

1981

Terry C. Kincheloe v. Coca-Cola Bottling  
Company of Ogden and The State Insurance Fund  
— Brief of Plaintiff, Appellant Terry C. Kincheloe

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

TERRY C. KINCHELOE,

Plaintiff,  
Appellant.

vs.

Case No. 17624

COCA-COLA BOTTLING COMPANY OF  
OGDEN and THE STATE INSURANCE  
FUND,

Defendant,  
Respondent.

---

BRIEF OF PLAINTIFF, APPELLANT

TERRY C. KINCHELOE

---

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FILED

APR 27 1981

Clk. Supreme Court

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OGDEN, STATE INSURANCE FUND,	)	
Defendant,	)	
Respondent.	)	

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PRELIMINARY STATEMENT

This is an appeal from a decision of the Industrial Commission of Utah in a workmen's compensation case in which Terry Kincheloe was awarded a permanent partial disability award of less than that to which he was entitled under Section 35-1-69, Utah Code Annotated 1953 and Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (1980).

DISPOSITION IN INDUSTRIAL COMMISSION

An award of permanent partial impairment was made to Mr. Kincheloe by Administrative Law Judge Richard Sumsion on January 29, 1981. The award, however, was not the full amount to which he was entitled. A Motion for Review was filed in the case with the full Industrial Commission seeking the additional compensation; however, the Industrial Commission upheld the Administrative Law Judge's decision likewise denying Mr. Kincheloe the full award to which he was entitled.

## RELIEF SOUGHT ON APPEAL

Reversal of the Industrial Commissions decision to deny Mr. Kincheloe payment for his overall permanent partial disability as is authorized by Section 35-1-69.

### FACTS

On February 12, 1980 Mr. Kincheloe, while in the employ of the Coca-Cola Bottling Company of Ogden, injured his back when lifting a case of soda pop. He herniated the left L5-S1 disc which was surgically removed from his back on February 20, 1980.

The February 12, 1980 injury had caused Mr. Kincheloe significant pain in his left hip and leg down to his foot. The injury caused no difficulty whatsoever to his right hip or leg which had been seperately injured in an industrial accident in Nebraska in 1974.

As a result of his first injury in 1974 Mr. Kincheloe had been determined to have a 15% permanent partial disability. As a result of the February 12, 1980 injury the medical panel in this case decided that Mr. Kincheloe had incurred an additional 5% permanent partial disability yielding a 20% overall disability from the combined effects of both injuries.

The Industrial Commission, reasoning that the February 12, 1980 injury was not causally connected to the pre-existing disability sustained in the 1974 accident, refused to award payment to Mr. Kincheloe on the basis of his combined disabilities as is required by Section 35-1-69. Therefore,

he was awarded compensation only on the basis of the 5% overall increase in his disability rating.

Mr. Kincheloe therefore seeks an order to the Industrial Commission directing that he be paid from the Second Injury Fund for his permanent partial disability based upon his overall permanent disability of 20% of the whole man rather than only on the basis of the increased amount of permanent partial disability incurred in the February 12, 1980 industrial injury.

#### ARGUMENT

In Findings of Fact, Conclusions of Law and Order from the Industrial Commission in a workmen's compensation decision dated January 29, 1981, Mr. Kincheloe was awarded compensation for a 5% increase in his overall permanent physical impairment due to an injury he received in an industrial accident on February 12, 1980. Prior to the injury of February 12, 1980 Mr. Kincheloe already had an existing 15% permanent partial disability from an industrial injury which occurred in Nebraska in 1974. The result of the second injury on February 12, 1980 was to increase his overall permanent partial impairment from 15% to 20%.

The Administrative Law Judge finding that the industrial injury of 1974 was not causally connected to the industrial injury of February 12, 1980 reasoned that Mr. Kincheloe was only entitled to an award of compensation for



the 5% increase in his overall permanent impairment rather than receive compensation based upon the combined injuries (or 20%) as is required under Section 35-1-69. Once again, contrary to the clear requirements of the statute and the case law of this Court, the Industrial Commission is attempting to carve out an exception to payment from the Second Injury Fund which does not exist.

The case of Intermountain Smelting v. Capitano, Supra, is directly on point and dispositive of this appeal. In Capitano, Intermountain Smelting challenged the manner of apportionment of workmen's compensation benefits as between itself and the Second Injury Fund set up by Sections 35-1-68 and 69, Utah Code Annotated, 1953, to pay for pre-existing disabilities. Capitano had a pre-existing 30% disability rating for his left leg after having been shot in Korea. He then fell in a subsequent industrial accident and injured his right leg. The injury to the right leg, unrelated to the prior injury to the left leg, but taken in combination with his pre-existing disability, increased his overall permanent physical impairment by 25%.

Intermountain Smelting argued that it should not be ordered to pay compensation "inasmuch as the applicant's pre-existing injury had nothing to do with the instant injury, or the medical expenses or total temporary disability incident thereto, the pre-existing disability fund, discussed below, should not be required to bear any of those expenses; and that to require it to pay such expenses will result in unjustified and improvident depletion of that special fund." (Capitano, p.336)

The argument was rejected by this Court which ordered payment from the Second Injury Fund on the basis of the combined disability with the employer paying only that portion of the overall disability attributable to the subsequent injury.

It is clear then, that there is no requirement by statute, nor inference therein that a subsequent industrial accident, in order to bring Section 35-1-69 into effect, must be causally connected to the first injury or pre-existing condition.

The only requirement in the statute is that the subsequent injury result in a permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity. The statute goes on to say that compensation shall then be awarded on the basis of the combined injuries. It does not speak at all to any causal connection between injuries.

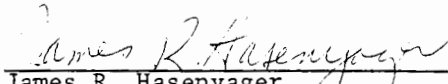
The cases of Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617 (1977) and White v. Industrial Commission, Nebo School District v. Cragen and Paris Co. v. Industrial Commission, 604 P.2d 478 (1978) held a 5% increase in disability to be a substantially greater permanent incapacity within the meaning of the statute requiring payment from the Second Injury Fund and likewise Mr. Kincheloe in the present case is entitled to a compensation award on the basis of his overall 20% permanent incapacity rather than only on the 5% increase

therein.

Wherefore, petitioner respectfully asks that an order be entered directing payment from the Second Injury Fund for Mr. Kincheloe's previously existing incapacity in the amount of 15% to provide him with the full award (20%) to which he is entitled.

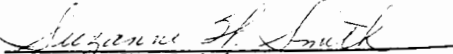
DATED this 22nd day of April, 1981.

Respectfully submitted,

  
James R. Hasenyager  
WARNER, MARQUARDT & HASENYAGER  
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed true and correct copies of the foregoing Brief to M. David Eckersley, BLACK and MOORE, Suite 500, Ten W. Broadway, Salt Lake City, Utah 84101, and to the Utah State Industrial Commission on behalf of the Second Injury Fund, 350 East Fifth South, Salt Lake City, Utah 84111, postage prepaid, on this 23rd day of April, 1981.

  
Suzanne W. Smith

IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED

MAY - 6 1981

TERRY C. KINCHELOE,

Plaintiff,

vs.

COCA-COLA BOTTLING COMPANY OF  
OGDEN and THE STATE INSURANCE  
FUND,


Defendant.

NOTICE OF CONCURRENCE Clerk Supreme Court, Utah

Case No. 17624

Defendants Coca-Cola Bottling Company of Ogden and The State Insurance Fund hereby give notice that they are in agreement with the facts asserted, legal authority presented and entitlement to relief requested by plaintiff in this action Terry C. Kincheloe. These defendants do not take issue with any matter asserted by the plaintiff on this Writ of Review and would merely note for the information of the Court that the proper party defendant to respond to the allegations raised by said plaintiff is the Industrial Commission of Utah, who is represented in this action by Frank V. Nelson.

DATED this 5<sup>th</sup> day of May, 1981.

  
M. David Eckersley  
Attorney for Defendants

# THE ATTORNEY GENERAL



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August 10, 1981

FILED

AUG 10 1981

Geoffrey J. Butler, Clerk  
Utah State Supreme Court  
State Capitol  
Salt Lake City, Utah 84114

Clerk, Supreme Court, Utah

Re: Terry C. Kincheloe v. Coca-Cola Bottling Company  
of Ogden and the State Insurance Fund  
Case No. 17624

Dear Mr. Butler:

The only issue in this case is whether the employee should be paid workmen's compensation twice for the same industrial accident.

This same issue is before this court in Calvin David v. Industrial Commission of the State of Utah and the Second Injury Fund, Supreme Court No. 17398.

Briefs have been submitted in that case but as of this date it has not been placed on the court calendar. The arguments submitted in the Brief of the David case by the Industrial Commission and the Second Injury Fund are the same as for this case.

We would request the court to refer to the State's arguments in the David case when the Kincheloe v. Coca-Cola No. 17624 case is set for argument.

Very truly yours,

Frank V. Nelson  
Assistant Attorney General  
Attorney for Industrial Comm.  
and Second Injury Fund.

FVN/lid

cc: James R. Hasenyager, Esq.