disease or congenital causes, a significant portion of which is attributable to a functional component based upon the absence of clinical findings to support either the nature, severity and duration of some of Claimant's continuing complaints.

The Commission concluded, claimant is entitled to workmens' compensation benefits, as provided by law, for the multiple injuries sustained by him in the industrial accident of July 23, 1972, which accident arose out of or was in the course of his employment with Defendant United States Steel Corporation.

The Commission then concluded: (R. 228)

"Considering Claimant's prior history and complaints, and considering the multiple problems following the July 23, 1972 accident, the various hospitalization, diagnostic efforts and cervical surgery were not unreasonable under the circumstances. The Medical Panel concluded that much of Claimant's disability was attributable to previously existing, co-existing and subsequent conditions. They also concluded that it was impossible to separate into distinct categories the various aspects or components of Claimant's permanent impairment because of the significant functional component being involved in the problem. Since Claimant has complex multiple problems not susceptible of reasonable separa-

tion or apportionment, since the problems and complaints are consistent with the industrial accident of July 23, 1972 and are reasonably correlated thereto, and since Claimant has undergone cervical surgery August 30, 1971 and was later able to return to his usual occupation February 15, 1972 and continued thereunder until the industrial accident of July 23, 1972, it should be concluded that the Defendant, United States Steel Corporation, should be responsible for the medical treatment of claimant following the July 23, 1972 industrial accident." Citing Brown v. Industrial Commission of Utah, 29 U. 2d 478, 511 P.2d 743.

The Industrial Commission entered its award which ordered, inter alia: (R. 229)

"That Defendant shall pay claimant permanent partial disability compensation benefits at the rate of \$59.00 per week for a period of 46.8 weeks (being 15%) which entitles Claimant to \$2,761.20 and which amount shall be paid Claimant in a lump sum."

The Medical Panel referred to a letter dated March 11, 1974 to Dr. Boyd G. Holbrook, Panel Chairman, from Dr. E. Alan Jeppsen, M.D., College of Medicine, University of Utah, Department of Psychiatry. Dr. Jeppsen stated, in answering question No. 7 from the Industrial Commission:

" Mr. McPhie does have a significant functional component to his problem at the present time. Mr. McPhie had a chronic pain syndrome in 1966 following his accident. This predisposed him to have another traumatic neurosis develop after his recent injury to his cervical spine. I think on top of that,

his impaired mental functioning predisposed him to focus on this limitation as an explanation of his poor functioning. The accident of July 23, 1972 would have to be considered the precipitating and aggravating event. Because of Mr. McPhie's condition at this point, it would be difficult to work out a treatment program for him, however, not impossible. With the use of a behavior modification in a hospital setting, along with the use of hypnosis, it would be possible to relieve a certain degree of Mr. McPhie's symptoms and to increase his functioning. It is, however, doubtful that he would ever be able to return to a job. I would not recommend psychiatric treatment at this time as this type of hospital treatment program is not yet available, but may be in the near future." (R. 205).

A letter from Utah State Board of Education, Division of Rehabilitation Services, May 7, 1974, to the Commission states:

"In giving consideration to Mr. McPhie for a rehabilitation program, it is my definite feeling that he is not medically feasible for vocational training or job placement. Mr. McPhie is a man advancing in age with limited accademic or vocational education. As various employment possibilities were mentioned these were eliminated because of medical limitations and lack of training. Boyd G. Holbrook, M.D., and his orthopedic associates spelled out quite clearly in their letter the extent of Mr. McPhie's injuries, and because of the poor prognosis, I feel it would be useless to try to attempt a vocational rehabilitation program with a man age 58 with as many physical and psychiatric complains and problems as this man has. With this man's disability, I feel that he should receive whatever compensation

and disability benefits that he is entitled to. I believe he would be a poor risk for any type of employment." (R. 219).

On November 1, 1974 McPhie filed objections to (and motion with) the Commission from the final Commission award dated October 25, 1974, and raised the following issue:

"Based upon said Finding and Conclusion, the award properly holds United States Steel Corporation liable for the 15% permanent loss of body function. The award failed to find, conclude and hold that the Special Fund provided for in Sections 35-1-69 and 35-1-68, Utah Code Annotated 1953, as amended, shall be required to pay benefits on the basis of said statutory liability and for the remaining permanent impairment which is 100%." (R. 231-232).

Thereafter, the Commission denied that motion and denied McPhie's Petition for Review, stating:

"As to the requirement or request of the Claimant that an Order be entered against the Special Injury Fund, we call the parties attention to a parallel case decided by the Commission on July 3, 1975 entitled L & M O'Driscoll v. United Park City Mines and The State Insurance Fund. It is our judgment that the McPhie case is very similar to the O'Driscoll case and, having decided against O'Driscoll, we see no reason to change positions in the case before us." (R. 238-239).

The opinion is reproduced in the Appendix.

## ARGUMENT

### POINT I: THE STATUTORY BACKGROUND

It is well established that an aggravation of a pre-existing condition or disability may constitute a compensable injury under Utah law.<sup>1/</sup> An employer is liable for permanent total disability resulting from the last of a series of injuries<sup>2/</sup> where Commission findings are based on reasonable evidence that the injury complained of is the sole cause of the disability for which the award is made.<sup>3/</sup>

The problem of apportionment has often caused hardships because, while the employee may have been able to work with a previous disability, the amount added by an industrial accident may effectively prevent him from working at all. Some states have adopted apportionment statutes, Utah does not recognize apportionment.<sup>4/</sup>

---

<sup>1/</sup> Halvorsen, Inc. v. Williams, 19 U.2d 113, 426 P.2d 1019

<sup>2/</sup> Standard Coal Co. v. Industrial Commission, 69 U 83, 252 P.2d 292

<sup>3/</sup> Hafer's, Inc. v. Industrial Commission of Utah, 526 P.2d 1088

<sup>4/</sup> Duaine Brown Chevrolet Co. v. Industrial Commission of Utah, 29 U.2d 478; citing Larson, Workmans Compensation, §95.31; Nielson v. Industrial Commission, 120 U 526, 236 P.2d 346.

To assist such an employee, the Utah legislature fashioned the combined injury Special Fund.<sup>5/</sup> The Special Fund is available in certain cases to make payment to previously handicapped workers who have been industrially injured. Another reason often cited for the Fund was to encourage employers to hire handicapped workers, the Fund's existence showing the employer that he would not be held liable for an employee's entire condition in the event of a work injury.<sup>6/</sup>

Second injury funds have been adopted in all but four states--Georgia, Louisiana, Nevada and Virginia, according to Larson,<sup>7/</sup> and are cited as the solution to the dilemma of apportionment vs. non-apportionment.

---

<sup>5/</sup> §31-1-68 UCA 1953, as amended. The Fund now receives \$15,600 for each employee killed, leaving no dependents plus a tax upon insured and self-insured carriers.

<sup>6/</sup> Larson, Workmans Compensation §59.31 n. 49  
"Within 30 days following the announcement of the non-apportionment rule in Nease v. Hughes Stone Co. (244 P 778) between seven and eight thousand, one-eyed, one-legged, one-armed, and one-handed men were displaced in Oklahoma."

<sup>7/</sup> Larson, Workmans Compensation §59.31 n. 51

The typical second injury statute applies only when the subsequent injury added to the prior impairment results in total permanent disability, but about one-third of the states, including Utah, omit this limitation.<sup>8/</sup> California has a compromise solution requiring that the degree of final disability be at least seventy percent.<sup>9/</sup>

35-1-69, the section under appeal, provides:

"(1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which compensation and medical care is provided by this title that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, compensation and medical care, which medical care and other related items are outlined in section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation and medical care shall be for the industrial injury only and the remainder shall be paid out of the special fund provided for in section 35-1-68 (1) hereinafter referred to as the "special fund."

A medical panel having the qualifications of the medical panel set forth in section 35-2-56, shall review all medical aspects of the case and determine first, the total permanent physical

---

<sup>8/</sup> Larson, Workmans Compensation §59.31 n. 53

<sup>9/</sup> California Labor Code, §4751

impairment resulting from all causes and conditions including the industrial injury; second, the percentage of permanent physical impairment attributable to the industrial injury; and third, the percentage of permanent physical impairment attributable to previously existing conditions whether due to accidental injury, disease or congenital causes. The industrial commission shall then assess the liability for compensation and medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only and the remainder shall be payable out of the said special fund. Amounts, if any, which have been paid by the employer in excess of the portion attributable to the said industrial injury shall be reimbursed to the employer out of said special fund.

(2) In addition the commission in its discretion may increase the weekly compensation rates to be paid out of such special fund, such increase to be used for the rehabilitation and training of any employee coming within the provisions of this chapter as may be certified to the commission by the rehabilitation department of the state board of education as being eligible for rehabilitation and training; provided, however, that in no case shall there be paid out of such special fund for rehabilitation an amount in excess of \$1,000."

In 1963 an amendment rewrote this section, which read:

"If any employee who has previously incurred permanent partial disability incurs a subsequent permanent partial

disability such that the compensation payable for the disability resulting from the combined injuries is greater than the compensation which, except for the pre-existing disability would have been payable for the latter injury, the employee shall receive compensation on the basis of the combined injuries, but the liability of his employer shall be for the latter injury only and the remainder shall be paid out of the special fund provided for in subdivision (1) of section 35-1-68; and in addition the commission in its discretion may increase the weekly compensation rates to be paid out of such special fund, such increase to be used solely for the training of any employee coming within the provisions of this section as may be certified to the commission by the rehabilitation department of the state board of education as being eligible for training; provided, however, that in no case shall there be paid out of such special fund for rehabilitation an amount in excess of \$735.00."

POINT II: THE COMMISSION ERRED BY BASING ITS ORDER ON ARBITRARY GUIDELINES, CONTRARY TO LAW

The impact of the Act seems to say: The permanent disability chargeable to the special fund must be the result of both the pre-existing condition and the subsequent accident and must be "substantially greater" than that which would have resulted from the accidental injury alone.

Thus, the amount the Fund contributes would usually be the difference between the compensation that

would be payable for the second injury alone and the compensation payable for the combined injury.

In this case the special medical panel, authorized by statute, established Plaintiff's physical disability for the second injury at 15%, the remaining permanent physical impairment was attributed to previously existing, co-existing and subsequent conditions of an indeterminable degree. He was rated 100% totally disabled from the concept of impairment, disability and wage loss. Prior to his second injury on July 23, 1972, Plaintiff had been able to work as a locomotive engineer at the Geneva Plant, notwithstanding his prior condition. Following that injury he was never able to work again.

In denying the Plaintiff benefits under the Special Fund, the Commission ruled:

"...that the McPhie case is very similar to the O'Driscoll case and having decided against Mr. O'Driscoll we see no reason to change positions in the case before us." (R. 239)

The complete O'Driscoll opinion appears in the Appendix to this brief.

In O'Driscoll, the Commission had this to say:

"The Commission has for years, labored with problems of this (35-1-69) section and, has endeavored to interpret what constitutes 'substantially greater.' The guidelines of what 'substantially greater' means

are elusive and difficult, even among the Commissioners. The Commission has not formulated a written policy regarding this matter, although in private discussions reference has been made to a 50% and a 40% figure. Said percentages were discussed in terms of the amount of percentage the industrial accident had to contribute before it became "substantially greater" within the meaning intended in the Workmen's Compensation law. The Commission had endeavored to treat each case individually with the idea in mind that each case would stand on its own facts, with no particular immovable policy being set. To evaluate the issue associated with this case, it is imperative to return to basic principles and endeavor to define the purpose for the statute. We believe there are at least two primary purposes of Section 35-1-69, Utah Code Annotated. First, to encourage the hiring of handicapped individuals by limiting the employer's liability to the industrial accident only. Second, to distribute the responsibility for pre-existing conditions on a broader financial base. The broader base became the combined injury fund, which is funded by all of the insurance carriers and/or self-insured employers.

In our judgment, the central issue of this case is one of social philosophy. When an industrial accident is a contributing factor to retire a man from the labor market, should industry pay the full impact of this loss and at what point in the scale of 0 to 100 does the industrial accident's contribution dictate that industry becomes responsible. One important guideline is the fact that Workmen's Compensation is an insurance funded type of program, even though it is social legislation, and some principles of insurance should be applied in arriving at conclusions. To arrive at some standards the State of Utah might use, we turn to statutes of other states

where similar problems have been reduced to statutory designations. Section 4751 of the California Code is as follows:

'If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article; provided, that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, and such latter permanent disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee, is equal to 5 percent or more of total, or, (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to or adjustment for the occupation or the age of the employee, is equal to 35 percent or more of total.'

It would appear that in California when there are combined permanent partial disabilities, the industrial accident must contribute at least 35% or more of the total. In the case before us, the applicant's disability

due to the industrial accident contributes only 15% and, therefore, would not qualify under the California Code. Although our statute does not specify a fixed percentage for qualification, we believe it reasonable in setting our standards to look at other statutes for guidance. It would be our conclusion that 15% in this particular case, does not qualify for the "substantially greater" designation even though he is now permanently and totally disabled."

McPhie is a case of first impression before this Court. The Commission's error consists in approaching the problem by applying a social philosophy test and the formula of another state (California) which is not relevant here.

Applying O'Driscoll, the Commission asks, why "should industry pay the full impact of this case" and "at what point in the scale of 0 to 100 does the industrial accident's contribution dictate that industry becomes responsible?" Has the Commission forgotten that the entire Fund has been contributed by non-dependency death forfeitures and a tax on insurance carriers? Apparently so, for it seems unwilling to award any of the fund created by a tax on industry. The Commission, anxious to preserve the Fund, is saying that the McPhies and the O'Driscolls had better be cared for by welfare or public charity. Commission's social philosophy rationale has no place here.

Secondly, the Commission conjures up the California statute as a guide, to arrive at a formula that industrial accident must contribute at least 35% or more of the total. It holds: "It would be our conclusion that 15% in this particular case (O'Driscoll), does not qualify for the 'substantially greater' designation even though he is now permanently and totally disabled."

The Fund should be liable when the degree of disability was made substantially greater by the combination of both injuries. Professor Larson cites several cases illustrating how some industrial commissions have applied the subtrahend calculations.<sup>10/</sup>

---

<sup>10/</sup> Special Indemnity Fund v. Simpson, 349 P.2d 635; Columbia Coal Co. v. Griffie, 425 S.W.2d 759; Reliance Ins. Co. v. Watts, 293 A.2d 836; Special Indemnity Fund v. Wilbanks, 340 P.2d 469 (reversed on other grounds); Subsequent Injuries Fund v. Ind. Acc. Comm'n, 348 P.2d 193 (a pre-existing psychiatric condition sufficient); Balash v. Harper, 70 A.2d 747; Davis v. Conger Life Ins. Co., 201 So.2d 727; Spencer v. Ind. Comm'n, 87 U 336, 40 P.2d 188 ("The fact that a man has once received compensation as for 50% of total disability does not mean that ever after he is, in the eyes of compensation law, but half a man, so that he can never again receive a compensation award going beyond the other 50% of the total").

If the Commission is sustained here, every worker with greater than 50% prior disability should be disqualified for any subsequent injury of 49% or less, since the second injury cannot be substantially greater arithmetically. Such arbitrary criteria makes the statute inoperative. Plaintiff's counsel is not aware of a Utah Industrial Commission decision granting any worker Special Fund benefits. The Commission's concern over the Fund's solvency is notable but should not be the basis for this denial.

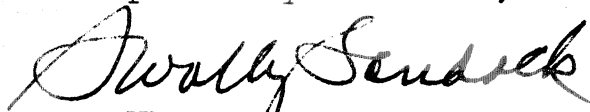
Here a 58 year old worker is relegated to the dump heap because of injuries received in employment in 1966 and 1972, when combined with other personal physical conditions. He is tagged as 100% totally and permanently disabled, given a magnanimous award of 15%, and is told that is all. He is disqualified for lifetime benefits because 15% is not substantially greater than 85%. This seems to be moving the Special Fund in reverse of the direction the legislature intended, and what common sense dictates. Is it reasonable to hold United States Steel liable for only 15% of the disability, and decree that the remaining 85% is exempt

from any coverage under an industrially funded program? Should public welfare take on this assignment also?

CONCLUSION

The Court should reverse the Order of the Commission and remand with instructions to find the Plaintiff qualified to receive benefits under the Special Injury Fund. The Court should further order the Commission to bear the Plaintiff's costs and attorney's fees in the interest of justice.

Respectfully submitted,



A. WALLY SANDACK  
SANDACK & SANDACK  
Attorneys for Plaintiff  
370 East Fifth South  
Salt Lake City, Utah 84111  
Telephone: (801) 531-0555

A P P E N D I X

THE INDUSTRIAL COMMISSION OF UTAH

File No. 1U653-1133

ELWIN M. O'DRISCOLL,

Applicant,

vs.

UNITED PARK CITY MINES and  
THE STATE INSURANCE FUND,

Defendants.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

DENIAL OF

MOTION FOR REVIEW.

\* \* \* \* \*

A Supplemental Order was entered in the above entitled case by a Hearing Examiner of the Commission on February 5, 1975, wherein he affirmed an Order of the Commission dated January 22, 1973. Subsequent to the Commission's Order of January 22, 1973, the case was appealed to the Supreme Court and later withdrawn. The withdrawal of the appeal was to further evaluate the case and to have the applicant examined by an Occupational Disease Panel to determine the extent of the applicant's disability for an occupational disease. The applicant was examined and found by the Panel to be one hundred (100%) percent disabled, but not due to an occupational disease. The Medical Panel for occupational disease found that he had no industrial lung disease, and no primary pulmonary disease.

Pursuant to Section 35-1-82.53, Utah Code Annotated, the case was then referred to the entire Commission for review. The Commission has reviewed the case and sat in banc to discuss the issues with counsel for the applicant. After review of the issues involved, we are of the opinion that the Motion for Review should be denied.

The applicant's position is that he is 100% permanently and totally disabled, and that he received a permanent partial disability as a result of the industrial accident, amounting to 15%, and this 15% combining with the other infirmities and disabilities he has entitles him to lifetime benefits under the provisions of Section 35-1-69, Utah Code Annotated. Said provision allows for benefits from the combined injury fund if the injuries sustained by the industrial accident is substantially greater than he would have had, if he had not had the preexisting condition. The Commission has for years, labored with the problems of this section, and, has endeavored to interpret what constitutes "substantially greater." The guidelines of what "substantially greater"

DENIAL OF MOTION FOR REVIEW  
RE: ELWIN M. O'DRISCOLL  
PAGE TWO

written policy regarding this matter, although in private discussions reference has been made to a 50% and a 40% figure. Said percentages were discussed in terms of the amount of percentage the industrial accident had to contribute before it became "substantially greater" within the meaning intended in the Workmen's Compensation law. The Commission has endeavored to treat each case individually with the idea in mind that each case would stand on its own facts, with no particular immovable policy being set. To evaluate the issue associated with this case, it is imperative to return to basic principles and endeavor to define the purpose for the statute. We believe there are at least two primary purposes of Section 35-1-69, Utah Code Annotated. First, to encourage the hiring of handicapped individuals by limiting the employer's liability to the industrial accident only. Second, to distribute the responsibility for preexisting conditions on a broader financial base. The broader base became the combined injury fund, which is funded by all of the insurance carriers and/or self-insured employers.

In our judgement, the central issue in this case is one of social philosophy. When an industrial accident is a contributing factor to retire a man from the labor market, should industry pay the full impact of this loss and at what point in the scale of 0 to 100 does the industrial accident's contribution dictate that industry becomes responsible. One important guideline is the fact that Workmen's Compensation is an insurance funded type of program, even though it is social legislation, and some principles of insurance should be applied in arriving at conclusions. To arrive at some standards the State of Utah might use, we turn to statutes of other states where similar problems have been reduced to statutory designations. Section 4751 of the California Code is as follows:

"If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the

DENIAL OF MOTION FOR REVIEW  
RE: ELWIN M. O'DRISCOLL  
PAGE THREE

that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, and such latter permanent disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee, is equal to 5 percent or more of total, or (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to or adjustment for the occupation or the age of the employee, is equal to 35 percent or more of total."

It would appear that in California when there are combined permanent partial disabilities, the industrial accident must contribute at least 35% or more of the total. In the case before us, the applicant's disability due to the industrial accident contributes only 15% and, therefore, would not qualify under the California Code. Although our statute does not specify a fixed percentage for qualification, we believe it reasonable in setting our standards to look at other statutes for guidance. It would be our conclusion that 15% in this particular case, does not qualify for the "substantially greater" designation even though he is now permanently and totally disabled.

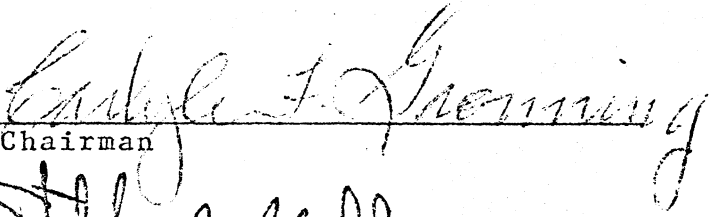
Applicant also contends the award of the Commission dated January 22, 1973 and the Order of the Hearing Examiner dated February 5, 1975, improperly computes the 15% disability. With this contention we agree. The Award should be based on 15% of 312 weeks or 46.8 weeks at \$51.20 per week.

IT IS THEREFORE ORDERED that the paragraph of the Commission's Order dated January 22, 1973 pertaining to permanent partial disability in the amount of \$1,536.00 shall be, and is hereby, amended to delete the \$1,536.00 figure to require defendants pay the sum of \$2,396.16 in lieu thereof.

IT IS FURTHER ORDERED that the Motion for Review filed by the applicant in all other respects shall be, and

DENIAL OF MOTION FOR REVIEW  
RE: ELWIN M. O'DRISCOLL  
PAGE FOUR

is hereby, denied and the prior Order and Supplemental  
Order of the Commission shall in all other respects be,  
and is hereby, affirmed.

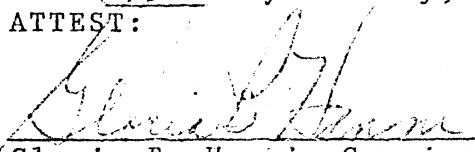
  
Chairman

  
Commissioner

  
Commissioner

Passed by the Industrial Commission of Utah, Salt Lake City,  
this 30<sup>th</sup> day of July, 1975.

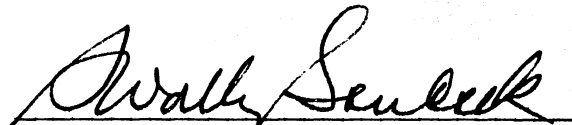
ATTEST:

  
Gloria E. Hanni, Commission Secretary

MAILING CERTIFICATE

The undersigned hereby certifies that two (2) true and correct copies of the foregoing BRIEF OF PLAINTIFF, JOHN M. McPHIE, were each mailed by first-class mail, postage prepaid, this 6th day of February, 1976, to Vernon B. Romney, Attorney General of Utah, Attorney for Defendant, The Industrial Commission of Utah, 263 State Capitol Building, Salt Lake City, Utah 84114, and to Erie V. Boorman, Attorney for Defendant, United States Steel Corporation, 79 South State Street, Salt Lake City, Utah 84111.

SANDACK & SANDACK

  
A. WALLY SANDACK

**RECEIVED  
LAW LIBRARY**

**SEP 17 1976**

**BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School**