1984

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

IN THE SUPREME COURT

OF THE STATE OF UTAH

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| VEYO CONCRETE PRODUCTS, INC., AND STATE INSURANCE FUND, Plaintiffs/Appellants, | ) | SUPREME COURT |
| v. | ) | Case 19272 |
| SECOND INJURY FUND AND INDUSTRIAL COMMISSION OF UTAH, Defendants/Respondents. | ) | |

WRIT OF REVIEW FROM AN ORDER
OF THE INDUSTRIAL COMMISSION

# BRIEF OF DEFENDANTS SECOND INJURY FUND & INDUSTRIAL COMMISSION


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# BRIEF OF DEFENDANTS SECOND INJURY FUND & INDUSTRIAL COMMISSION

## NATURE OF THE CASE

This is a Writ of Review from an order of the Industrial Commission of Utah.

## DISPOSITION BY THE INDUSTRIAL COMMISSION

The defendants Second Injury Fund and Industrial Commission concur in the Statement of the Disposition contained in the brief of the plaintiff State Insurance Fund.

## RELIEF SOUGHT ON APPEAL

The defendants respectfully request that this court affirm the order of the Industrial Commission of Utah.

## STATEMENT OF FACTS

The defendants concur in the Statement of Facts contained in the brief of the plaintiff State Insurance Fund.

## ISSUE ON APPEAL

The issue on appeal is whether the State Insurance Fund, the Worker's Compensation Carrier, is entitled to a reimbursement from the defendant Second Injury Fund for medical expenses and temporary total disability benefits paid by the insurance carrier to the applicant Frederick Paulus on claims filed on several industrial accidents.

## ARGUMENT

THE INDUSTRIAL COMMISSION CORRECTLY APPLIED THE UTAH WORKER'S COMPENSATION ACT TO HOLD THE PLAINTIFF STATE INSURANCE FUND LIABLE AS THE WORKER'S COMPENSATION INSURANCE CARRIER FOR ALL THE MEDICAL EXPENSES AND TEMPORARY DISABILITY BENEFITS FOR LOSS TIME FROM WORK AS A RESULT OF THE INDUSTRIAL INCIDENTS.

The plaintiff insurance company erroneously argues that based upon the current August 12, 1978 industrial accident, the employer's insurance carrier should be entitled to reimbursement from the defendant Second Injury Fund at 7/13ths or 53.8% of all medical and temporary disability benefits paid by the carrier on the 1978 industrial injuries because the injured worker had a

pre-existing condition, although the prior incapacities of the low back and (L) knee were found to be unrelated to the industrial injuries and the current industrial incapacity was not substantially greater than it would have been had the injured worker not had the pre-existing incapacities.

Based upon the record, the Administrative Law Judge specifically found that the current 1978 industrial incapacity was not made "substantially greater than" by the applicant's pre-existing condition:

> " . . . Section 35-1-69, U. C. A., which says that the industrial injury must "result in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity". We cannot find in this case that the industrial injury resulted in a substantially greater permanent incapacity as a result of the pre-existing condition when a completely different part of the body is involved and the applicant at the time of the 1978 incident had no significant complaints or complications with either his back or his knee which parts of the body had the pre-existing problems noted by Dr. Holbrook. The recent Supreme Court case of USF&G v. Anderton, dated January 1983 breathed a new life into the "substantially greater" provision making it again a viable principal." Emphasis Added.

Findings of Fact, Conclusions of Law and Order, page six, dated February 7, 1983 (R. 215).

In the above entitled matter, the Industrial Commission of Utah has ruled that since the applicant's medical expenses and temporary disability benefits arose from the 1978 industrial event the payment of such benefits was the exclusive responsibility of the employer or its insurance carrier, pursuant to Utah Code Ann., Sections 35-1-45, 69 and 81. The position taken by the Commission

is that before the plaintiff insurance carrier is entitled to any reimbursement against the defendant Second Injury Fund under Utah Code Ann., Section 35-1-69 for benefits paid to the injured worker on said accidents, the compensation insurance carrier is required to show that the pre-existing incapacities made the industrial injuries "substantially greater than" they would have been "but for" the previous incapacities. Day's Market Inc. v. Muir, 669 P.2d 440 (Utah 1983). See also. U. S. F. & G. v. Industrial Commission, 657 P.2d 764 (Utah 1983); Kincheloe v. Coca-cola Bottling Co. of Ogden, 656 P.2d 440 (Utah 1982).

This Court has set forth the test for involving the defendant Second Injury Fund under Section 69 as follows:

> "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 occasioned by accidental injury, disease or congenital causes, followed by 2) subsequent (industrial) injury resulting in further permanent incapacity which is 3) substantially greater than that which would have been incurred had there been no pre-existing incapacity. . . The Commission is statutorily obligated to determine whether the subsequent injuries sustained . . . have resulted in further permanent incapacity which is substantially greater. . ." Emphasis Added.

U. S. F. & G. v. Industrial Commission, supra.

This Court conclusively resolved the issue of "substanially greater than" in Day's Market, Inc. v. Muir, supra. In Day's Market the Commission denied the insurance carrier reimbursement under Section 69 because the carrier had failed to show that the pre-existing

incapacity had the "effect" of substantially increasing the current industrial injury. The Court held:

> (Second Injury) Fund's only application is where the current incapacity is substantially greater . . . this language requires a finding as to the effect the pre-existing incapacity has upon the current incapacity. Findings in the abstract as to the total pre-existing incapacity are of little assistance in making this determination, since the full responsiblity falls upon the current employer (or carrier) unless it can be said that the current incapacity is substantially greater than it would have been "but for" the pre-existing incapacity.

Day's Market, Inc. v. Muir, 669 P.2d 440(Utah 1983).

This ruling requires a finding that the subsequent industrial injury was made substantially greater by the pre-existing incapacity. In U. S. F. & G. and Day's Market the Commission denied the worker's compensation insurance carrier any reimbursement from the defendant on the basis that the pre-existing condition did not make the industrial injuries substantially greater than they would have been otherwise. Very simply, the Commission denied reimbursement to the carriers because all of the medical and temporary disability benefits resulted from the industrial accidents only, which were the sole responsibility of the employer insurance carrier.

This same logic applies in the instant case on the ground that the applicant's pre-existing incapacities did not contribute to or "effect" the need of medical treatment or temporary total disability caused by the industrial injury. In the case at bar,

The injured worker (Frederick J. Paulus) sustained multiple injuries to both his shoulders and head from an industrial accident occurring on August 12, 1978 when his truck lost control, hit an embankment and flipped over (R. 31). The applicant was thrown from the vehicle and was pinned under the driving axle. He was immediately taken to the Southern Nevada Memorial Hospital for examination. Following the event he was treated by Dr. Neal C. Patel and Dr. D. Ross McNaught in Cedar City, Utah for problems in both the (R) and (L) shoulders. Due to the 1978 industrial event the applicant underwent surgery for his left shoulder in November of 1978 (R. 210); surgery on his right shoulder in February of 1979 (R. 211); and then his left shoulder was re-operated on in 1979. There is no evidence in the record to show that the pre-existing conditions of the applicant's (L) knee or low back acted upon the (L) and (R) shoulder injuries to make them substantially greater than they would have been otherwise.

Based upon the above 1978 industrial accident and the injuries sustained thereby, the compensation insurance carrier (plaintiff State Insurance Fund) paid compensation benefits for treating his shoulder and head injuries. Now the plaintiff erroneously seeks reimbursement against the defendant on the grounds that pursuant to Section 69 the industrial injuries (both shoulder and head) should be added in some "additive analysis"

with the pre-existing conditions (left knee and low back) so as to require the Second Injury Fund to pay for 7/13th or 53.8% of the medical costs and temporary disability benefits incurred in treating the injured worker's shoulder problems caused by the industrial accident. Such a contention is contrary to the statute and this Court's interpretation of what the statute requires.

Clearly, the statute requires a showing of how the prior incapacitites have acted upon the current industrial injury to make the industrial impairment substantially greater than it would have been "but for" the previous incapacity:

> (1) If any employee who has previously incurred a permanent incapacity . . . sustains an industrial injury . . . 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 . . . shall be awarded on the basis of the combined injuries, but the liability of of the employer for such compensation and medical care shall be for the industrial injury only. . .

Utah Code Ann., Section 35-1-69.

The plaintiff erroneously applies an additive analysis to the above statute to argue that the defendant ought to pay 7/13th of all the benefits flowing from the industrial injuries. Such an application is contrary to this Court's ruling in U. S. & G., supra, and Day's Market, supra. The plaintiff again misinterprets the ruling in Kincheloe v. Coca-Cola Bottling Co. of Ogden, 656 P.2d 440 (Utah 1982) to argue that the cause and effect is not important in showing how the industrial injury resulted in a permanent incapacity which is substantially greater

than it would have been "but for" the pre-existing condition.

> 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 . . . This analysis was recently confirmed in Kincheloe v. Coca-Cola Bottling Co. of Ogden, 656 P.2d 440 (1982) . . . 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 442 (note dropped, emphasis added).

Brief of Plaintiff/Appellant, Pages 7 & 8.

Kincheloe does not stand for such a proposition, nor does it confirm it. On the contrary, Kincheloe ruled that the employer's insurance carrier was not entitled to rembursement because "it was reasonable for the law judge to conclude that plaintiff did not sustain "permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity." Kincheloe held that the Second Injury Fund had no application where the Commission made such a finding supported by substantial evidence and reasonable inferences to be drawn therefrom.

The plaintiff State Insurance Fund, the worker's compensation insurance carrier in this matter, continues to argue that a line of cases stand for an erroneous standard that the insurance

carriers ought to be reimbursed where the injured worker had some form of pre-existing condition even though the previous incapacity did not make the current industrial injury substantially greater than. Such an argument is not supported by Utah case law.

The purpose of the statute was obviously to require a "substantially greater than" test. This test continues to require a "but for" analysis, see Day's Market, Inc., supra, OR a "relationship or interrelationship" between the current industrial injury and all the prior incapacities to show whether the industrial incapacity is substantially greater than it would have been otherwise. Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617 (Utah 1977). See also. Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980).

In Ortega this Court found a "relationship" between the industrial pain problems and the pre-existing psychiatric impairment to rule that such an "increase" in the industrial injury satisfies the substantially greater test. Capitano held that the combined "effects" or the "interrelationsip" of both the previous condition and the industrial injury entitled the applicant to an award on the theory that the shifting of weight from the current injury of the right ankle to the prior Korean War injury of the left leg established an "interrelationship" between the two injuries to justify a finding that the previous injury adversely affected his industrial injury.

In White v. Industrial Commission, 604 P.2d 478 (Utah 1979) this Court set forth the method of apportioning liability in paying benefits once it was determined that the "substantially greater than" requirement under Utah Code Ann., Section 35-1-69 was met. In McPhie v. U. S. Steel Corp., 551 P.2d 504 (Utah 1976), this Court held that the defendant Second Injury Fund was responsible for a proportionate share of the liability for a permanent injury which could be "partially attributable" to a pre-existing condition. Regarding the apportionment of liability on death claims, the Court ruled that the statute creating the Second Injury Fund, Utah Code Ann., Section 35-1-68, does not allow for an apportionment of liability or reimbursement on death claims. Pittsburgh Testing Laboratory v. Keller, 657 P.2d 1367 (Utah 1982).

The more recent cases have clearly required a showing of "substantially greater than" in order to invoke liability against the defendant Second Injury Fund.

U. S. F. & G. v. Industrial Commission, supra, set forth the elements of entitlement under Utah Code Ann., Section 35-1-69 for pre-existing conditions: "Basically, those conditions are three in number: 1) (previous) incapacity . . . followed by 2) subsequent (industrial) injury . . . which is 3) substantially greater than that which would have been incurred had there been no pre-existing incapacity. . ." As the Court observed in Kincheloe v. Coca-Cola Bottling Co., supra, the fact that the prior injury is unrelated is not dispositive. However, the Second Injury Fund is to compensate only one who sustains permanent incapacity which is substantially greater than he would have had otherwise.

The requirement of showing "substantially greater than" is clearly stated in the Kincheloe decision:

> "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.
>
> The law judge's primary reason for disallowing compensation from the Second Injury Fund is, however, proper reasoning for the ruling under the statute. . . ." Emphasis Added.

Kincheloe v. Coca-Cola Bottling of Ogden, 656 P.2d 440 (Utah 198

Kincheloe further stated that where the Commission makes a specific finding that the cause of the applicant's need for benefits was from the industrial injury and that the pre-existing condition did not make the industrial injury substantially greater than it would have been "but for" the pre-existing condition, the Court should not upset such a finding where it is supported by substantial evidence and reasonable inferences to be drawn therefrom. Kaiser Steel Corp. v. Monfredi, 613 P.2d 888 (Utah 1981).

In the case at bar, the Administrative Law Judge, acting in behalf of the Utah Industrial Commission, made a specific finding that the pre-existing conditions (left knee and low back) did not make the industrial injuries (left and right shoulder and head) substantially greater than would have been otherwise:

> "This was a very complicated case . . . All of the back problems either pre-existed the 1978 (industrial) incident or were the result of a natural progressive degenerative problem thereafter. Since August 1976 (date of industrial accident) was the only bonafide disabling industrial injury the progressive degenera of the back thereafter, rated at 5%, cannot be the basis of a recovery . . . As to the 5% impairment to

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. . . . .

2. . . . .

3. The third reason that there can be no recovery for the pre-existing impairment is the prohibition set forth in the statute itself, Section 35-1-69, which says that the industrial injury must "result in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity". We cannot find in this case that the industrial injury resulted in a substantially greater permanent incapacity as a result of the pre-existing condition when a completely different part of the body is involved and the applicant at the time of the 1978 incident had no significant complaints or complication with either his back or his knee . . ."
Emphasis Added.

Findings of Fact, Conclusions of Law and Order dated February 7, 1983. (R. 214, 215)

The law judge's findings above are supported by substantial evidence and medical records:

(1) There is not a medically demonstrable causal connection between the low back problems complained of and the industrial accident . . .There is no evidence that any of the three accidents of 8-12-78, March 1981 or July 1981 have had any demonstrable lasting effects on his back condition.
Emphasis Added.

(R. 201).

Based upon the substantial evidence and reasonable inferences to be drawn therefrom, the Administrative Law Judge and the Industrial Commission did not act arbitrarily or capriously in ruling that the industrial injury did not result in a substantially greater incapacity because of the pre-existing condition. Consequently,

it was reasonble for the Administrative Law Judge to rule that the plaintiff insurance carrier was not entitled to a 7/13 or 53.8% reimbursement from the defendant Second Injury Fund under the provisions of Utah Code Ann., Section 35-1-69.

In summary, the above stated statute and the cited Utah case law specifically require a showing of "substantially greater" before the employer or its insurance carrier is entitled to any reimbursement against the Second Injury Fund. The mere showing of a pre-exisiting impairment rating is not sufficient grounds to require the defendant to reimburse the compensation insurance carrier for benefits paid on an industrial accident. This conclu is directly supported by an old Utah case that is seldom cited by the parties. In Hafer's Inc. v. Industrial Commission, 526 P.2d (Utah 1974), the employer's insurance carrier (State Insurance Fu argued that it was solely liable for 75% of the medical costs and compensation benefits awarded to the injured worker. The insura carrier asserted that there was medical evidence to show that the injured worker had a prior disability which could fairly be rated at 25 per cent and it therefore relied on Section 35-1-69, U. C. A. 1953, to argue that 25% of the applicant's benefits should be awarded against Section 69. Hafer's Inc. held that the Commissio did not act capriciously, arbitrarily or unreasonably, or in exc of its authority in holding that the industrial injury complaine was the sole cause of the applicant's disability and that the wo compensation insurer was liable for the whole award, without an

reimbursement against the defendant Second Injury Fund, pursuant to Utah Code Ann., Section 35-1-69.

## CONCLUSION

Veyo Concrete Products, Inc. v. Second Injury Fund, the above entitled matter, represents a long list of cases appealed to the Utah Supreme Court where the insurance carrier is seeking reimbursement from the defendant on the basis that the claimants had a pre-existing "unrelated" impairment rating. State Insurance Fund v. Second Injury Fund, Supreme Court No. 19694; Day's Market, v. Muir, Supreme Court No. 19782; U. S. F. & G. v. Industrial Commission, Supreme Court No. 19691; and Hall v. Second Injury Fund, Supreme Court No. 19345.

The Second Injury Fund petitioned the Court on a Writ of Review to interpret the 1981 amendments to Section 35-1-69 regarding awards of Permanent Partial Disability to applicants on "unaggravated, unrelated" pre-existing conditions and also, whether reimbursement to the employer's insurance carrier should be based upon ratable impairments of "unaggravated, unrelated" pre-existing body parts. Second Injury Fund v. Streator Chevrolet and/or State Insurance Fund, Supreme Court no. 19595.

The "substantially greater" requirement under the statute was not altered or omitted by the 1981 or 1984 amendments. Second Injury Fund has been consistent in arguing that "before" any carrier is entitled to reimbursement from the Second Injury Fund, there must

be a showing under Section 35-1-69 (pre and post 1981 amendments that the industrial incapacity resulted in a substantially greater than incapacity than what the injured worker would have had if he did not have the previous incapacity. Under Day's Market the test requires a "but for" analysis, not an additive one:

> ". . .this language requires a finding as to the effect the pre-existing incapacity has upon the current incapacity. Findings in the abstract as to the total pre-existing are of little assistance in making this determination, since the full responsibility falls upon the current employer (or insurer) unless it can be said that the current incapacity is substantially greater than it would have been "but for" the pre-existing incapacity."

Day's Market, Inc. v. Muir, 669 P.2d 440 (Utah 1983).

Based upon the requirements of the "substantially greater" under the statute and Utah case law, the plaintiff carrier in this case is not entitled to a 7/13ths reimbursement against the Second Injury Fund. Hafer's Inc. v. Industrial Commission, 526 P.2d 1181 (Utah 1974). See also. Day's Market, Inc. v. Muir, supra; U. S. & G. v. Industrial Commission, supra; and Kincheloe v. Coca-Cola Bottling Co. of Ogden, supra. Good sense would preclude reimbursing carriers for benefits paid on injuries where the pre-existing problems contributed nothing to said industrial injuries.

In the case at bar, the plaintiff carrier has simply failed to show how the pre-existing left knee and low back conditions contributed to 53.8% of the benefits in treating the "right and left shoulder" industrial injuries. Hence, the Second Injury Fund is only liable for benefits where the pre-existing incapacity had the effect of substantially contributing to a portion of the benefits

flowing from the industrial injury. By employing an additive analysis, the plaintiff confuses the requirement of the statute assuming that under Section 69 the defendant Second Injury Fund is always liable for a portion of medicals and compensation without a "but for" analysis of how the previous incapacity made the industrial injury "substantially greater."

The defendants respectfully request a ruling from the Court that the Second Injury Fund is only liable for benefits where the pre-existing incapacity has the effect of substantially contributing to a portion of the benefits caused by the current industrial injury. In other words, as this Court has stated previously in the cited cases, the statute (pre and post 1981 amendments) requires that the current industrial injury must result in a substantially greater impairment because of the pre-existing condition before any reimbursement is allowed.

DATED THIS 20th day of September, 1984.

Frank V. Nelson,
Assistant Attorney General

Gilbert A. Martinez,
Administrator and Attorney of the
Second Injury Fund

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing RESPONSE BRIEF was mailed, postage prepaid, on the 21st day of September, 1984, to the following parties:

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