

1983

**American Coal Co., Emery Mining Corp., And State Insurance Fund  
v. Terry W. Sandstrom, Industrial Commission of Utah, And  
Second Injury Fund : Brief of Respondent Industrial Commission  
Of Utah And Second Injury Fund**

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IN THE SUPREME COURT OF THE STATE OF UTAH

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AMERICAN COAL CO.,	)	
EMERY MINING CORP.,	)	
and STATE INSURANCE FUND,	)	
	)	
Plaintiff/appellant,	)	Case No. 19134
	)	
vs.	)	
	)	
TERRY W. SANDSTROM,	)	
INDUSTRIAL COMMISSION OF	)	
UTAH, and SECOND INJURY FUND,	)	
	)	
Derendants/Respondents.	)	

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BRIEF OF RESPONDENT  
INDUSTRIAL COMMISSION OF UTAH AND  
SECOND INJURY FUND

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Utah Code Annotated §35-1-69, as amended . . . . .	1,2,3,4 6,10,13
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### Cases Cited

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BRIEF OF RESPONDENT  
INDUSTRIAL COMMISSION OF UTAH AND  
SECOND INJURY FUND

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NATURE OF THE CASE

The Appellant State Insurance Fund is seeking reimbursement from the Second Injury Fund under Section 35-1-69 Utah Code Annotated, as amended.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Order and the Supplemental Order of the Industrial Commission addressed two issues: The first issue was whether, under Section 35-1-69, as amended, and which became effective May 12, 1981, the State Insurance Fund was eligible for reimbursement for payments for the accident of 11/23/81 of medical care and temporary total disability prior to the applicant's date of stabilization. The Order held: "The State Insurance Fund is not entitled to reimbursement" for that period. (R-213) The second issue raised was whether Section 35-1-99, Utah Code Annotated applies to the Second

Injury Fund as well as to the employer/insurance carrier. The Order held that "the right to compensation shall be wholly barred" did not apply to the Second Injury Fund. (R-204)

#### RELIEF SOUGHT ON APPEAL

Respondents request the Order of the Industrial Commission denying reimbursement to the State Insurance Fund under the amended portion of §35-1-69 Utah Code Annotated for temporary total disability and payments for medical care be affirmed. Respondents further request that the denying of the Second Injury Fund to the provisions of Section 35-1-99 be reversed and that any claim for compensation be wholly barred.

#### STATEMENT OF FACTS

Sandstrom sustained personal injury in four separate accidents arising out of or in the course of his employment. The dates of these accidents are as follows: November 21, 1977, May 4, 1979, December 17, 1980, and November 23, 1981. (R-39)

The first three accidents were while employed by American Coal Company, who in 1980 changed their name to Emery Mining Corporation and in November of 1981 he was employed by Gusco, Inc. (R-38, 39)

The State Insurance Fund was the insurance carrier for both employers and all the accidents. On July 30, 1982, the State Insurance Fund entered into a settlement agreement

with Sandstrom for the 1981 accident only and was for 10% of the whole. The Second Injury Fund was not a party to that agreement.

There was no permanent impairment attributed to the 1979 accident.

As a result of the other three accidents, applicant has suffered a total overall impairment of 20% permanent partial disability of the whole man to his back and 10% permanent partial disability of the whole man to his neck. (R-39) There was also a Settlement Agreement of all the parties of January 11, 1983. Appellant's Brief.

In addition to the question of reimbursement under amended §35-1-69, the question was raised as to whether claims which are "wholly barred" applies to the Second Injury Fund.

#### ISSUE ON APPEAL

Does Section 35-1-69 provide for reimbursement to the insurance carrier for medical expenses and temporary total disability compensation up to the time of stabilization of injuries under the 1981 amendment? A second issue is whether Section 35-1-99 applies to the Second Injury Fund.

A corollary issue concerning the first issue on reimbursement is whether the settlement agreement of July 30, 1982, between Sandstrom and the State Insurance Fund can later



be redefined or altered to allow the State Insurance Fund to obtain reimbursement from the Second Injury Fund.

#### ARGUMENT I

##### THE ORDER OF THE COMMISSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Order of the Industrial Commission interpreting the 1981 amendment or §35-1-69 must be confirmed when supported by substantial evidence and reasonable inferences to be drawn therefrom.

As stated in Kaiser Steel Corp. v. Monfredi, 631 P.2d 888 (1981), and reaffirmed in Sabo's Electronic Service v. Sabo, 642 P.2d 722 (1982), and in Kincheloe v. State Insurance Fund, 656 P.2d 440, (1982), the scope of review in Industrial Commission cases is limited to:

[W]hether the Commission's findings are "arbitrary or capricious," or "wholly without cause" or contrary to the "one [inevitable] conclusion from the evidence" or without "any substantial evidence" to support them. Only then should the Commission's findings be displaced.

The conclusions reached by the Commission regarding the claimed apportionment by the Appellants under Section 35-1-69 are entirely consistent with what the Commission knew the changes meant that were made by the legislature to Section 69.

## ARGUMENT II

THE 1981 AMENDMENTS TO 35-1-69 SPECIFICALLY DISALLOWED  
APPORTIONMENT FOR MEDICALS AND TEMPORARY TOTAL DISABILITY  
UP TO THE END OF TEMPORARY TOTAL DISABILITY

As has been stated before and as the surge of  
appealed cases to this court testifies, the cases of McPhie v.  
U.S. Steel Corp., 551 P.2d 504 (Utah 1976), Intermountain  
Health Care v. Ortega, 562 P.2d 617 (Utah 1977), White v.  
Industrial Commission, 604 P.2d 478 (Utah 1979) and  
Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah  
1980) drastically changed the concept of the law of workmen's  
compensation that had been successfully followed for more than  
thirty years. One of the severe changes was in giving  
reimbursement to the insurance carrier for medical expenses and  
total temporary disability compensation. The reimbursement was  
to be paid by the Second Injury Fund on the basis of the  
percentage of permanent partial disability attributable to any  
pre-existing condition, related or non-related to the  
industrial injuries. No state law has made such reimbursement  
either by statute or court ruling.

To bring back some logic to this direction forced  
upon the Commission, amendments were proposed in 1981 to the  
legislature by Workmen's Compensation Advisory Council. This  
Council has members representing the employer, the employee and  
the insurance carrier.

The changes made by the legislature in Section 35-1-69 followed the agreed upon amendments prepared by the Advisory Council. One of the important amendments was for the very purpose of reversing the ability of carriers to receive reimbursement for medicals and temporary total disability compensation on the basis of the percentage of pre-existing impairment for the first period of temporary total disability resulting from the industrial injury.

The following paragraph is entirely new language.

Where the payment of temporary disability benefits, medical expenses, or other related items are required as a result of the industrial injury subject to this section, the employer or its insurance carrier shall be responsible for all such temporary benefits, medical care, or other related items up to the end of the period of temporary total disability resulting from the industrial injury. Any allocation of disability benefits, medical care, or other related items following such a period shall be made between the employer or its insurer and the second injury fund as provided for herein, and any payments made by the employer and its insurance carrier in excess of its proportionate share shall be recoverable at the time of the award for combined disabilities if any is made hereunder. Utah Code Ann. §35-1-69 (Supp. 1981). (Emphasis added.)

It should be noted that the non-apportionment is "up to the end of the period of temporary total disability resulting from the industrial injury." This language allows apportionment for future medicals and future temporary total disability that occurs after the initial period of temporary

total disability has ended. This language of allocation following such a period was insisted upon by some members of the Advisory Council who didn't want to give up all the benefits which had accrued to the carriers under the court interpretation of the old statute.

The amended statute by its wording and by specific intent now provides for reimbursement only after the initial period of temporary total disability.

The legislative amendment was drafted by the Council to read that the employer was obligated to pay all benefits for the first period of temporary total disability, and that after such a period, there would be an apportionment between the employer and the Second Injury Fund for "future" benefits. The language of the 1981 amendment above clearly states that the employer or insurance carrier shall pay compensation benefits and medical care during the first period of temporary total disability caused by the industrial accident and then after "such a period," there would be an apportionment between the employer and the Second Injury Fund for "future" benefits.

This case is the first one brought under this particular part of amended Section 69. The cases cited by the State Insurance Fund do not pertain and are not relevant to the amended language of that section.

### ARGUMENT III

THE PROVISION OF SECTION 35-1-99 WHICH STATES THAT  
"IF NO CLAIM FOR COMPENSATION IS FILED WITH THE INDUSTRIAL  
COMMISSION WITHIN THREE YEARS FROM THE DATE OF THE  
ACCIDENT OR THE DATE OF THE LAST PAYMENT OF COMPENSATION,  
THE RIGHT TO COMPENSATION SHALL BE WHOLLY BARRED,"  
APPLIES TO THE SECOND INJURY FUND

The Administrative Law Judge, over the objections of the Second Injury Fund (R-42, 204 and 213) incorrectly determined that Section 99 did not apply to the Second Injury Fund. The Order then said the Second Injury Fund must pay compensation and medical for the 1977 and 1979 accidents as they pre-existed the last accidents, even though the carrier for all the accidents, the State Insurance Fund, claims exeptions because of Section 99.

The wording of the statute is clear and must apply to all insurers and obligors: ". . . IF NO CLAIM FOR COMPENSATION IS FILED WITH THE INDUSTRIAL COMMISSION WITHIN THREE YEARS FROM THE DATE OF THE ACCIDENT OR THE DATE OF THE LAST PAYMENT OF COMPENSATION, THE RIGHT TO COMPENSTION SHALL BE WHOLLY BARRED", emphasis added.

Obviously the purpose of Section 35-1-99 is to bar stale or untimely filed claims. The Statute is clear in its wording that such claims are wholly barred, not solely barred against the employer or its insurance carrier.

Section 35-1-99 did not read that - - the right to compensation shall be wholly barred but that if you fail to

file a claim within three years you can always receive your compensation from the Second Injury Fund as a pre-existing condition. Such a reading would destroy or abolish the effect of Section 35-1-99. Should the Industrial Commission interpret Section 35-1-99 to read as such, the effect of such an interpretation is that no claims are wholly barred. In other words, if the applicant or the applicant's attorney can not resurrect an old untimely filed claim against the employer, the party can file for a hearing on a new claim alleging that the new industrial injury aggravated the "wholly barred" injuries and therefore, those wholly barred injuries are now pre-existing conditions allowing for compensation from the Second Injury Fund for the previously wholly barred claims. Consequently, there is no such statute as a wholly barred claim and the effect is to eliminate Section 35-1-99.

Should it be the desire to alter Section 35-1-99, such a change should be made by the State Legislature in redrafting the Statute, and not for the Industrial Commission or our courts to interpret the Statute to read that a "wholly barred claim" does not really mean a claim is wholly barred, but that the claim is merely barred against the defendant employer and not the other defendant.

The arguments, if there are any, that Section 35-1-99 is an applicable defense against the employer or its insurance carrier only, and not the Second Injury Fund would likely be:

1. Pursuant to prior court determinations, a wholly barred claim under Section 35-1-99 has never been applied as a defense against the right of an applicant to receive compensation from the Second Injury Fund.

2. Pursuant to Section 35-1-69, the Second Injury Fund must pay compensation on all pre-existing incapacities regardless if the claims are wholly barred under Section 35-1-99.

The first argument fails because the Utah Supreme Court has never directly addressed the issue of the applicability of the statute of limitations defense under the Utah Code against the liability of the Second Injury Fund. The Court has not held that Section 35-1-99 does not apply against the Second Injury Fund and that if a claim is wholly barred against the employer, the claim is not "wholly barred" but that the applicant can now be paid by the Second Injury Fund as a pre-existing incapacity. The Second Injury Fund is a separate entity and as such should be allowed to raise the same defenses under the Workmen's Compensation Statutes as any other party

defendant, as the Supreme Court stated in Paoli v. Cottonwood Hospital, 656 P.2d 410 (Utah 1982).

"The law creating the Second Injury Fund provides . . . shall . . . represent the Second Injury Fund in all proceedings brought to enforce claims against it . . . The latter provisions established the Legislature intent that the Second injury Fund has the capacity to defend itself against the claims . . . (under the Workmen's Compensation Statutes) . . . pursuant to that intent, we have consistently treated the Second Injury Fund as a separate entity for the purposes of its defense and liability for claims . . . "

The Court further stated:

The current employer is only responsible for the percentage of permanent impairment attributable to the industrial injury (or injuries), and the Second Injury Fund is responsible for the remainder . . . "

The second possible argument is also based on a false presumption. The Second Injury Fund does not pay on all pre-existing incapacities. Under Calvin David v. Industrial Commission, 649 P.2d 282 (1982), the second Injury Fund does not pay compenstion for a pre-existing impairment that has already been compensated. Also, pursuant to Section 35-1-99, the Second Injury Fund does not pay compensation on a claim that has been wholly barred by the Statute of Limitations.

It is necessary, of course, that the barring of claims under Section 99 applied only to industrial accidents and not to previously incurred incapacities which were not from industrial accidents.



To find that the wholly barred industrial claims of 1977 and 1979 can be reinstated as a pre-existing condition, allows this applicant, and all other similarly situated, to circumvent this section of the law. The language of the Statute is clear and convincing that the 1967 and 1976 claims may be wholly barred as they apply to both employer and the Second Injury Fund. To allow such claims to come through the back as a pre-existing claims, would open the back door to all prior claims tht have been barred by Section 35-1-99.

#### ARGUMENT IV

#### COMPENSATION AND OTHER OBLIGATIONS FOR THE 1981 ACCIDENT WERE "SETTLED" BY THE JULY 30, 1983 AGREEMENT.

Although the previous argument (II) under the 1981 amendment to Section 69 is controlling the Second Injury Fund is likewise not subject to reimbursing the State Insurance Fund for 50% of the medicals and total temporary disability because the 1981 accident had been settled. A settlement agreement was made between the State Insurance Fund and Mr. Sandstrom on July 30, 1982 (R-194). The State Insurance Fund cannot now to their benefit after their legal obligation as stipulated by them in their prior negotiated agreement in order to refer the case to include reimbursement from the Second Injury Fund. See this Respondent's Brief in Rhodes v.

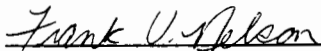
Industrial Commission, #19163, a case which is now before the Court.

CONCLUSION

The Commissions Order denying the State Insurance Fund from receiving reimbursement for medicals and temporary total disability compensation up to the end of the initial period of temporary total disability should be affirmed. Such a position was intended and is made clear by the amendments to Section 35-1-69.

Section 99 precludes any obligation on the Second Injury Fund for claims which bar recovery from the State Insurance Fund and other issuers.

DATED this 12th day of August, 1983.

  
\_\_\_\_\_  
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MAILING CERTIFICATE

I hereby certify I mailed two true and exact copies  
of the foregoing Brief of Respondent, first-class, postage  
prepaid to the following parties:

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DATED this 12<sup>th</sup> day of August, 1983.

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