1983

Richard H. Shepherd v. Diversa-Cycle Products, Inc., Utah Industrial Commission, And State Insurance Fund : Petitioner's Brief

IN THE SUPREME COURT

OF THE STATE OF UTAH

RICHARD H. SHEPHERD, Applicant and Petitioner, vs. DIVERSA-CYCLE PRODUCTS, INC., UTAH INDUSTRIAL COMMISSION, and STATE INSURANCE FUND, Defendants and Respondents.	)	Case No. 19100

PETITIONER'S BRIEF

Appeal from Final Order of the Utah State Industrial Commission

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STATEMENT OF THE NATURE OF THE CASE

This is an action for review of a final order entered by a majority of the Utah State Industrial Commission on March 8, 1983. The commission awarded Petitioner temporary total disability benefits for a period of six months; benefits for 5% permanent partial impairment sustained in an industrial accident on December 1, 1979; and benefits for 10% pre-existing permanent partial impairment incurred during World War II while Petitioner was in the military service of the United States. The Commission denied Petitioner compensation from the Second Injury Fund for the remainder of his 37% combined injuries.

RELIEF SOUGHT ON APPEAL

Petitioner seeks reversal of the Commission's denial of

compensation from the Second Injury Fund for the remainder of his 37% combined injuries.

STATEMENT OF FACTS

During the course of his employment with the defendant company on December 1, 1979, the Petitioner fell and struck on the edge of an open pit and on a pipe. (R. 167, R. 164 and R. 168) Petitioner was knocked unconscious. (R. 167, R. 164 and R. 168) In the process of the fall, he hit his neck against a steam pipe causing some burns and his right hip hit the corner of the pit opening. (R. 168)

This incident occurred about 12:00 noon. Petitioner tried to continue work after recovering but could not do so effectively. (R. 168) Peitioner drove himself to the emergency room of the L.D.S. Hospital in Salt Lake City where x-rays were taken. (R. 12-13, R. 168) It was noted that Petitioner had an abrasion of the right hip and a muscle strain of the right side of the neck. He was given a sling and advised to rest and take pain medications. (R. 168)

He continued to have pain in his neck, back and shoulder. He was off work until mid-January of the following year. He was terminated by his company. He feels he could have done some of the work, but apparently could not do all that was expected of him. He continued to have soreness in the right side of his neck. (R. 164)

Petitioner could not return to work December 3, because he was having problems with his lower back, shoulder, cla-

vicle and neck. (R. 168) On December 3, he visited the V.A. Hospital, Dr. Latimer and a chiropractor, Dr. Wayman. He did not return to the V.A. Hospital for treatment of this injury but did return to the V.A. Hospital around March 10, 1980, for another problem. (R. 168) Petitioner has had black out attacks since the accident. (R. 169)

By way of history, while in the military service the Petitioner was thrown from a truck and suffered back, shoulder, hip and leg injuries from which he was disabled until about December 1945. (R. 169) More particularly, Petitioner was thrown out of the truck onto his neck and shoulder, sustaining a cervical fracture, a dislocation of both shoulders, an injury to both ankles, fractured ribs, injury to hips and knees dislocated. (R. 74, R. 26) In 1946 he received a 20% disability rating from the Veterans Administration and then in 1977 he received a government combined rating of 60%, which included 40% for his back. (R. 169)

The medical panel did not merely restate the 60% rating given Petitioner by the Veterans Administration, but assigned him 20% pre-existing permanent partial impairment for his lower back, 10% pre-existing permanent partial impairment for his neck and 5% pre-existing permanent partial impairment for sensory loss from surgery to relieve the pain of the war injuries. (R. 166) In 1962, Petitioner had a rhizotomy on his lower back to alleviate the pain he suffered from the service injury. (R. 74, R. 24-25)

The Medical Panel Report was submitted in evidence and the findings therein were adopted by the Administrative Law Judge as his own:

"1. The percentage of permanent partial impairment at this time is as follows:

Involvements	Percent of Whole Man	
	Pre-existing	Related to Injury
Low Back	20 Percent	0 Percent
Neck	10 Percent	5 Percent
Sensory Loss (Surgery)	5 Percent	0 Percent

Syncope of uncertain etiology:

Note: From the present information, it seems unlikely that there is a direct connection between the syncopal episodes and the effects of the injury. There is no confirmation of any certain period of unconsciousness from an injury to the head at the time, and those who saw the patient most immediately did not record any unconsciousness or neuro-symptoms whatsoever. The initial events were quite delayed and apparently related to emotional factors as much as anything. However, this formulation may be modified by more definitive information which may become available to the panel members. (R. 169)

2. A reasonable period of temporary total disability is set at six months, as being ample time for recovery from the physical effects of the injury . . . (R. 170)

The Administrative Law Judge finds the applicant is entitled to temporary total disability compensation based on six months or 26 weeks . . . The applicant is further entitled to permanent partial impairment benefits base on 5% . . . The medical panel found the applicant had a pre-existing impairment of 35% which would combine to 32%. The applicant has been compensated for more than that amount in pre-existing permanent partial impairment benefits and is not entitled to additional benefits from the Second Injury Fund for that purpose. The insurance carrier, however, is entitled to reimbursement for a portion of its medical costs and temporary total disability compensation payments, which reimbursement should be based on a

ratio of 32/37's of the amounts paid by the State Insurance Fund." (R. 170)

The Administrative Law Judge ordered, inter alia:

1. The State Insurance Fund pay Petitioner $4,000 for temporary total disability compensation and $2,184 for permanent partial impairment benefits attributable to the industrial accident.

2. The Second Injury Fund reimburse the State Insurance Fund for 32/37's of the medical costs and temporary total disability. (R. 170)

On or about June 7, 1982, Petitioner, by and through counsel, timely filed a Motion for Review alleging the Administrative Law Judge had erred in not awarding Petitioner compensation for pre-existing conditions. (R. 173-174)

On January 13, 1983, a majority of the Commission affirmed the Administrative Law Judge's award of temporary total disability benefits and compensation for 5% permanent partial impairment resulting from the December 1, 1979, industrial accident. (R. 179-182) However, the Commission reversed the Administrative Law Judge's denial of benefits for Petitioner's permanent for the pre-existing 10% condition of the neck. The Commission ordered, inter alia:

> " . . . that the Administrator of the Second Injury Fund prepare the necessary vouchers directing the State Treasurer as Custodian of the Second Injury Fund, to pay the Applicant compensation at the rate of $140.00 per week for 31.2 weeks or a total of $4,368.00, as compensation for a 10% permanent partial impairment attributable to pre-existing conditions, said amount to be paid in a lump sum." (R.180)

With respect to compensation for the full 32% remainder of Petitioner's 37% combined permanent partial impairment, the majority wrote:

> " . . . But common sense would dictate that the same rules precluding double compensation from workmen's compensation should apply for pre-existing problems which were fully compensated and were not exacerbated by the industrial accident." (R. 179)

Commissioner Saathoff dissented from the majority:

> "The original Order of the Administrative Law Judge denied pre-existing disability benefits to the applicant, but awarded reimbursement to the State Insurance Fund. The Motion for Review filed by the applicant was on this issue. In my opinion the statute requires that the applicant is entitled to benefits under Section 35-1-69, Utah Code Annotated before the insurance carrier is eligible for reimbursement. The majority of the Commission makes the assumption that the Legislature intended that all pre-existing disability that has previously been compensated, should be denied, even though incurred in the military service of our country. I do not read this intent into Section 35-1-69, Utah Code Annotated. I do, however, concur that any permanent partial disability resulting from an industrial accident, once compensated should not be compensated again. The majority also assumes that statute gives the Commission the authority to separate pre-existing disabilities and to award benefits from the Second Injury Fund only for those pre-existing disabilities which are to the same portion of the body as was injured in the industrial accident, again, I do not interpret Section 35-1-69, Utah Code Annotated, to give the Commission the authority to separate these disabilities in determining Second Injury Fund benefits. I believe this policy would defeat one of the main purposes of that Section, which is to encourage employers to hire people who have some degree of pre-existing disability. I think recent Supreme Court decisions have upheld this concept. I would therefore grant the Motion for Review, except for awarding benefits for the 5% sensory loss." (R. 181)

Petitioner adopted Commissioner Saathoff's arguments and on or about January 27, 1983, filed a Motion for Review of the January 13 Order. (R. 183-189) On March 8, 1983, the

majority denied Petitioner's Motion for Review and affirmed its Order of January 13. (R. 191-192) Commissioner Saathoff again dissented. (R. 191) Petitioner has appealed from that March 8, 1983, Denial of Motion for Review. (R. 194-197) That appeal is before this Court now.

ARGUMENT

POINT I. THE COMMISSION ACTED IN EXCESS OF ITS STATUTORY POWERS IN AWARDING PETITIONER BENEFITS FROM THE SECOND INJURY FUND FOR ONLY 10% OF PRE-EXISTING MILITARY PERMANENT PARTIAL DISABILITIES RATHER THAN AWARDING PETITIONER COMPENSATION AS REQUIRED BY SECTION 35-1-69 ON THE BASIS OF HIS COMBINED PRE-EXISITNG INJURIES RATED BY THE COMMISSION TO BE 32%.

The compensation to which Petitioner is entitled should be determined by the law in effect at the time of the injury in 1979. The law in effect in 1979 reflected no legislative intent to deny benefits from the Second Injury Fund on the basis of precluding double recovery. The historical purpose of the Second Injury Fund statutes in effect at the time of the injury was to encourage the hiring of handicapped veterans and civilians returning from war by creating the "special fund."

Petitioner has met the criteria entitling him to compensation from the Second Injury Fund for his 32% pre-existing military permanent partial impairment. The merger of Petitioner's successive disabilities entitles him to compensation from the Second Injury Fund. Petitioner's 37% permanent partial impairment is substantially greater than

the 5 permanent partial impairment he would have incurred if he had not had the pre-existing disability.

Compensation should be determined by the law in effect at the time of the injury

In case of an injury arising before the effective date of Section 35-1-69 as last amended in 1981 but not heard until afterward, the level of benefits to be awarded should be determined by the law in effect at the time of the injury, not at the time of the award. Smith v. Industrial Commission, Utah, 549 P.2d 448 (1976). The Administrator of the Second Injury Fund noted that the 1981 amendment to Section 35-1-69 "applies only to injuries that occurred on or after May 12, 1981, the effective date of the change." (R. 177) Petitioner injury occurred on December 1, 1979.

In Kincheloe v. Coca-Cola Bottling Co. of Ogden & State Ins. Fund, Utah, 656 P.2d 440 (1982), the Court observed in footnote 5 on page 442:

> "In 1981, the legislature did change the law in an apparent attempt to preclude "double recovery" for a pre-existing injury. Inasmuch as the incident here concerned occurred in 1980, we are bound to apply the law as of that date."

The statutory and case law in effect on December 1, 1979, evidenced no intent to deny compensation from the Second Injury Fund for pre-existing military permanent partial impairment. In the case at bar, the Commission exceeded its authority in applying recent statutory and case law precluding "double recovery" and in denying special fund payment.

The law in effect at the time of the injury

The law prior to the 1981 amendments to Section 35-1-69 regarding recovery from the Second Injury Fund where a merger of successive disabilities takes place was exemplified in Intermountain Smelting v. Capitano, Utah, 610 P.2d 334 (1980). In that case, the applicant for workmen's compensation fell and severely injured his right ankle while working on a construction project. The applicant had a pre-existing injury (he had been shot in the left leg while in the military service in Korea) for which he had been given a 30% disability rating and monthly compensation in the amount of $113 for life. A medical panel found that the applicant had sustained a 30% loss of use of his right foot; that the shifting in weight had also adversely affected the use of his left foot; and that the combined effects of both injuries amounted to a loss of bodily function of 25%. The Commission held that of the 25%, 8.5% was attributable to the construction injury and 16.5% to the pre-existing injury, but refused to order proportional contribution from the second injury fund. On appeal, this Court held that pursuant to statute, the employer is responsible for only the percentage of compensation and medical care which the industrial injury bears to the applicant's total disability; the remainder of the total disability is to be paid out of the second injury fund.

In Capitano, the Court recognized the Commission's desire to minimize expenditure from the Second Injury Fund, but

noted that it was necessary to [illegible] consideration to purposes of the statute [illegible] second injury fund.

> " . . . one of them is to make it easier for persons who have previous injuries or disabilities to obtain employment. Another is that the objective just stated is served by conferring a benefit upon employers by minimizing the risks to them in hiring such persons. See statements of Justice Tuckett, speaking for this Court in McPhie v. U.S. Steel Corp., Utah, 551 P.2d 504 (1976)." 611 P.2d at 337.

Capitano concerned an employer's right to reimbursement from the Second Injury Fund where the employee was awarded benefits for an industrial injury and for pre-existing military permanent partial impairment. The Commission made no attempt to deny the applicant there compensation for his pre-existing 16.5 military permanent partial impairment. The Commission, however, did attempt to begrudge the employer reimbursement from the Second Injury Fund on other grounds. The Court instructed the Commission:

> " . . .If it is (the Commission's) conviction that the law should be different (regarding disbursements from the Second Injury Fund), perhaps that should be addressed to the legislature, whose function and prerogative it is to make changes or clarifications in the law." Capitano, id.

In 1981, the Legislature amended Section 35-1-69. The Legislature expressed no intent in those amendments to deny compensation from the Second Injury Fund where an employee has suffered a pre-existing disability incurred in the military service of the United States.

Historical purpose of post-war enactment of special fund legislation

The "special fund" was created [illegible] the legislature

in 1921, slightly more than one year following the Treaty of Versailles which was ratified on January 10, 1920, and officially ended World War I. Section 3140, sub. 6 read:

> 6. If any employee who has previously incurred permanent partial disability incurs a subsequent permanent partial disability such that the compensation payable for the disability resulting from the combined injuries is greater that the compensation which except to the pre-existing disability would have been payable for the latter injury, the employee shall receive compensation on the basis of the combined injuries, but the liability of his employer shall be for the latter injury only and the remainder shall be paid out of the special fund provided for in subdivision 1 of this section." L. 1921, ch. 67.

It fairly can be said from the date of enactment, that the legislature intended through the enactment of subsection 6 to encourage the hiring of handicapped veterans and civilians returning from war by creating the "special fund."

Pennsylvania's second injury fund was created just after World War II. In a case quite similar to the case at bar, the Superior Court of Pennsylvania held that a handicapped employee, who had previously lost his right leg (presumably in the military service of the United States) and who later sustained an industrial injury, was entitled to receive benefits from that state's second injury reserve fund. Carpinelli v. Penn. Steel Castings Co. et al., 209 Pa.Super. 390, 227 A.2d 912 (1967).

In the opinion, the Pennsylvania court noted that Pennsylvania's second injury reserve fund statute had been enacted in 1945, when an influx of handicapped war veterans

was anticipated. The Pennsylvania legislature had indicated in its journal that the underlying purpose of the statutes was to liberalize the compensation law "to give the handicapped worker greater opportunity and . . .to provide less risk for employers . . ." The court ruled that the Workmen's Compensation Law, being remedial legislation, should be construed in favor of those it intended to benefit. The court affirmed the order of the Workmen's Compensation Board awarding the employee compensation from the second injury reserve fund.

The Utah legislature intended through the enactment of statutes creating the "special fund" in 1921 to encourage the hiring of handicapped veterans by relieving employers of liability for pre-existing impairment. The Utah legislature has not since repealed the "special fund" statutes or expressed an intent that the veterans the laws historically intended to benefit should be dispossessed.

To affirm the Commission's denial of Second Injury Fund compensation for Petitioner's pre-existing war injuries would be to disembowel the "special fund" statutes of the very purpose for which they were created. This Court must reverse the Commission's denial of benefits from the Second Injury Fund for the remainder of Petitioner's 37% permanent partial impairment.

Petitioner has met the criteria entitling him to compensation from the Second Injury Fund

Explicit statutory authority exists to award compensa-

tion from 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 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. United States Fidelity & Guaranty Company v. Industrial Comm'n. et al., Utah, 657 P.2d 764 (1983). These conditions are the conditions set forth in Section 35-1-69, Utah Code Annotated, 1953, as amended.

The Administrative Law Judge found that Petitioner had sustained permanent incapacity occasioned by accidental injury which occurred during World War II, while he was in the military service of the United States. The medical panel determined, and the Administrative Law Judge found, that Petitioner suffered a combined 32% pre-existing permanent partial impairment as the result of military injuries and surgery to relieve the pain of the injuries.

The Administrative Law Judge found that Petitioner incurred subsequent industrial injury on December 1, 1979, which resulted in further permanent partial incapacity of 5% of the whole man. The permanent incapacity resulting from the industrial accident was substantially greater than that which would have been incurred had there been no pre-existing incapacity. But for Petitioner's impaired agility he would not have suffered any injury at all when he slipped on the

ice and grease at the edge of the pit.

Merger of successive disabilities entitles Petitioner to compensation from the Second Injury Fund

The majority attempts to narrow the range of Second Injury Fund liability by denying compensation from the Fund for that portion of pre-existing problems which "were not exacerbated by the industrial accident." (R. 179) The Commission awarded Petitioner permanent partial benefits for the pre-existing 10% condition of the neck. The majority wrote:

> " . . . This area was directly involved in the industrial accident and the condition was substantially worsened as a result of that incident." (R. 180)

The majority misconstrues the "merger" doctrine as it generally applies in second injury fund cases. Professor Larson writes:

> " . . . The question sometimes arises whether the second injury must be shown to have been related to or to have acted upon the prior injury (footnote omitted) - as, for example, when the loss of a thumb combines with previous loss of fingers of the same hand. It is generally held that no such special relation between the injuries is necessary, so long as the existence of the former substantially augments the disability ensuing from the latter." Larson's Workmen's Compensation Law, Vol. 2, Section 59.32(f), pp. 10-444 to 10-447.

The learned professor concludes that even though injuries are not physically related, where a merger of successive disabilities takes place, a claimant is entitled to an award from the second injury fund.

In a footnote, Professor Larson cites Hermansen v. Web-

ster Outdoor Advertising Co., 230 So.2d 145 (Fla. 1970), where a finding that the claimant's prior leg injury had not "merged" with a subsequent injury because the leg condition was in no way affected by the second injury was held to be error, since merger does not require a reinjury of the previously injured part of the body. Larson, supra, footnote at the bottom of p. 10-446.

This Court has recently recognized the generally held requirement that where a merger of successive disabilities takes place a claimant is entitled to an award from the Second Injury Fund. In Kincheloe, supra, the Court wrote:

> "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 that he would have incurred if he had not had the pre-existing incapacity."

The claimant in Kincheloe would have been entitled to an award from the Second Injury Fund, but for the fact that the Administrative Law Judge had found that he had recovered from the 15% prior permanent parital pre-existing impairment he had sustained prior to his 1980 5% permanent partial industrial impairment.

The Commission erred in denying Petitioner compensation from the Second Injury Fund for all of his combined 32% pre-existing impairment and in awarding Petitioner compensation for only the 10% pre-existing neck condition, because only the 10% pre-existing neck impairment was ag-

gravated by the industrial accident. The Commission found that the neck condition was substantially worsened as a result of the industrial accident. Merger does not require a reinjury of each part of the body previously impaired. The Commission's finding that the neck condition was substantially worsened as a result of the industrial accident satisfies the requirement for compensation from the Second Injury Fund that Petitioner have suffered permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity. This Court must reverse the Commission's denial of compensation for all of the remainder of Petitioner's combined injuries.

Petitioner's permanent incapacity is substantially greater than he would have incurred if he had not had the pre-existing incapacity

Section 35-1-69, Utah Code Annotated, 1953, as amended, provided on December 1, 1979, 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 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 the employer for such compensation 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 hereinafter referred to as the "special fund." (Emphasis added.)

The Industrial Commission has struggled with the language "substantially greater." In Intermountain Health Care v. Ortega, Utah, 562 P.2d 617 (1977), this Court construed the language "substantially greater." There Justice Crockett wrote:

> 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 latter. It simply means that it be some definite and measurable portion of the causation of the disability." 562 P.2d at 619.

In Ortega, the Commission, as directors of the Second Injury Fund, posed its denial of benefits from the Second Injury Fund on the ostensible basis that because the pre-existing condition was quiescent and did not require medical treatment until the accident, the employer should be held responsible for the expenses thereof. The Court pointed out:

> " . . . that if the requirement of the statute is met, that is, if the resulting permanent incapacity is substantially greater than if the pre-existing incapacity had not existed, the proportionate causation must be found and that portion attributable to the previous condition paid out of the special fund. (See McPhie v. U.S. Steel Corp., 551 P.2d 504 (Utah 1976), concurring opinion of Justice Ellett.) Ortega, supra.

In White v. Industrial Comm'n., Nebo School District et al. v. Cragun et al., and the Paris Co. et al. v. Industrial Comm'n. et al., Utah 604 P.2d 478 (1979), this Court instructed the Industrial Commission to award compensation from the Second Injury Fund where pre-existing impairment was followed by further permanent incapacities

of 5% in the cases of applicants Christensen and White. The Court expressed no reservation regarding whether the 5% further incapacities incurred by applicants Christensen and White were substantially greater than those which would have been incurred had there been no pre-existing incapacities.

Similarly, in United States Fidelity & Guaranty Company, supra, the Court expressed no reservation regarding whether the possible 5% further incapacity incurred by the applicant there was substantially greater than that which would have been incurred had there been no pre-existing incapacity. The Court wrote:

> " . . . It is therefore necessary to remand this case to the Commission for the purpose of submitting (the issue of a medical panel determination of the impairment resulting from the industrial accident) to an appropriate medical panel. The medical panel shall then review the medical aspects of this case and determine the percentage of impairment resulting from the subsequent injury. After having been apprised of the determinations of the medical panel, the Commission shall then assign liability for the payment of present and future medicals." 657 P.2d at 767.

The Court instructed the Commission to determine whether the subsequent injuries sustained resulted in further permanent incapacity "which is substantially greater than he would have incurred if he had not had the pre-existing incapacity."

In the case at bar, Petitioner's 5% industrial impairment is 13.5% of the total impairment that he has suffered.

Under Ortega, McPhie and White, the law in effect at the time of Petitioner's industrial injury, Petitioner's pre-existing combined 32% impairment was a "definite and measurable portion of the causation of Petitioner's total 37% combined disability." It fairly can be said that that Petitioner's combined 32% impairment was a definite and measurable portion of the causation of Petitioner's subsequent 5% industrial impairment; but for Petitioner's reduced agility, he would not have suffered any industrial injury. Petitioner's pre-existing condition increased the resulting disability by 86.5%. Consequently, under the requirements of the statute in effect at the time of Petitioner's industrial accident, it follows that compensation should have been awarded from the Second Injury Fund for all of Petitioner's combined 32% per-existing impairment. The Court must reverse the Order of the majority denying Petitioner compensation for all but 10% of his pre-existing permanent partial impairment.

No authority exists to deny Petitioner compensation from the Second Injury Fund for pre-existing military impairment on the basis of "double recovery"

In 1981, the legislature did change the law in an apparent attempt to preclude "double recovery." Because the industrial injury aggravated Petitioner's pre-existing injury and because Petitioner's pre-existing injury was not compensated for under the Workmen's Compensation Act or

the Utah Occupational Disease Disability Law, the 1981 amendments would not preclude recovery in this case. Recent case law would not preclude recovery in this case either. In Paoli v. Cottonwood Hospital et al., Utah, 656 P.2d 420 (1982), the Court held that an injured employee should not be permitted to recover against the Second Injury Fund for a pre-existing condition attributable to an industrial injury for which he has already been compensated under the Workmen's Compensation laws of another state. In David v. Industrial Commission et al., Utah, 649 P.2d 82 (1982), the Court held that where an injured employee applied simultaneously for compensation for a pre-existing injury and for a subsequent industrial injury, the employee was not entitled to an additional award from the Second Injury Fund for the pre-existing impairment. Neither case stands for the proposition that a disabled American veteran permanently partially impaired as a result of an industrial accident should be denied compensation from the "special fund" created by the legislature to encourage the hiring of handicapped veterans.

World War I and II may be far behind us now, but that does not entitle the Commission to abrogate legislation intended, in some small way, to repay the debt the citizens of this state felt they owed to those who risked their lives and limbs to defend our precious nation. That the Congress chose to express its gratitude to our veterans by enacting

legislation to compensate them for injuries sustained in the service of our nation should not be held against these brave men. The laws intended to honor our veterans must be upheld. Lest we forget.

CONCLUSION

In McPhie, supra, the Commission refused the applicant compensation from the Second Injury Fund on the basis that his 100% permanent total impairment was not substantially greater than he would have incurred if he had not had a pre-existing 85% incapacity. The Court remanded the case to the Commission to make new findings regarding whether the applicant's permanent 100% incapacity was substantially greater than if he had not had a major pre-existing impairment.

In Ortega, supra, the Commission denied proportionate contribution from the Second Injury Fund to the employer because the applicant's pre-existing condition remained quiescent and did not require medical treatment until the subsequent industrial accident. The Court reversed the Commission's denial of contribution from the fund.

In White, supra, the Commission refused to order proportional contribution from the Second Injury Fund to the employer on the bases that the 3-year statute of limitations on the pre-existing injury had run (Christensen, Cragun), that the permanent incapacity was not substantially

greater than would have been incurred if applicant had not had the pre-existing condition (Christensen, White), and that the applicant was better off after the industrial accident by having had the pre-existing condition taken care of and stabilized (White). The Court reversed the Commission's denial of contribution from the fund.

In Capitano, supra, the Commission denied proportional contribution from the Second Injury Fund to the employer for medical and temporary total disability payments on the bases that the applicant's pre-existing injury had nothing to do with the subsequent industrial injury or the medical expenses or temporary total disability payments incident thereto and that payment of medical and temporary total disability would deplete the fund. The Commission made no attempt there to argue that the applicant should be denied compensation for his pre-existing service connected impairment because he was receiving veterans disability compensation from the United States government for his war injuries. The Court reversed the Commission's denial of contribution from the fund.

In U.S.F.&G., supra, the Commission apportioned present and future medical expenses between the pre-existing and subsequent insurance carriers and refused to order proportional contribution from the Second Injury Fund where pre-existing and industrial impairment had resulted from

four separate industrial accidents on the basis that the pre-existing and industrial impairment had resulted from an industrial accident, rather than from other non-industrial accidental, disease, of congenital causes. The Court did not subscribe to the reasoning of the Commission.

In Northwest Carriers et al. v. Industrial Comm'n et al. and Ingersoll et al. v. Camp et al., Utah, 639 P.2d 138 (1981), the Commission denied reimbursement from the Second Injury Fund to the State Insurance Fund for extrinsic factors contributing to total disability. The Court ordered reimbursement from the fund.

In Kincheloe, supra, the Commission attempted to deny compensation and proportionate contribution, inter alia, on the basis that the part of the body injured in the industrial accident bore no relation to the part of the body previously injured. The Court indicated the fact that the industrial injury was unrelated to the previous injury was not dispositive.

In the case at bar, the Commission again resolutely denies payment from the Second Injury Fund under theories inapplicable to the circumstances involved. To date the legislature had expressed no intent to repudiate the historical purpose of the Second Injury Fund to encourage the hiring of handicapped veterans and civilians returning from war by conferring a benefit upon employers. The Court

must construe the remedial Second Injury Fund statute, Section 35-1-69, Utah Code Annotated, 1953, as amended, in favor of one of those it intended to benefit.

The merger of Petitioner's successive 32% pre-existing military impairment with the 5% industrial impairment has resulted in permanent partial impairment substantially greater than Petitioner would have incurred if he had not been disabled during World War II. The Commission found that Petitioner's condition was "substantially worsened as a result of that incident." (R. 180) The fact that Petitioner's back was not reinjured in the 1979 industrial accident is no basis for denying him compensation from the Second Injury Fund. The fact that the industrial impairment is a definite and measurable portion of the causation of Petitioner's 37% permanent partial disability is dispositive. The Court must reverse the Order of the Majority denying Petitioner compensation for all but 10% of his pre-existing permanent partial military impairment and must order the Commission to award Petitioner compensation from the Second Injury Fund for the remainder of his combined injuries.

DATED this 4th day of July, 1983.

Virginia Curtis Lee

VIRGINIA CURTIS LEE
Attorney for Applicant and
Petitioner

CERTIFICATE OF SERVICE

Mailed a true and correct copy of this PETITIONER'S BRIEF to:

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