1985

San Juan Pools and or State Insurance Fund v. David D. Sweeney, Utah State Second Injury Fund and Utah Industrial Commission : Vaughn's Heating and Appliance and or State Insurance Fund v. Mike Maupin and Utah State Second Injury Fund and Utah Industrial Commission : Brief of Respondent

Utah Supreme Court

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Fred R. Silvester, Esq.; Attorney for State Insurance Fund. Gilbert A. Martinez, Esq.; Attorney for Second Injury Fund.

IN THE SUPREME COURT OF THE STATE OF UTAH

SAN JUAN POOLS and/or STATE INSURANCE FUND, 1985 20460	:	
Plaintiffs on Appeal/ Appellants,	:	Case No. 20460
-v-	:	
DAVID D. SWEENEY, UTAH STATE SECOND INJURY FUND AND UTAH INDUSTRIAL COMMISSION,	:	
Defendants on Appeal/ Respondents.	:	

VAUGHN'S HEATING AND APPLIANCE and/or STATE INSURANCE FUND,	:	
Plaintiffs on Appeal/ Appellants,	:	
-v-	:	Case No. 20474
MIKE MAUPIN AND UTAH STATE SECOND INJURY FUND AND UTAH INDUSTRIAL COMMISSION,	:	
Defendants on Appeal/ Respondents.	:	

BRIEF OF RESPONDENT
SECOND INJURY FUND AND INDUSTRIAL COMMISSION

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BRIEF OF DEFENDANT
SECOND INJURY FUND

Nature of the Case

This is a writ of review from an order of the Industrial Commission of Utah.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Does Utah Code Ann. Section 35-1-69, as amended by the Utah Legislature in 1981, require payment of reimbursement out of the Second Injury Fund to the State Insurance Fund, insurance carrier for two above named employers, for medical expenses and temporary total disability compensation incurred directly from industrial injuries where the industrial accident did not aggravate the injured worker's pre-existing incapacities, or where the pre-existing incapacities did not make the industrial injuries substantially greater than they would have been otherwise.

PROVISION WHOSE INTERPRETATION IS DETERMINATIVE

Utah Code Ann. Section 35-1-69, as amended by the Utah Legislature in 1981, and became effective on May 12, 1981 (SEE ADDENDUM, EXHIBIT A).

STATEMENT OF THE CASE

The defendant Second Injury Fund concurs in the statement of facts contained in the brief of the plaintiff/appellant State Insurance Fund, insurer for San Juan Pools and Vaughn's Heating & Appliance. The Second Injury Fund notes additionally that it has paid to David D. Sweeney compensation in the amount of $6,722.00, and has paid to Mike Maupin compensation in the

amount of $2,347.00. These payments were made by the Second Injury Fund directly to the injured workers for permanent partial impairments, without any reimbursement to the insurance carrier.

SUMMARY OF ARGUMENT

The statute which created the Second Injury Fund was enacted to encourage the hiring of handicapped workers by spreading the risk between the Second Injury Fund and the employer in only those cases where the industrial injury was aggravated by a pre-existing incapacity, or in cases where the industrial injury was made substantially greater than it would have been but for the previous incapacity. The purpose of the Second Injury Fund is accomplished in those cases where the previous incapacity combines with the industrial injury by a special nexus, such as an aggravation or the substantially greater test. By holding the employer responsible for the industrial injury only and the Second Injury Fund liable for the previous incapacitites that added specifically to the combined injuries under U. C. A. Section 35-1-69 of the Utah Worker's Compensation Act, the employer is encouraged to hire the handicapped by knowing that it will not be held responsible for the previous condition which contributes to, or combines with the industrial injury.

However, in those cases where the prior incapacity adds nothing to, or does not causally contribute to the temporary total disability compensation and medical care of an injured worker following an industrial injury, there should be no apportionment of liability and no reimbursement to insurance carriers. In such cases, the employer's insurer pays only those benefits that were 100% caused by the industrial accident, and the employer, as well as the Second Injury Fund, are not responsible for medical care flowing from totally unrelated health problems that have no nexus with the industrial event.

Allowing reimbursement from the Second Injury Fund on the basis that the injured worker had a previous health problem that was "unaggravated and contributed nothing in making the industrial injury substantially greater" would defeat the purpose of the Second Injury Fund. The law specifically requires that the previous incapacity "combines" with the industrial injury by an aggravation or by making it substantially greater than it would be otherwise. This causal nexus of "combining injuries" must be established. Unless these conditions of entitlement are met, the employer or its insurer shall be liable for all the medical care and temporary total disbility which was caused solely by the industrial event.

In the two cases at bar, the prior incapacities were not aggravated by the industrial accidents, and the previous health problems did not make the industrial injuries substantially greater

than they would have been otherwise. Consequently, 100% of medical benefits were caused by the industrial injury and shall be the sole responsibility of the employer, without any right of reimbursement against the Second Injury Fund.

AGRUMENT

POINT I

A 10% IMPAIRMENT FROM THE INDUSTRIAL ACCIDENT DOES NOT AUTOMATICALLY INVOKE REIMBURSEMENT FROM THE SECOND INJURY FUND WITHOUT FIRST SHOWING A SUBSTANTIALLY GREATER REQUIREMENT OR AN AGGRAVATION.

This action for review raises an issue of first impression on an amendment to Utah Code Ann. Section 35-1-69 of the Utah Worker's Compensation Act, enacted by the Utah Legislature in 1981. The question to be resolved is what responsibility the defendant Second Injury Fund has under the amended statute for impairments which pre-existed the two industrial injuries, but were not affected by or related to the injuries.

The pertinent portion of Section 69 of the Act, the provision which determines the liability of the Second Injury Fund for the previous incapacities is as follows: (A Copy of the entire provision is included in Appendix A.)

> 35-1-69. Combined injuries resulting in permanent incapacity-Second Injury Fund -- Training of Employee.

"(1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which either compensation or medical care, or both, 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, or which aggravates or is aggravated by such pre-existing incapacity, compensation, medical care, and other related items as 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, medical care, and other related items shall be for the industrial injury only and the remainder shall be paid out of the second injury fund provided for in section 35-1-68 (1).

For purposes of this section, (a) any aggravation of a pre-existing injury, disease, or congenital cause shall be deemed "substantially greater", and compensation, medical care, and other related items shall be awarded on the basis of the combined injuries as provided above; provided, however, that (b) where there is no such aggravation, no award for combined injries shall be made unless the percentage of permanent physical impairment attributable to the industrial injury is 10% or greater and the percentage of permanent physical impairment resulting from all causes and conditions, including the industrial injury, is greater than 20%. . . ."

In defendant's view, the meaning of the amended statute is clear. The plain language of the first paragraph establishes alternative requirements for entitlement to Second Injury Fund benefits: 1) Substantially Greater, OR 2) Aggravation. Either the pre-existing impairment must have caused the current industrial impairment to be "substantially greater" than it would have been otherwise, or the industrial injury must have aggravated or been aggravated by the pre-existing impairment.

The second paragraph of the amended statute then defines what is meant by an "aggravation" under the first paragraph.

Aggravation provides under part (a) that any aggravation of a pre-existing impairment is automatically deemed substantially greater for that aggravated pre-existing injury, and that (b) where there is no aggravation no award for the pre-existing injury shall be made unless the percentage of impairment attributable to the industrial injury is 10% or greater and the percentage of impairment resulting from all causes is greater than 20%. Subdivision (b) is not applicable in the instant cases because the Commission held that there was no aggravation or substantially greater as required by the statute.

In order for the plaintiff State Insurance Fund to be entitled to reimbursement for the payment of industrially related benefits, it must establish: 1) That each of the pre-existing impaired body parts were "aggravated by" the industrial event, OR 2) That each of the pre-existing body incapacities made the industrial injury "substantially greater" than it would have been otherwise. The State Insurance Fund has simply failed to show in either case, the previous incapacities were aggravated by the industrial injury OR that the industrial injury is now substantially greater because of the pre-existing conditions.

In the case of Mike Maupin, the applicant Maupin sustained an industrial accident during the course of employment on June 16, 1982, when he fell from a ladder. The injury resulted in a 5% loss of bodily function for a sprain of the back, a 15% loss of function

for psychiatric diagnoses secondary to the industrial event, and a 17% hearing loss in the right ear. This totals 37% impairment caused by the industrial accident. However, when combined on the values chart, the resulting industrial impairment was 33%.

Before this accident in 1982, the applicant Maupin had a previous incapacity of the left hand, which was rated at 22% of the whole person. The industrial injury of 1982 did not aggravate this left hand incapacity, and in addition, the left hand problem did not make the industrial injuries substantially greater than they would have been but for the prior hand problem. In other words, the pre-existing hand incapacity added nothing to, or did not contribute to the industrial injuries of the back, psychiatric or hearing loss.

The State Insurance Fund, on appeal, erroneously seeks to receive a 46% reimbursement of all the medical expenses it paid in treating the applicant's industrial injuries of the back, psychiatric and hearing. The basis for the 46% reimbursement request is that the applicant Maupin had a pre-existing hand problem. This arbitrary request is made without any showing how the previous hand problem added to, or contributed to the medical care flowing from the industrial accident.

The Industrial Commission ruled that the employer and/or its insurer, the State Insurance Fund, were fully responsible for the industrial injury only. By the Commission order, the State Insurance Fund is liable for all the benefits flowing

directly from the industrial event, including the medical care of treating the back strain, the psychiatric deficiencies, and the hearling loss. In addition, the Commission's order required the employer's insurer to be responsible for the compensation, such as the temporary total disability compensation for lost wages and permanent partial disability for residual impairments sustained by the applicant.

The final order of the Commission is not arbitrary or capricious. The Commission's order is supported by the statutory langugage of U. C. A. Section 35-1-50 (compensation shall be paid out of the State Insurance Fund for loss sustained on account of such injury) and U. C. A. Section 35-1-69 (compensation, medical care and other related items. . . shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation, medical care, and other related items shall be for the industrial injury only . . .). In the instant case, all of the medical costs and temporary total disability were from the industrial injury only, and therefore, such benefits are the sole responsiblity of the State Insurance Fund.

The findings of the Commission are supported by a preponderance of the evidence. The final order is supported by the Medical Panel report of January 10, 1984,

> "6. What percentage of medical costs were due to the industrial accident and what percentage of medical costs

were due to pre-existing conditions:

Answer: To the best the panel can determine, 100% would be due to the industrial conditions involving this 6-16-82 injury." Emphasis Added.

In the case of David D. Sweeney, the applicant Sweeney sustained an industrial accident during the course of employment on July 18, 1983, when a fiberglass fell and hit Mr. Sweeney on the head and neck. The injury resulted in the excision of a herniated cervical disc, which resulted in an industrial impairment of 20% of the whole man. Prior to this neck injury, the applicant Sweeney had the following previous incapacities: 1) 5% loss of body function of the lower extremity for a left knee injury; 2) 15% loss of body function of the lower extremity for a left knee incapacity; 3) 5% loss of body function for a thoracic spine non-industrial injury; and 4) 5% loss of body function for left hand and wrist non-industrial injury. Based upon the above medical findings, the Industrial Commission ordered the employer and its insurance carrier to pay all the medical expenses for the treatment of the applicant's neck injury, and did not require the employer to pay any medical costs regarding treatment of the applicant's pre-existing left knee, thoracic spine, or left hand and wrist.

The employer's insurer now erroneously argues that it should be reimbursed at 27/42 or 64% of all the medical costs that it paid for the applicant's July 18, 1983 industrial injury to his neck. This contention is made by the State Insurance Fund

without submitting any evidence on how the previous left knee, thoracic spine and left hand and wrist added to or contributed in any way to the treatment of the cervical neck injury. It is obvious from the Commission record that 100% of the medical costs in treating the neck injury were incurred by the industrial event when the fiberglass fell and hit Mr. Sweeney on the head and neck.

The defendants contend that even if the "substantially greater test" of Section 69 is not satisfied, the Second Injury Fund is liable when an "aggravation test" is established. Recent amendment to Section 69 provide that the Second Injury Fund may be liable for benefits if substantially greater permanent incapacity results, or if the industrial injury aggravates or is aggravated by such pre-existing incapacity.

The defendant Second Injury Fund concedes its liability for benefits associated with a pre-existing condition that is aggravated by the accident. Plaintiff State Insurance Fund erroneously advances the argument that whenever an industrial injury results in a 10% impairment all previous incapacities result in Second Injury Fund reimbursement regardless of their effect on the injury. To that end, the State Insurance Fund points to the ratings of 10% or greater for the injury and greater than 20% combined to argue for reimbursement when there is no aggravation and no substantially greater than.

Even if the applicant does have a 10% industrial impairment within the meaning of the statute, the unrelated pre-existing conditions do not give rise to Second Injury Fund liability. From its terms it is obvious that subsection 69 (1) (b) does not create a new form of Second Injury Fund liability. It operates instead as a limitation on the Fund's liability in cases where the "substantially greater test" has been satisfied but there has been no aggravation within the meaning of the statute. For example, if a medical panel reported that a pre-existing condition caused an industrial impairment to be "substantially greater" than it would have been otherwise, but the applicant's over-all impairment is less than 20% or the industrial impairment is less than 10%, no Second Injury Fund liability arises. However, the mere fact that an injured worker has an over-all impairment of 20% and an industrial impairment of 10% does not automatically entitle him to benefits. The "substantially greater test" must be satisfied, as provided for in paragraph one, regardless of the percentage of impairment involved. As this Court stated recently in the case of American Coal Co. v. Sandstrom, Utah Sup. Ct. Case No. 19134, filed May 1, 1984

> The first paragraph of amended Section 35-1-69 (1), with the exception of minor wording changes unrelated to this appeal, is virtually unchanged in substance

> from the pre-1981 statute. The plain meaning of this paragraph controls the interpretation of the remainder of 35-1-69 (1).

The purpose of the statute under the controling provision (first paragraph) was obviously to require two separate tests of entitlement, and to provide that the "substantially greater" or the "aggravation" requirements should be applied under different standards of proof. The new 1981 amendment of the U. C. A. Section 35-1-69 did not alter the test of "substantially greater." This test continues to requre some finding of a relationship or interrelationship between the current industrial event and all the pre-existing incapacities. Intermountain Health Care v. Ortega, 562 P. 2d 617 (Utah 1977); and 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" of both the pre-existing and industrial impairments entitled the applicant to an award of benefits on the theory that the shifting of weight from the industrial 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 effected his new injury.

The "substantially greater" test therefore requires a finding of some relationship between the industrial injury and the pre-existing incapacity or an increase in the industrial impairment because of the pre-existing incapacities. As the Court observed in U. S. F. & G. v. Industrial Commission, 657 P.2d 764-76 (Utah 1983), and has not been modified by the 1981 amendment:

> . . . statutory authority exists to apportion compensation awards. . . provided pertinent conditions are met . . . (1) (previous) 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. . .therefore. . .the Commission is statutorily obligated to determine whether the subsequent injuries sustained . . have resulted in further permanent incapacity which is substantially greater.

This Court conclusively resovled the issue of "substantially greater" in Day's Market, Inc. v. Muir, 669 P.2d 440 (Utah 1983). In Day's Market the Commission denied the worker combined benefits under Section 69 because he had failed to show how the pre-existing incapacity had the "effect" of substantially increasing the current industrial impairment. 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 unless it can be said that the current incapacity is substantially greater than it would have been "but for" the pre-existing incapacity.

From the total language of the statue, it is clear that "any aggravation" of an indivdual body part meets the test of "substantially greater" for that aggravated body part. And where there is no aggravation no combined injuries shall be found unless the percentage of phycial impairment from the industrial injury is 10% or greater and the impairment resulting from all causes is greater than 20%. The words "any aggravation" simply means that there may be an aggravation of any body part. An aggravation is not restricted to certain physical structures of the body. Thus, an aggravation of a prior back problem entitles an insurer to reimbursement. But where the industrial injury is to the back and the prior health problem is to a finger, this is not an aggravation and the employer is not entitled to reimbursement.

The requirement of "any aggravation" under this definition requires a "causal connection" between the current industrial impairment and the previous incapacity. In the instant cases, no such "causal connection" was made between the industrial injury and the prior incapacities. The amended statute is clear that in those cases where there is no aggravation no benefits shall be awarded for those non-aggravated body parts without a showing that the prior unrelated health problems have made the industrial injury substantially greater and in addition, the industrial impairment was 10% or greater and the combined injuries were greater than 20%. In the two cases at bar, the percentage ratings are establish-

ed, but the "substantially greater" requirement under the controlling provision of the statute has not been established. Consequently, the Industrial Commission denied both employers the right of reimbursement where all the benefits flowing from the injuries were the direct cause of the industrial accident.

Should this Court adopt the plaintiff State Insurance Fund's erroneous contention that they should be reimbursed solely under the 10/20 ratings for all payments made in treating the industrial injuries, the decision would result in the Second Injury Fund reimbursing all future cases for countless totally unrelated health problems, such as hearing and vision loss, heart and lung conditions, obesity, arthritis, diabetes, alcoholishm and learning disabilities due to previous conditions that existed before the industrial injury. Reimbursements solely because of 10/20 percentages will allow a windfall to the employer, <u>without</u> requiring the employer to make a showing of how the previous incapacities effected the injured worker's industrial injuries to make it "substantially greater" or whether the previous body impairments were "aggravated by" the current accident. Such a result would be inconsistent with the purpose of the Worker's Compensation Act which is to apportion liability for the ultimate effects of the industrial injuries, but not to provide a general health insurance program for any and all health problems a worker suffers.

Considering the statutory scheme of the amendment to Utah Code Ann. Section 35-1-69 and the cited cases, a clear reading of the Act establishes the following: a) the prior incapacities did not make the current injuries substantially greater; and b) the industrial injuries did not aggravate or was not aggravated by the pre-existing incapacities. Therefore, no provision in the statute demands that the Commission should rule that the insurer should receive Worker's Compensation reimbursement for unrelated health impairments. The State Insurance Fund's position is in conflict with the plain language of the amendment and is based on an assumption that the Utah Legislature intended by the amendment to expand the Worker's Compensation Act to reach health problems completely unrelated to employment conditions, an assumption which is totally unfounded.

POINT II

EMPLOYER'S INSURANCE CARRIER IS NOT ENTITLED TO A REIMBURSEMENT FOR BENEFITS INCURRED DIRECTLY FROM AN INDUSTRIAL ACCIDENT, WHERE THE PRIOR PROBLEMS ADDED NOTHING TO THE INDUSTRIAL BENEFITS.

The plaintiff erroneously argues that based upon the current industrial accident, the employer should be entitled to reimbursement from the defendant because the injured worker had

a previous condition, although the prior incapacities were totally unrelated to the injuries and treatment of those accident caused injuries.

In the two entitled matters, the Commission has ruled that since the applicant's medical expenses arose from the industrial events, the payment of benefits was the exclusive responsibility of the employer. The position taken by the Commission is that before the employer is entitled to reimbursement under Section 69, the insurer is required to show that the previous incapacities made the industrial injuries "substantially greater" but for the prior incapacities. Day's Market v. Muir, 669 P.2d 440 (Utah 1983); Kincheloe v. Coca-cola Bottling Co. of Ogden, 656 P.2d 764 (Utah 1982). Or, a prima facie showing of an aggravation is required under the new threshold.

Very simply, in the two cases at bar, the Commission denied the insurer any reimbursement from the defendant Second Injury Fund because all of the medical and temporary total disability benefits resulted from the industrial injuries only, which were the sole responsibility of the employer's insurance carrier. Clearly, the statute requires a showing of how the previous incapacities have acted upon the current industrial injury to make the new impairment substantially greater than it would have been "but for" the previous incapacities, or a showing of an aggravation of the prior condition. The plaintiff erroneously applies an additive analysis to the above statute to argue

that the insurer ought to receive reimbursement of all benefits flowing from the industrial injuries because the injuries combined up to greater than 20%. Such an application is contrary to the intent of the statute. As Professor Larson stated in describing the function of the Second Injury Funds in the American Law of Worker's Compensation generally:

> Necessity that second injury add to prior disability Although the prior impairment need not combine with the compensable injury in any special way, it must add something to the disability before the special fund can become liable. In other words, it is not enough to show that claimant had some kind of handicap, if that contributed nothing to the final disability. For, example, pre-existing partial loss of hearing was not a basis for shifting part of compensation liability to the Special Fund when the ultimate disability took the form of silicosis or an injured hand.

Larson on Worker's Compensation at 59.32 (g).

The defendant Second Injury Fund is not liable for benefits relating to the applicant's pre-existing unrelated incapacities because they did not make the industrial impairment substantially greater, or were not aggravated by such. Nothing in subsection (b) of paragraph two of Utah Code Ann. Section 35-1-69 (1) expands the responsibility of the Second Injury Fund to reach unrelated health problems. On the contrary, this provision is a limitation on the Fund's liability, eliminating cases where impairment ratings are below the specified level from those for which the fund is liable.

CONCLUSION

This Court should affirm the Industrial Commission's final Order by holding that before insurance carriers are entitled to reimbursement benefits from the special fund under the 1981 amendment to Section 35-1-69, the "Substantially Greater" requirement OR the "Aggravation" test must be statutorily satisfied on each and every pre-existing body part.

DATED THIS 23rd day of July, 1985.

Gilbert A. Martinez,
Attorney for Second Injury Fund
and Industrial Commission

MAILING CERTIFICATE

I hereby certify that four (4) true and correct copies of the foregoing Brief of Respondent Second Injury Fund were mailed, first class, postage prepaid, to the following on this 23rd day of July, 1985:

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APPENDIX A

35-1-69. Combined injuries resulting in permanent incapacity - Payment out of second injury fund - Training of employee. (1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustaines an industrial injury for which either compensation and or medical care, or both, 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, or which aggravates or is aggravated by such pre-existing incapacity, compensation and, medical care, ~~which medical care~~ and other related items are as 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, and other related items shall be for the industrial injury only and the remainder shall be paid out of the ~~special~~ second injury fund provided for in section 35-1-68(1) ~~hereinafter referred to as the "special fund"~~.

For purposes of this section, (a) any aggravation of a pre-existing injury, disease or congenital cause shall be deemed "substantially greater", and compensation, medical care, and other related items shall be awarded on the basis of the combined injuries as provided above, provided, however, that (b) where there is no such aggravation, no award for combined injuries shall be made unless the percentage of permanent physical impairment attributable to the industrial injury is 10% or greater and the percentage of permanent physical impairment resulting from all causes and conditions, including the industrial injury, is greater than 20%. Where the pre-existing incapacity referred to in subsection (1) (b) of this section previously has been compensated for, in whole or in part, as a permanent partial disability under this act or the Utah Occupational Disease Disability Law, such compensation shall be deducted from the liability assessed to the second injury fund under this paragraph.

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 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 or 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.

A medical panel having the qualifications of the medical panel set forth in section 35-2-56, shall review all medical aspects of the case and determine first, the total permanent physical impairment resulting from all causes and conditions including the industrial injury; second, the percentage of permanent physical impairment attributable to the industrial injury; and third, the percentage of permanent physical impairment attributable to the previously existing condition or conditions, whether due to accidental injury, disease or congenital causes. The industrial commission shall then assess the liability for permanent partial disability compensation and future medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only and ~~the remainder~~ any amounts remaining to be paid hereunder shall be payable out of the ~~said special~~ second injury fund; provided, however, that medical expenses shall be paid in the first instance by the employer of its insurance carrier. Amounts, if any, which have been paid by the employer in excess of the portion attributable to the said industrial injury shall be reimbursed to the employer out of ~~said special~~ the second injury fund upon written request and verification of amounts so expended.

(2) In addition the commission in its discretion may increase the weekly compensation rates to be paid out of such special fund, such increase to be used for the rehabilitation and training of any employee coming within the provisions of this chapter as may be certified to the commission by the rehabilitation department of the state board of education as being eligible for rehabilitation and training; provided, however, that in no case shall there be paid out of such special fund for rehabilitation an amount in excess of $1,000.