1984

Veyo Concrete Products, Inc. and State Insurance Fund v. Industrial Commission of Utah, And Second Injury Fund : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

VEYO CONCRETE PRODUCTS, INC., and STATE INSURANCE FUND,	:	
Plaintiffs/Appellants,	:	Supreme Court No. 19272
vs.	:	
INDUSTRIAL COMMISSION OF UTAH, and SECOND INJURY FUND,	:	
Defendants/Respondents.	:	

BRIEF OF APPELLANTS

James R. Black
BLACK & MOORE
Attorney for Plaintiffs
261 East 300 South, #300
Salt Lake City, Utah 84111
363-2727

Frank V. Nelson
Assistant Attorney General
Attorney for Industrial
Commission of Utah
236 State Capitol Building
Salt Lake City, Utah 84114

Gilbert Martinez
Second Injury Fund
160 East 300 South
Salt Lake City, Utah 84111

Stephen W. Julien
Attorney for Frederick
Paulus
P.O. Box 1538
Cedar City, Utah 84720

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

TREATISE CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

VEYO CONCRETE PRODUCTS, INC., and STATE INSURANCE FUND,	:	
Plaintiffs/Appellants,	:	Supreme Court No. 19272
vs.	:	
INDUSTRIAL COMMISSION OF UTAH, and SECOND INJURY FUND,	:	
Defendants/Respondents.	:	

BRIEF OF APPELLANTS

NATURE OF THE CASE

This is a worker's compensation case involving Second Injury Fund. The issues in this case involve: first, the proper construction of Section 35-1-69, U.C.A.; second, whether the Administrative Law Judge committed error in discounting the applicant's pre-existing conditions; and third, what effect, if any, a Statement and Request agreement between State Insurance Fund and the applicant has regarding State Insurance Fund's right to reimbursement from Second Injury Fund.

DISPOSITION BY THE INDUSTRIAL COMMISSION

A hearing was held September 20, 1982, in St. George, Utah, before an Administrative Law Judge of the Industrial Commission on an application of Frederick J. Paulus for worker's compensation benefits for an industrial injury which occurred on August 12,

1978. (R, 24) Applicant Paulus claimed benefits based on injuries he sustained to his back and shoulders in a truck accident while driving as an employee of Veyo Concrete Products, Inc., of Veyo, Utah. The Administrative Law Judge entered his Findings of Fact, Conclusions of Law and Order on February 7, 1983, holding, among other things, that State Insurance Fund was liable for all medical and temporary total disability compensation payments. (R, 215-216)

Defendant State Insurance Fund filed a Motion for Review on February 23, 1983, requesting that the Order be amended to hold that there should be a reimbursement from Second Injury Fund to State Insurance Fund of 7/13ths of amounts paid on temporary total and medical compensation. Applicant Paulus also submitted a Motion for Review on February 25, 1983, arguing other issues.

On May 17, 1983, the Industrial Commission issued a Denial of Motions for Review, in which it upheld the Administrative Law Judge's Order. (R, 235-236)

Writ of Review was granted by the Utah Supreme Court on June 17, 1983. Appellants now submit their brief in this matter.

RELIEF SOUGHT ON APPEAL

Applicants request that the Order of the Commission be reversed and remanded. The Commission should be instructed to order Second Injury Fund to make reimbursement to State Insurance Fund on the basis of a 7/13 proportion.

STATEMENT OF FACTS

The basic facts in this case are not in dispute and

may be recounted briefly. Frederick J. Paulus was injured on August 12, 1978, when the truck that he was driving blew a left front tire. The truck rolled onto the median, and Mr. Paulus was thrown through the windshield and pinned under the back axle. The accident occurred on I-15 in southern Nevada. At the time, Mr. Paulus was an employee of Veyo Concrete Products, Inc., of Veyo, Utah. (R, 12-13)

Mr. Paulus apparently sustained several injuries including a laceration on the right side of his forehead, back injury, and injury to both shoulders. (R, 3) Applicant Paulus underwent surgery in Cedar City for his left shoulder in November of 1978. The surgery was performed by Ross McNaught, M.D. Mr. Paulus underwent a similar surgical procedure on the right shoulder on February 5, 1979. On March 26, 1979, the left shoulder was repaired a second time. In October of 1979, Mr. Paulus had further problems with his left shoulder; and Dr. McNaught performed further surgery on the left shoulder in November of 1979. (R, 194-195; 210-211)

On September 11, 1980, applicant Paulus signed a Statement and Request settlement with State Insurance Fund, receiving a rating of 4% permanent partial impairment of the whole man for his shoulders. (R, 9)

In December 1980, Mr. Paulus went to work as a truck driver for a Mr. Jim Andrus. In March, 1981, during this employment, Mr. Paulus was on his trucking job for Andrus at Los Angeles when his back went out. He was bent over and could not straighten

up. His partner had to drive the truck back to St. George. Mr. Paulus described the pain as being in approximately the same place as the pain he had had in his back when he first hurt his back in the truck accident of August 12, 1978. After some physical therapy, Mr. Paulus returned to work in about two or three weeks. (R, 51-57, 211)

In July, 1981, while still working for Andrus, Mr. Paulson reinjured his back while unloading 55-gallon drums in Salt Lake City. He was examined by Dr. Mortenson, a neurosurgeon in Cedar City, and again put on physical therapy. Mr. Paulson again returned to work after about three weeks. (R, 58-61, 211-212)

A hearing on the matter was held in St. George on September 20, 1982, before an Administrative Law Judge of the Industrial Commission. The medical questions were referred to a medical panel for evaluation. (R, 184-188) The findings of the medical panel were adopted by the Administrative Law Judge as his own in his Findings of Fact, Conclusions of Law and Order, issued February 7, 1983. (R, 210-216) The conclusions of the medical panel are set out in full in the Appendix I, attached hereto.

ARGUMENT

POINT I

THE UTAH STATE INSURANCE FUND IS ENTITLED TO REIMBURSEMENT FROM SECOND INJURY FUND FOR 7/13THS OF AMOUNTS PAID, UNDER SECTION 35-1-69 U.C.A., BECAUSE APPLICANT'S PERMANENT PARTIAL IMPAIRMENT RESULTING FROM HIS INDUSTRIAL ACCIDENT WAS SUBSTANTIALLY GREATER THAN IT WOULD HAVE BEEN BUT FOR HIS PRE-EXISTING INCAPACITY.

Section 35-1-69, U.C.A., was amended in 1981; but it is the pre-1981 version of this Section which applies in the present case as the accident in the course of Mr. Paulus' employment occurred in August of 1978. U.S.F. & G. v. Industrial Commission, Utah, 657 P.2d 764, 768 (1983). At the time of applicant Paulus's August 1978 injuries, Section 35-1-69, U.C.A. (1953, as amended), read in pertinent part:

> (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 had he 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 for 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 Section 35-1-68(1) hereinafter referred to as the "special fund" (emphasis added) (The entire pre-1981 amendment Section is attached hereto as Appendix II)

In dispute is the meaning and application of the phrase underlined above.

The Utah Supreme Court has had occassion to review the pre-1981 version of this provision a number of times. McPhie v. United States Steel Corp., Utah, 551 P.2d 504 (1976); Intermountain Health Care Inc., v. Ortega, Utah, 562 P.2d 617 (1977); White v. Industrial Commission, Utah, 604 P.2d 478 (1979); and Intermountain Smelting Corp. v. Capitano, Utah, 610 P.2d 334 (1980).

The Utah Supreme Court clarified this provision in

Intermountain Healthcare, Inc. v. Ortega, supra. In that case the claimant had a pre-existing psychological condition relating to pain in her back. The Commission found that the claimant had a permanent partial disability of 30%, 10% attributable to her pre-existing psychological condition and 20% attributable to an accident which occured while on the job. The Commission, failed however, to require the Second Injury Fund to pay its proportionate share of medical expenses and the temporary total disability compensation. The Utah Supreme Court held that Section 35-1-69 required the Second Injury Fund to pay 1/3rd of the medical expenses and temporary total disability compensation, because 1/3rd of the employee's permanent partial disability was attributable to her pre-existing condition. In coming to this decision, the Utah Supreme Court stated:

> The requirement that the pre-existing condition combines with the later injury to cause a "substantially greater" permanent incapacity does not mean that the former must be greater than the later. It simply means that it be some definite and measurable portion of the causation of the disability. It surely cannot be doubted that 30% is substantially greater than 20%, nor that 10% disability is itself substantial in that it is definite and measurable. Consequently, inasmuch as it appears that the pre-existing condition increased the resulting disability by one-third, it follows that under the requirements of the statute, the medical expenses as well as the compensation award should have been apportioned two-thirds from the employer and one-third from the special fund. (emphasis added) 562 P.2d at 619.

The Ortega decision has not been overruled or modified since, so the above-quoted standard must be viewed as a valid

interpretation of Section 35-1-69.

In the present case, the Administrative Law Judge adopted the findings of the medical panel. The medical panel concluded that applicant Paulus's total physical impairment from all causes was 13%; 7 of the 13% was due to pre-existing causes, which consisted of a left knee impairment of 2% and a low-back impairment of 5%. Thus, under the Ortega standard, Mr. Paulus's permanent incapacity is "substantially greater than he would have incurred if he had not had the pre-existing incapacity." In the language of Ortega, it surely cannot be doubted that 13% is substantially greater than 6% (that attributable to the industrial accident) nor that a 7% disability (that attributable to pre-existing condition) is itself substantial in that it is definite and measurable. Consequently, inasmuch as it appears that the pre-existing condition increased the resulting incapacity by 7/13, it follows that under the requirement of the statute, the medical expenses as well as the temporary total compensation award should be apportioned 6/13ths from the employer and 7/13ths from Second Injury Fund.

The standard announced and applied in Ortega, is a simple additive analysis of the "substantially-greater requirement," rather than a causal analysis. That is, under Ortega, it is immaterial whether the pre-existing condition causes the permanent incapacity resulting from the industrial injury to be greater than it otherwise would be. Under Ortega, it is enough that the pre-existing incapacity adds to the permanent incapacity resulting from the industrial injury, so that the employee's

total permanent partial incapacity is significantly greater.

This analysis was recently confirmed in Kincheloe v. Coca-Cola Bottling Co. of Ogden, Utah, 656 P.2d 440 (1982). In Kincheloe, the Administrative Law Judge held that Second Injury Fund had no application. One of the Judge's reasons was that the claimant's 1980 industrial injury was "unrelated" to his prior incapacity from an injury in 1974. Commenting on this point, the Utah Supreme Court stated:

> Under the reasoning of Capitano, the fact that the 1980 injury is unrelated to the 1974 injury is not dispositive. Irrespective of any causal connection, the Second Injury Fund is to compensate one who sustains "permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity." 656 P.2d at 442 (note dropped, emphasis added).

This arrangement was later limited by the 1981 amendment to Section 35-1-69. Under part (b) of the second paragraph (added in the 1981 amendment) awards for combined injuries where there is no aggravation between the pre-existing condition and the industrial injury a percentage-impairment threshold was added. This provision, of course, does not apply to the present case, since the applicant's industrial injury occurred before the effective date of the 1981 amendment.

The analysis of Section 35-1-69 urged by appellants was also confirmed in White v. Industrial Commission, Utah, 604 P.2d 478 (1979). In White, the Court consolidated three cases, each of which depended upon judicial construction of Section 35-1-69. In each of the consolidated cases, the employee had

significant physical incapacity before he or she sustained the industrial injury. In two of the cases 50% of the applicant's permanent partial impairment was attributable to pre-existing conditions, the other half attributable to the industrial injury. In the third case, 75% of the total physical impairment of the applicant was attributable to the previously existing impairments and 25% was attributed to the industrial accident. In reviewing all three cases, the Utah Supreme Court merely noted the percentage amounts of pre-existing condition and impairments attributable to the industrial injuries. It did not discuss the nature of any of the injuries involved in any of the three cases nor did it discuss any possible causal relationships between pre-existing conditions and the later industrial injuries. Thus, looking only at the percentage amounts of pre-existing impairment and percentage amounts from the industrial injuries, the Supreme Court held that the Second Injury Fund was required to reimburse the insurance carrier for the proportion of medical expenses and temporary total disability compensation equal to the percentage of permanent partial disability applicable to the pre-existing injuries.

In the 1980 case of Intermountain Smelting Corp. v. Capitano, Utah, 610 P.2d 334, appellants' interpretation of Section 35-1-69 was again confirmed. In that case a construction worker severly injured his right ankle. The Commission adopted findings that the claimant had a 25% permanent partial disability, 16 1/2% attributable to a pre-existing injury to his left leg from

being shot in the service in Korea and 8 1/2% attributable to the industrial injury. In Capitano, the special fund (now Second Injury Fund) urged that it should not be required to bear any of the expenses, inasmuch as the claimant's pre-existing condition had nothing to do with the industrial injury. The Court expressly addressed this argument, first quoting Section 35-1-69 itself. The Court acknowledged that the interpretation offered by the special fund was "not entirely without logic and plausability", but noted that it is the Court's responsibility to interpret and apply the statute as it is written in accordance with its purpose. Accordingly, the Court concluded that the employer is responsible only for the percentage of compensation and medical care which the injury occuring in his employment bears to the applicant's total disability, the remainder to be paid out or reimbursed by the special fund. 610 P.2d at 336-337.

In support of his holding in his Findings of Fact, Conclusion of Law and Order, of February 7, 1983, the Administrative Law Judge cited the recent case of U.S.F. & G. v. Industrial Commission, Utah, 657 P.2d 764 (1983). (R, 215) A review of this case, however, does not appear to offer any guidance one way or the other as to the proper interpretation and application of the pre-1981 version of Section 35-1-69. First, the case comes in 1983 and considers Section 35-1-69 in its post-1981 amendment version. Second, insofar as it discusses Section 35-1-69 at all, the case merely restates the statute itself. The Court states:

> Explicit statutory authority exists to apportion compensation awards and medical costs between employers and the Second Injury Fund, provided pertinent conditions are met. Basically, those conditions are three in number: 1) permanent incapacity occassioned by accidental injury, disease or congential causes, followed by 2) subsequent injury resulting in further permanent incapacity which is 3) substantially greater than that which would have been incurred if there had been no pre-existing incapacity. 657 P.2d at 767.

This passage simply does not help determine the issue in the present case.

To summarize, the pre-1981 version of Section 35-1-69, as interpreted by the relevant case law, clearly supports appellants' contention that State Insurance Fund is entitled to reimbursement from Second Injury Fund for a portion of medical expenses and compensation based on the ratio of applicant Paulus's pre- existing impairment to the impairment he sustained in his industrial injury, in this case 7/13. The recent case cited by the Administrative Law Judge in his Findings of Fact, Conclusions of Law and Order, does not indicate anything to the contrary, nor does it support the Commission's holding.

POINT II

> THE ADMINISTRATIVE LAW JUDGE'S REASONING THAT ONE OF APPLICANT'S PRE-EXISTING CONDITIONS PROVIDED NO BASIS FOR SECOND INJURY FUND AWARD WAS INCONSISTENT WITH THE PROPER CONSTRUCTION OF SECTION 35-1-69.

In his Order, the Administrative Law Judge took the view that all of Mr. Paulus's back problems either pre-existed his 1978 accident, or were the result of a natural, progressive degenerative condition. The Administrative Law Judge also adopted

the finding of the medical panel that there was no connection between Mr. Paulus's lower back problems and his industrial accident:

> 1. There is not a medically demonstrable causal connection between the low back problem complained of and the industrial accident. This man has had back symptoms as far back as 1975 and has had intermitent back symptoms since that time that in general have been progressively increasing. There is no evidence that any of the three accidents of 8-12-78, March 1981 or July 1981, have had any demonstrable lasting effect on his back condition. (R, 212)

It was with these adopted facts that the Administrative Law Judge offered one reason for not requiring the Second Injury Fund to participate in payment of medical expenses and compensation. His reasoning is as follows:

> As to the 5% impairment to the back existing before August 1978, we have a more difficult question. The Administrative Law Judge finds that the applicant cannot recover from the Second Injury Fund for the 5% impairment of the back as it existed prior to the August 1978 injury for three reasons:
>
> * * * * * * * * * * * *
>
> 2. The second reason is simply that there can be no Second Injury Fund award since there is no new industrial injury or even a basis for an industrial award. . . . (R, 215)

The Administrative Law Judge's reasoning here apparently refers to Mr. Paulus's 5% permanent partial impairment from his pre-existing back condition. The fact that his industrial injury did not reinjure or aggravate his pre-existing back condition is irrelevant. As argued under Point I, no medical causal connection between the industrial injury and pre-existing conditions need

exist in order for Second Injury Fund to be liable for a portion of medical expenses and compensation. Following the Ortega standard, Mr. Paulus's pre-existing back condition was rateable at 5% and thus was a "definite and measurable portion of the causation of the disability" and most certainly even unrelated physical impairments can and do have an effect on an individual's overall employability that is the very thing that Second Injury Funds are designed to protect.

POINT III

THE ADMINISTRATIVE LAW JUDGE ERRED IN MAINTAINING THAT ONE OF APPLICANT'S PRE-EXISTING CONDITIONS WAS NOT REALLY A PERMANENT IMPAIRMENT.

In his Findings of Fact, Conclusions of Law and Order, the Administrative Law Judge stated:

> 2. The second reason is simply that there can be no Second Injury Fund award since there is no new industrial injury or even a basis for an industrial award. Though the panel found that the applicant had a 2% increase in impairment, this was not in reality a permanent increase since it could be corrected by minor surgery. (R, 215, emphasis added)

The Judge's statement concerning a 2% increase in impairment apparently refers to the 2% impairment of the left knee pre-existing the August 1978 accident. Whether this impairment is permanent or could be corrected by minor surgery, as asserted by the Administrative Law Judge, is not stated in the medical panel report. (R, 194-203) There is no evidence upon which the Commission could base such an opinion. The conclusion of the medical panel in this regard is found under the question asking about permanent

impairment and is answered as follows:

> (5) b. There is a minor calcification of the proximal end of the medial collateral ligament of the left knee at its proximal end over the medial femoral condyle indicitive of "Pelligrini-Stieda calcification of the left medial collateral ligament" related to his 1975 accident. This represents 5% impairment of the extremity or 2% impairment of the body. (R, 213-214)

The Administrative Law Judge simply erred on this point. The Judge's statement is purely speculative and not supported by any evidence in the case. The medical panel would not have rated it as a permanent impairment if it was not permanent. In the absence of conflicting medical evidence, the trier of fact cannot disregard the evidence of the Commission- appointed panel. In the present case, Mr. Paulus's knee condition resulted from a glider crash in 1975. (R, 199)

It should be noted that at point (9) in the medical panel report as adopted by the Administrative Law Judge, the medical panel rates Mr. Paulus's left shoulder at 4% permanent partial impairment but, at the same time, advises that future surgery might well be expected to reduce this impairment by 2%. In that instance, the Administrative Law Judge did have a conclusion of the medical panel that future medical procedure could reduce the percentage of impairment. Nevertheless, the Administrative Law Judge in his Order, accepts the left shoulder impairment as a 4% permanent partial impairment.

Even if the Commission was correct in its analysis of the 2% left knee impairment, there still remains the 5% permanent

partial impairment of the lower back, which existed prior to the accident of August of 1978. Mr. Paulus's total physical impairment from all causes would then be 11%, instead of 13%, with 6% due to the accident and 5% due to the pre-existing low back condition. In that case, State Insurance Fund should be reimbursed by the Second Injury Fund on the basis of the fraction 5/11. That is to say, the Second Injury Fund should reimburse State Insurance Fund for 5/11ths of the temporary total compensation and medical costs.

POINT IV

THE STATEMENT AND REQUEST AGREEMENT BETWEEN APPLICANT AND THE STATE INSURANCE FUND DOES NOT CUT OUT THE APPLICANT'S PRE-EXISTING PERMANENT PARTIAL IMPAIRMENT RATING, AS IMPLIED BY THE ADMINISTRATIVE LAW JUDGE AND THEREFORE CANNOT BE A BAR TO THE REIMBURSEMENT ENTITLEMENT OF THE STATE INSURANCE FUND.

The first reason the Administrative Law Judge gave in his Order for not apportioning the liability for benefits concerns the Statement-and-Request Settlement form signed between the State Insurance Fund and the applicant. The Judge argues as follows:

> As to the 5% impairment to the back existing before August 1978, we have a more difficult question. The Administrative Law Judge finds that the applicant cannot recover from the Second Injury Fund for the 5% impairment of the back as it existed prior to the August 1978 injury for three reasons:
>
> 1. That the Statement and Request was agreed to and signed, allowing the applicant a 4% permanent partial impairment rating following the 1978 incident. This agreement becomes a full accord and satisfaction binding on the applicant as to all claims prior to

> the signing of that document and acceptance of the 4% benefits. It cannot be called res judicata because the Commission did not enter an Order, however, the accord and satisfaction forecloses the applicant from renegotiating the benefits he was entitled to at that time at some later date much the same as res adjudicata. (R, 215)

The Administrative Law Judge implies by this argument that the permanent partial impairment rating of 4%, to which Mr. Paulus agreed, <u>included</u> any and all permanent partial impairments that existed prior to the August 1978 industrial injury, in particular the 5% pre-existing back injury. The Statement and Request agreement cannot be so construed, however.

Such settlement agreements must be narrowly construed to cover only those claims or rights specifically mentioned. Professor A. Larson states:

> <u>Section 82.51 General rule: only specifically mentioned claims included</u>
>
> A settlement covers only those claims or rights that are specifically mentioned in the agreement. Thus claims for a latent injury unknown at the time of the settlement, or subsequent injuries, <u>or for prior injuries not covered in the agreement</u> have been held not barred by a settlement agreement. Larson, Workmen's Compensation Law, Vol 3, Section 82.51 (footnotes dropped, emphasis added).

The 4% permanent partial impairment mentioned in the Statement and Request refers only to the condition of Mr. Paulus's shoulders. This is recognized by the Administrative Law Judge at the hearing:

> The Court: The signature was he signed away a Statement of Request for a 4% permanent partial impairment of his shoulders.
>
> Mr. Julien: That's correct. (R, 27)

It is also quite clear from the wording in the Statement and Request:

> . . . for a permanent partial impairment 4% of the whole man as rated by Dr. Ross McNaught, M.D. (R, 9)

The record discloses that the rating made by Dr. McNaught, as of the date of the settlement agreement (September 4, 1980), was the rating he gave Mr. Paulus in a letter of June 30, 1980. It is clear from Dr. McNaught's discussion in his letter that he is referring only to Mr. Paulus's shoulders when he makes the 4% rating. Referring to the shoulders, Dr. McNaught writes:

> There is some residual stiffness which certainly may improve with time, but at present it is about a 6% upper extremity impairment, or a 4% whole man impairment. (R, 83)

Given all this, it would be perverse to believe that Mr. Paulus thought he was agreeing to a rating including <u>any and all</u> of his physical impairments and not just his shoulders.

Since the Statement and Request agreement refers only to the shoulder condition of Mr. Paulus, it does not concern the ratings for Mr. Paulus's pre-exisiting conditions. Mr. Paulus did not sign away any permanent partial impairment rating for pre-existing conditions; and since he did have a pre-existing impairment, the Second Injury Fund becomes liable for its proportionate share of Mr. Paulus's temporary total compensation benefits and medical expenses under Section 35-1-69.

As found by the medical panel, the rating for pre-existing impairment is 7%, 5% for low back condition and 2% for left knee condition. (R, 202) In his Order, the Administrative Law Judge

adopted the findings of the medical panel that Mr. Paulus's total physical impairment from all causes was 13%. For this reason, appellants contend that 7/13 is the proper proportion of reimbursement it should receive from Second Injury Fund.

If the 4% mentioned in the Statement and Request were adopted to rate Mr. Paulus's shoulder condition, then his total impairment rating would be 11%. Combining this with the rating for pre-exisiting impairment, the fraction would then be 7/11--meaning that Second Injury Fund would be liable for a larger portion.

Whether the proper portion of reimbursement by Second Injury Fund to State Insurance Fund should be 7/13 or 7/11, it is perfectly clear that Mr. Paulus did not sign away any claims based on pre-existing impairment and that, therefore, Second Injury Fund is liable for reimbursement to State Insurance Fund.

POINT V

THE FACT THAT SECOND INJURY FUND WAS NOT A PARTY TO THE STATEMENT AND REQUEST AGREEMENT DOES NOT RELEASE IT FROM LIABILITY BASED ON APPLICANT'S PRE-EXISTING CONDITIONS.

In the recent case of Rhodes Pump Sales v. Industrial Commission, Utah, No. 19163, filed April 26, 1984, the Supreme Court held that the State Insurance Fund was entitled to an apportionment between it and the Second Injury Fund for medical expenses and temporary total disability benefits it had paid to the claimant. The Court held Second Injury Fund liable, even though a settlement agreement had been signed which made no mention of any pre-existing condition and to which Second Injury Fund was not a party. The Court's reason for so holding was in part that the parties were

unaware of the pre-existing condition at the time of the settlement agreement.

The present case is similar in that the State Insurance Fund did not know of any pre-existing conditions at the time the Statement and Request was signed. It was for this reason that no pre-existing conditions were referred to in the Statement and Request (See Point IV); and it was also for this reason that Second Injury Fund was not made a party to the Statement and Request settlement agreement.

As set out in the Statement of Facts, above, the Statement and Request was signed before Mr. Paulus had aggravated his back problems in March and April, 1981, while working for Mr. Andrus. More importantly, the record reveals that no mention was anywhere made of a pre-existing back condition prior to the Statement and Request settlement agreement of September 11, 1980. In his letter of November 11, 1978, Dr. McNaught notes "some type of back injury" from the accident; but he does not mention any pre-existing back condition. (R, 3) Neither is any pre-existing condition mentioned in his letter of June 30, 1980. (R, 11) There is no reference to any pre-existing condition in the early hospital and medical reports. (R, 5-6) No mention of a pre-existing condition is made on the Employee's Statement of September 18, 1978; and the shoulder condition is the only problem noted on Mr. Paulus's Application for a Hearing of February 2, 1979. (R, 8, 12) According to Mr. Paulus's testimony at the hearing of September 20, 1982, he did not receive any treatment for his

low back from the time of his accident until January 30, 1981. (R, 71-72) In fact, the subject of pre-existing conditions actually did not come to the attention of the State Insurance Fund until after the hearing of September 20, 1982--well after the Statement and Request settlement agreement.

After the hearing, State Insurance Fund acquired additional medical records that indicated Mr. Paulus had pre-existing back problems. At the hearing, additional medical doctors were first brought to the attention of the parties other than Mr. Paulus. Counsel for the State Insurance Fund immediately after receipt submitted those records to the Administrative Law Judge; and the additional records were forwarded to the medical panel. (R, 189-191) These medical records are at pages 136-144 and 151-175 of the present Record. [1]

In view of the above recounted facts and the Supreme Court holding in Rhodes Pump Sales, supra, the Second Injury Fund should not be released from liability for apportionment with State Insurance Fund on the basis of the Statement and Request settlement agreement in this case. The Rhodes Pump Sales case is dispositive of that issue without further argument.

CONCLUSION

Based on the pre-1981 version of Section 35-1-69, U.C.A., and the supporting case law, the Utah State Insurance Fund is entitled to reimbursement from Second Injury Fund for 7/13ths

---

[1]The table of contents to the Supreme Court Record mistakenly indicates that these medical records were part of the Exhibits, D-1 through D-6, submitted at the hearing of September 20, 1982.

of amounts paid to applicant Paulus for medical expenses and temporary total compensation benefits. None of the reasons mentioned by the Administrative Law Judge in his Order of February 7, 1983, affect this conclusion. Although the Administrative Law Judge applied that Mr. Paulus's pre-existing back condition would have to aggravate or be aggravated by his industrial injury in order to receive any Second Injury Fund award, the question of aggravation is irrelevant under the pre-1981 version of Section 35-1-69. Although the Administrative Law Judge dismissed Mr. Paulus's knee condition as not really a permanent impairment, this was error because the only medical evidence in the record is to the contrary.

Finally, although the Administrative Law Judge refers to the Statement and Request agreement, that agreement does not at all affect Second Injury Fund's liability for reimbursing State Insurance Fund. First, the agreement itself does not refer to any pre-existing impairments and thus, applicant Paulus and the State Insurance Fund cannot be understood to have signed away any permanent partial impairment rating for pre-existing conditions. Second, the fact that Second Injury Fund was not party to the Statement and Request agreement cannot release it from liability in this case, because State Insurance Fund was unaware of any pre-existing conditions at the time of the agreement. Accordingly, it must be concluded that the Second Injury Fund is liable for reimbursement to the State Insurance Fund on the basis of applicant's pre-existing impairments and that the proper

fraction for the apportionment is 7/13 in this case.

DATED THIS _____Day of May, 1984.

BLACK & MOORE

BY James R. Black
JAMES R. BLACK

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF was sent this 29th Day of May, 1984, to the following:

Mr. Stephen W. Julien
Attorney for Applicant
P.O. Box 1538
Cedar City, Utah 84720

Frank V. Nelson
Assistant Attorney General
Attorney for Industrial
Commission of Utah
236 State Capitol Building
Salt Lake City, Utah 84114

Gilbert Martinez
Second Injury Fund
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84111

Annette Sorg

APPENDIX # I

lated to the episode of July 1981.

(5) a. There is permanent physical impairment attributable to progressive degenerative lumbar spine disorder which appears to be gradually progressive over a period of time from 1975 and currently the equivalent of 10% permanent physical impairment of the body as a whole. 5% (or 1/2) was present previous to 8-12-78. The other 5% (or 1/2) has been due to natural progression of his degenerative disc disease since 8-12-78 and not a result of the episodes at work relating to his back.

b. There is a minor calcification of the proximal end of the medial collateral ligament of the left knee at its proximal end over the medial femoral condyle indicative of "Pelligrini-Stieda calcification of the left medial collateral ligament" related to his 1975 accident. This represents 5% impairment of the extremity or 2% impairment of the body.

(6) Applicant's total physical impairment if any resulting from all causes and conditions is as follows:

Right shoulder	2%	due to this accident
Left shoulder	4%	due to this accident
Left knee	2%	due to accident of 1975
Low back	5%	prior to accident of 8-12-78
Total	13%	Combined 13%

In this case the combined is the same value as the total of the numbers.

(7) There has been 5% additional permanent physical impairment of the low back from gradual progressive disorder of the lumbar spine since the industrial injury.

(8) The surgeries and medical procedures performed were necessitated by the applicant's industrial accident.

(9) The applicant would well be served by excision of the outer end of the left clavicle which would be expected to reduce his permanent physical impairment by 2% and would result in a moderate losttime of 4 to 8 weeks depending upon his activies. At some future time he may require the same procedure on the right shoulder. If such a procedure is performed on the right shoulder it would not reduce the permanent impairment below the present rating of 2%.

No additional medical treatment or medication appears to be reasonably required in treating the applicant's problems from the industrial injury.

(10) I believe that this questions has received a comprehensive answer in the above. If there remains any

question please contact this examiner.

Very sincerely,

Boyd G. Holbrook, M.D.
BGH:hh

APPENDIX # II

35-1-69. Combined injuries resulting in permanent incapacity—Basis of compensation—Special fund—Training of employee.—(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 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.