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IN THE SUPREME COURT OF THE STATE OF UTAH

WILMA HALL, CITY CAB COMPANY, INC., and THE STATE INSURANCE FUND,

Appellants,

-v-

SECOND INJURY FUND,

Respondent.

Case No. 19345

BRIEF OF APPELLANTS

APPEAL FROM THE INDUSTRIAL COMMISSION ORDER

CONFIRMING FINDINGS OF FACT & CONCLUSIONS OF LAW

OF ADMINISTRATIVE LAW JUDGE RICHARD G. SUMSION

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Respondent.	:	

APPEAL FROM AN ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

STATEMENT OF THE NATURE OF THE CASE

This case is an appeal from an order of the Industrial Commission confirming the Findings of Fact and Conclusions of Law of the Administrative Law Judge.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Administrative Law Judge confirmed the findings of the medical panel that Wilma Hall's industrial accident did not result in permanent incapacity substantially greater than she would have incurred if she had not had a number of pre-existing conditions. The Administrative Law Judge, Richard G. Sumsion, entered his Findings of Fact, Conclusions of Law and Order in the case on April 21, 1983. The Industrial Commission of Utah confirmed the Findings of Fact, Conclusions of Law and Order and denied the State Insurance Fund's Motion for Review on June 29, 1983.

RELIEF SOUGHT ON APPEAL

Appellant, State Insurance Fund, is asking this Court to reverse the Order of the Industrial Commission insofar as it states that the industrial accident did not result in a permanent incapacity substantially greater than the plaintiff would have sustained had she not had her pre-existing incapacities, and insofar as it denies reimbursement to the State Insurance Fund from the Second Injury Fund. The Utah State Insurance Fund has paid approximately $12,000.00 for medical expenses and compensation to the applicant since the industrial accident. The finding of the Commission, that the accident did not result in a permanent incapacity substantially greater than that which the applicant would have incurred if she had not had the pre-existing injuries, effectively denies the State Insurance Fund reimbursement from the Second Injury Fund in a case where the applicant has suffered from a long history of pre-existing conditions that the medical panel rated as 47% whole man impairment. The panel stated the industrial accident increased the applicant's permanent partial impairment to 52%.

Reimbursement from the Second Injury Fund, provided for in Utah Code Ann., Section 35-1-69, cannot be ordered unless the applicant sustains an <u>incapacity substantially greater</u> than that which she would have incurred if she had not had pre-existing incapacities. This statute further requires that the pre-existing incapacity be a <u>permanent incapacity</u>. Appellant asserts that the pre-existing incapacities were permanent and the applicant's industrial accident resulted

in a permanent incapacity substantially greater than that which she would have incurred had she not had pre-existing incapacities. Appellants seek to have the Order of the Industrial Commission overruled and a new order entered granting appellants reimbursement according to the medical panel evaluation. The Utah State Insurance Fund should be reimbursed from the Second Injury Fund for 47/52nds, or 90%, of the expenses and compensation it has paid.

STATEMENT OF FACTS

The plaintiff, Wilma Hall, sustained injuries on March 9, 1981, during the course of her employment as a cab driver, when she was struck broadside by another car (R. 18-19). Ms. Hall was taken to the emergency center for treatment and was released (R. 20). Since the accident, Ms. Hall has suffered increasingly severe neck, back and leg problems, and has not returned to work (R. 19-20). Ms. Hall has suffered from hypothyroid obesity for the majority of her life, weighing on the average, 275 pounds (R. 27). During the first four months after the accident, Ms. Hall gained approximately 100 additional pounds (R. 27). In addition to the hypothyroid obesity, Ms. Hall has suffered from angina for the past 20 years, for which she has been hospitalized on numerous occasions (R. 30-31). Finally, Ms. Hall suffers from degenerative cervical arthritis of her spine (R. 304).

The medical panel, consisting of Boyd G. Holbrook, M.D., and Allen McFarlane, M.D., was appointed by the Industrial Commission to evaluate the medical aspects of the case (R. 279). The medical panel reviewed the file and submitted their conclusion which stated, in part:

> COMBINED DUE TO ALL CAUSES
>
> (5) Previously existing and concurrent physical impairment is 47%.
>
> (6) The industrial accident did not result in permanent incapacity substantially greater than the applicant would have incurred had she not had the pre-existing incapacity. It is possible that had she not had degenerative cervical arthritis of her spine, the symptoms in her neck at the time of her accident would have been considerably less, would not have been so prolonged and would not have rendered any permanent physical impairment. This would be anticipated but is speculative.
>
> Almost all of this woman's impairment is a result of non-industrial factors. Except for the cervical area there is no relationship between the industrial accident and the other medical problems and physical impairment that she has. The accident did not "break the camel's back" as her extensive present disability is almost entirely the result of non-industrial impairments.
>
> Except for the cervical area, there is no relationship between the industrial accident and the other medical problems and physical impairment that she has.
>
> (7) No further medical treatment including medications will be reasonably required in treating the applicant as a result of the industrial injury in the foreseeable future.

(R. 303-304) (Emphasis added).

The Administrative Law Judge, in his Findings of Fact, Conclusions of Law and Order, adopted the findings of the medical panel as his own, stating:

> The crucial question is whether or not aside from the cervical area there is evidence to support the applicant's claim that the industrial injury resulted in permanent incapacity substantially greater than she would have incurred if she has not had the pre-existing incapacities. Certainly obesity in and of itself could properly be regarded as an impairment, but it is inconceivable that obesity can be considered a permanent impairment in the sense contemplated by the statute. . . .
>
> The Administrative Law Judge is unaware of any Utah Supreme Court case that has required a permanent and total disability where obesity has been a dominant factor in the claim for disability. Furthermore, the Administrative Law Judge is unaware of any Supreme Court case that has required the payment of Second Injury Fund benefits for pre-existing conditions where the pre-existing conditions have been unrelated to the industrial accident.

(R. 316-17) (Emphasis added).

These Findings of Fact, Conclusions of Law and Order were entered by the Administrative Law Judge on June 29, 1983. Appellant, the State Insurance Fund, filed a Writ of Review with this Court on July 29, 1983. Applicant, Wilma Hall, filed a Petition for Writ of Review, For Cross-Writ of Review and Joinder in Writ of Review on August 1, 1983. The State Insurance Fund based its Writ of Review on the following contentions:

1. The Industrial Commission acted arbitrarily and capriciously in holding that obesity did not interact with Ms. Hall's industrial injury to result in impairment substantially greater than she would have incurred had she not had that preexisting condition.

2. The Industrial Commission acted arbitrarily and capriciously in holding the degenerative arthritis did not interact with the industrial injury to result in a permanent incapacity substantially greater than Ms. Hall would have incurred had she not had the preexisting incapacity.

3. The Industrial Commission acted arbitrarily and capriciously in finding that Ms. Hall's cardiovascular disease, Class 1, did not interact with the industrial injury to result in a permanent incapacity substantially greater than Ms. Hall would have incurred without that pre-existing incapacity.

4. The Industrial Commission acted arbitrarily and capriciously in holding that all of Ms. Hall's combined pre-existing incapacities, equalling 47% impairment to the whole body, did not interact with the industrial injury to result in an impairment substantially greater than Ms. Hall would have sustained without the preexisting conditions.

5. The Industrial Commission acted arbitrarily and capriciously in deciding that in Ms. Hall's case the "substantially greater" test was not met because most of Ms. Hall's incapacities were "nonindustrial."

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN FINDING THAT MS. HALL'S OBESITY COULD NOT BE CONSIDERED A PERMANENT IMPAIRMENT WHICH INTERACTED WITH THE INDUSTRIAL INJURIES TO RESULT IN A PERMANENT INCAPACITY SUBSTANTIALLY GREATER THAN MS. HALL WOULD HAVE SUFFERED HAD SHE NOT HAD THE PREEXISTING INCAPACITY OF OBESITY.

Utah Code Ann., Section 35-1-69, which provides for reimbursement for preexisting incapacity, provides in part:

> 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" (Emphasis added).

This statute requires that the pre-existing incapacity be a permanent incapacity. Apparently, the Administrative Law Judge did not feel that obesity could be classified as "permanent". In his Findings of Fact, Conclusions of Law and Order, he states:

> Certainly obesity in and of itself could properly be regarded as an impairment, but it is inconceivable that obesity can be considered as a permanent impairment in the sense contemplated by the statute . . .
>
> The Administrative Law Judge is unaware of any Utah Supreme Court case that has required a finding of permanent and total disability where obesity has been a dominant factor in the claimed disability period.

(R. 352-53).

This is an illogical conclusion. The applicant has suffered from obesity and hypothyroidism for most of her life and has been under a doctor's care for this condition for some 18 years, according to the medical panel report. Webster's New Collegiate Dictionary defines permanent as "continuing or enduring without fundamental change." Certainly Ms. Hall's obesity and hypothyroidism have been "continuing and enduring without fundamental change" for most of her life. It seems clear that this pre-existing incapacity is indeed a permanent condition and that the Administrative Law Judge erred in finding that it was not a permanent incapacity "in the sense contemplated by the statute." Furthermore, the fact that there are no cases to date in which obesity was a permanent pre-existing incapacity is hardly dispositive of the issue in this case.

The Administrative Law Judge also determined that the pre-existing condition of obesity did not result in an injury

substantially greater than Ms. Hall would have sustained without this pre-existing condition. The mere numbers which the medical panel included in their medical report indicate that Ms. Hall's obesity resulted in a permanent incapacity substantially greater than she would have incurred from her industrial accident had she not had the pre-existing incapacity. The medical panel stated that Ms. Hall suffered a 47% pre-existing permanent partial impairment, 30% of which was from mild hypothyroidism and obesity, and a 10% permanent partial impairment from the accident. When these impairments are totally combined, she has a 52% permanent partial impairment. Certainly, the existence of the 30% impairment from the obesity resulted in an impairment substantially greater than Ms. Hall would have suffered without that pre-existing condition. Without the pre-existing incapacity of hypothyroid obesity, Ms. Hall's impairment would be 22% instead of 52%. Without all of the pre-existing incapacities, Ms. Hall's permanent partial impairment would be 10% instead of 52%. Certainly 52% permanent partial impairment is "substantially greater" than 10% permanent partial impairment.

POINT II

THE INDUSTRIAL COMMISSION ABUSED ITS DISCRETION IN FINDING THAT MS. HALL'S DEGENERATIVE ARTHRITIS DID NOT INTERACT WITH HER INDUSTRIAL INJURY SO AS TO RESULT IN A PERMANENT INCAPACITY SUBSTANTIALLY GREATER THAN SHE WOULD HAVE INCURRED HAD SHE NOT HAD THE PRE-EXISTING ARTHRITIS.

Both the medical panel and the Administrative Law Judge referred to Ms. Hall's degenerative arthritis and, indeed, both suggested that the arthritis may have increased the injury sustained in the accident. However, neither the Administrative Law Judge nor the medical panel completed its discussion of the problem. The medical panel, in their conclusion adopted by the Administrative Law Judge, states:

> It is possible that had she not had the degenerative cervical arthritis of her spine, the symptoms in her neck at the time of her accident would have been considerably less, would not have been so prolonged and would not have rendered any permanent physical impairment. This would be anticipated but is speculative. . . .
>
> Almost all of this woman's impairment is a result of non-industrial factors. Except for the cervical spine area there is no relationship between the industrial accident and the other medical problems and physical impairment she has. . . .
>
> Except for the cervical area there is no relationship between the industrial accident and the othe medical and physical impairment that she has.

On three separate occasions, the medical panel refers to the cervical area and pre-existing problems and furthermore indicates that the existence of the arthritis in the cervical area probably increased the symptoms from the accident. However, in contradictory fashion, the medical panel then concludes that none of the pre-existing conditions interacted with the injuries sustained in the industrial accident. These are illogical and are internally contradictory conclusions.

The Administrative Law Judge acted arbitrarily and capriciously in adopting these illogical and contradictory conclusions as his own. Furthermore, the Administrative Law Judge himself makes the same confusing, contradictory, and illogical conclusions when he states in his Conclusions of Law:

> It is abundantly clear from the medical panel report that the percentages assigned to the applicant's non-industrial impairment have no relationship to industrial accident <u>except as to the impairment assigned to the residual of her cervical spine injury. Had the applicant not had her pre-existing problems, the medical panel speculated that she may not have sustained any permanent physical impairment as a result of her industrial accident. Because of the pre-existing problems, at least to a substantial extent</u>, the applicant does now have a 10% residual impairment in her cervical area . . .

(R. 316). Again, the Judge continually refers to the fact that had the applicant not had the pre-existing cervical problems her impairment from the accident would have been less. Yet, in complete contradiction, the Administrative Law Judge concludes and the Industrial Commission accepts that the pre-existing conditions did not result in an impairment substantially greater than she would have incurred had she not had the pre-existing conditions. Clearly, the acceptance of such illogical and contradictory conclusions was arbitrary and capricious on the part of the Industrial Commission.

POINT III

THE INDUSTRIAL COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN FINDING THAT MS. HALL'S CARDIOVASCULAR DISEASE, CLASS I, DID NOT INTERACT WITH THE INDUSTRIAL INJURY TO RESULT IN A PERMANENT INCAPACITY SUBSTANTIALLY GREATER THAN MS. HALL WOULD HAVE INCURRED WITHOUT THAT PRE-EXISTING INCAPACITY.

The hypertensive cardiovascular disease, Class 1, suffered by Ms. Hall was a permanent pre-existing disease that created a resulting industrial injury substantially greater than what would have occurred had the disease not been present. The very numbers expressed by the medical panel show that without this heart disease Ms. Hall's incapacity would have been less, her recovery capacity greater, and she would not have suffered the amount of disability she now suffers as a result of the industrial injury. The medical panel states that Ms. Hall's hypertensive cardiovascular disease has resulted in a 5% permanent impairment. Certainly this 5% permanent impairment has interacted with the industrial accident and the other pre-existing conditions to result in a 52% permanent partial impairment.

POINT IV

THE INDUSTRIAL COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN HOLDING THAT ALL OF THE COMBINED PRE-EXISTING INCAPACITIES, EQUALLING 47% IMPAIRMENT TO THE WHOLE BODY, DID NOT INTERACT WITH THE INDUSTRIAL INJURY TO RESULT IN AN IMPAIRMENT SUBSTANTIALLY GREATER THAN THAT MS. HALL WOULD HAVE SUSTAINED WITHOUT THE PRE-EXISTING INCAPACITY.

All of Ms. Hall's pre-existing incapacities worked together to result in an industrial injury substantially greater than would have existed had the pre-existing incapacities not been present and working in tandem. Without all the pre-existing incapacities, Ms. Hall's permanent incapacity would be 10% instead of 52%. Ms. Hall could have recovered more quickly and easily from her injuries and would have been able to return to work. The very numbers presented by the medical panel demonstrate that the Administrative Law Judge and the Industrial Commission acted arbitrarily and capriciously in finding that Ms. Hall's pre-existing injuries did not interact with her industrial injury to result in an incapacity substantially greater than she would have incurred without the pre-existing incapacities.

POINT V

THE INDUSTRIAL COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN DECIDING THAT IN MS. HALL'S CASE THE "SUBSTANTIALLY GREATER" TEST WAS NOT MET BECAUSE MOST OF MS. HALL'S INCAPACITIES WERE NON-INDUSTRIAL.

The Administrative Law Judge in this case merely adopted the medical panel conclusion that the "industrial accident did not result in permanent incapacity greater than the applicant would have incurred had she not had the pre-existing incapacity." Neither the Administrative Law Judge nor the medical panel explained which pre-existing incapacity they were talking about in reaching this conclusion. The medical panel and the Judge

seemed to say that the single pre-existing condition from which Ms. Hall suffered fell into one major category of obesity. This is not the case. Aggregation of all pre-existing conditions to determine whether the substantially greater requirement is met is improper because each may react with the industrial accident differently and cause a different result. Each separate incapacity must be examined individually to determine if the industrial injury was substantially greater because that incapacity was present. In making this examination of separate pre-existing incapacities, it is clear that even if Ms. Hall had had only one of these pre-existing incapacities, she still would meet the substantially greater requirement.

In assessing whether the substantially greater test is met, it must first be determined exactly what that test means. Neither the Administrative Law Judge nor the medical panel adequately explained what they thought "substantially greater" meant, despite the fact that such a request was made to the panel. The panel's reasoning, adopted by the Judge, seems to be that because Ms. Hall's present disability is a result of non-industrial factors, the substantially greater test was not met. This, however, is not the test for substantially greater.

As explained in Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980), and Kincheloe v. Coca Cola Bottling Co., 656 P.2d 440 (Utah 1982), the fact that the recent industrial

injury is not related to the pre-existing incapacity is not dispositive of the question of whether the industrial injury is substantially greater than it would have been without the pre-existing incapacities. The test requires only that the judge determine whether the incapacity resulting from the industrial accident is substantially greater because the pre-existing conditions are present, so long as the pre-existing conditions are a result of disease, injury, or congenital cause. The test does not require the judge to examine whether the pre-existing condition is mostly a result of industrial factors. The Utah Supreme Court, in Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617 (Utah 1977), explained what is meant by "permanent incapacity . . . substantially greater than if the pre-existing incapacity is nonexistent." In that case the applicant suffered from a pre-existing psychological condition relating to pain in his back. A back strain resulted in a medical panel determination that he had a 30% permanent partial disability with 10% of that pre-existing and 20% due to an industrial incident. The Court explained:

> The requirement that the pre-existing condition combines with a later injury as a "substantially greater" incapacity does not mean that the former must be greater than the latter. 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%, that the 10% disability is itself substantial but 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 awards should have been apportioned two-thirds from the employer and one-third from the special fund.

Id., at 619.

In applying the substantially greater test, it is obvious that the disability suffered by Ms. Hall due to the industrial injury is greater because of her pre-existing conditions. Certainly 52% is substantially greater than 10%. These pre-existing conditions prevented her from recovering normally from the industrial injury, and due to this failure to recover, she has been unable to, and probably never will, return to work. Ms. Hall's permanent incapacity was substantially greater than it would have been had she not had the pre-existing conditions. This conclusion is borne out by the numbers.

The Administrative Law Judge acted arbitrarily and capriciously in adopting the medical panel finding that Ms. Hall's pre-existing conditions did not result in a substantially greater incapacity than she would have incurred without those pre-existing conditions.

POINT VI

THE INDUSTRIAL ACCIDENT RESULTED IN A PERMANENT PARTIAL INCAPACITY SUBSTANTIALLY GREATER THAN WHAT WOULD HAVE EXISTED WITHOUT THE PRE-EXISTING INCAPACITIES; THEREFORE THE INDUSTRIAL COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN NOT ORDERING REIMBURSEMENT TO THE STATE INSURANCE FUND FROM THE SECOND INJURY FUND IN AN AMOUNT EQUAL TO THE PERCENTAGE OF THE PERMANENT PARTIAL DISABILITY ATTRIBUTABLE TO THE PRE-EXISTING CONDITIONS.

This Court's interpretation of Section 35-1-69 has consistently allowed contribution from the Second Injury Fund for all types of worker compensation payments in an amount equal to the percentage of permanent partial disability attributable to any pre-existing condition. McPhie v. United States Steel Corp., 551 P.2d 504 (Utah 1976); Intermountain Health, Inc., v. Ortega, 562 P.2d 617 (Utah 1977); White v. Industrial Commission, 604 P.2d 478 (Utah 1979); Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980); Paoli v. Cottonwood Hospital, 656 P.2d 410 (Utah 1982); United States Fidelity & Guarantee Company v. Industrial Commission, 647 P.2d 754 (Utah 1983). Although Section 35-1-69 was amended in 1981, the Legislature did not state that the amendment was retroactive. Therefore, the insurance carrier should be reimbursed for all benefits paid. The pre-1981 statute is applicable here since the injury involved occurred on March 9, 1981, and those amendments did not go into effect until March 12, 1981.

In Intermountain Health Care, this Court held that Section 35-1-69 required proportionate contributions from the special fund (the Second Injury Fund) for compensation and medical benefits in cases involving pre-existing injuries. The Commission found that the claimant had a partial disability of 30%; 10% attributable to pre-existing psychological conditions and 20% attributable to an accident which occurred on the job. The Commission failed, however, to require the Second Injury Fund to pay its proportionate share of medical expenses. This Court found that Section 35-1-69 required the Second Injury Fund

to reimburse the insurance carrier for one-third of the medical expenses and compensation because one-third of the employee's permanent partial disability was attributable to the pre-existing condition. In the instant case, the numbers presented by the medical panel indicate that 47% of the applicant's disability is attributable to pre-existing conditions. Therefore, the Second Injury Fund is obligated to reimburse the State Insurance Fund for a percentage of benefits and medical expenses, which the State Insurance Fund has paid to the applicant equal to that percentage of permanent partial disability attributable to the applicant's many pre-existing conditions.

This Court extended the holding of Intermountain Health Care to cover temporary total disability compensation in the case of White v. Industrial Commission, 604 P.2d 478 (Utah 1979). The Court consolidated several cases, each of which depended upon judicial construction of Section 35-1-69. In each case the Court held the Second Injury Fund must reimburse the insurance carrier for a proportion of medical expenses and temporary total disability compensation equal to the percentage of permanent partial disability applicable to the pre-existing injury. In the instant case, the State Insurance Fund has paid a substantial amount in medical expenses and temporary total disability and permanent partial disability, and the Fund should be reimbursed for that portion of these payments equal to the

percentage of the impairment due to the applicant's pre-existing incapacities.

In Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980), this Court again held that the Commission erred in ordering the employer to pay all medical compensation and temporary total disability benefits when a portion of the disability was attributable to a pre-existing injury. In that case, the Court stated:

> We think that the reasonable conclusion to be drawn therefrom is that the employer is responsible for only the percentage of compensation and medical care which the injury occurring in the employment bears to the applicant's total disability. This conclusion is also borne out by the final provision that any amount which has been paid by the employer in excess of the portion attributable to the industrial injury should be reimbursed to him out of the special fund.

Id., at 337.

Section 35-1-69 was amended in 1981. Though the 1981 amendments do not apply here, this Court's interpretation of the statute even after those amendments indicates the general purpose and structure of the Second Injury Fund requires that it reimburse the insurance carrier for all expenses and disability paid out. In United States Fidelity & Guarantee Co. v. Industrial Commission, 657 P.2d 754 (Utah 1983), this Court interpreted 35-1-69, as amended. Though that case involved several statutes and a fairly complicated fact situation, the Court discussed the implication and purpose of Section 35-1-69:

> Explicit statutory authority exists to apportion compensation awards and medical costs between the employers and the Second Injury Fund, provided certain conditions are met. Basically those conditions are three in number: (1) Permanent incapacity of the employer is assessed on "the basis of the percentage of permanent physical impairment attributable to the industrial injury only and the remainder shall be paid out of a said special (Second Injury) fund.

Id., at 767.

In the instant case, the State Insurance Fund has paid temporary total disability, medical expenses and permanent partial disability due to the industrial accident of approximately $12,000.00. Since the medical panel itself found that 47% of Ms. Hall's impairment was due to pre-existing incapacities, the State Insurance Fund should be reimbursed from the Second Injury Fund for 47/52nds or 90%, as is described in the statute and relative case law.

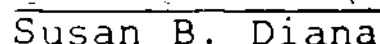
CONCLUSION

The Administrative Law Judge and the Industrial Commission acted arbitrarily and capriciously in adopting the medical panel's conclusion that the industrial accident did not result in permanent incapacities substantially greater than Ms. Hall

would have incurred had she not had the pre-existing incapacities. The findings were internally contradictory. The denial of the State Insurance Fund's Motion for Review should be reversed. The State Insurance Fund respectfully requests this Court remand this case to the Industrial Commission so that they may make an appropriate determination of the amount of reimbursement the State Insurance Fund should receive from the Second Injury Fund.

Respectfully submitted this ______ day of December, 1983.

BLACK & MOORE



Susan B. Diana

CERTIFICATE OF DELIVERY

I hereby certify that I hand-delivered a copy of the foregoing Brief this ______ day of December, 1983, to the following:

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