# One-Eyed, One-Legged And One-Armed Men Need Not Apply - The Rise Of Second Injury Funds

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July 25, 2008

Second (or subsequent) injury funds (SIF's) have been abolished in 19 states. Alabama and Maine began this movement in 1992, with Arkansas and New York being the most recent converts; each ending its respective program in 2007. Some states, such as South Carolina, have already passed laws that call for the end of their second injury funds over the next several years. Further, the American Insurance Association has been at war against second injury funds since at least the mid 1990's, working to convince the remaining states to abolish or substantially alter the fund programs that still exist.

Has the time for second injury funds passed? Are these archaic social programs that have outlived their usefulness? It depends on who is being asked and their agenda. Regardless of which side is making the argument, the focus is on MONEY; the cost if the plan is kept intact or the cost if the plan is abolished. It is all about the money, regardless of the eloquence of any other reason presented.

To explore these questions, the next few paragraphs will provide some of the history behind these programs, the threshold for protection, benefits offered, how the funds are financed and will conclude with arguments for and against dismantling a decades old employer safety net.

**History of Second Injury Funds**

New York created the nation's first Second Injury Fund in 1916, just three years after creation of its workers compensation statute. Few states followed suit until World War II with most states adopting second injury funds in the early-to-mid 1940's based on a national model code. This rush to provide this employer protection was intended to clear a path for veterans who had sustained injury during the war. Injured veterans were not being hired due to employers' fears of being held financially responsible for the cumulative effect of an injury suffered on the job coupled with a pre-existing war injury. SIF's were designed to temper if not completely remove this fear.

Employers' fears arose from several court cases culminating in a 1925 Oklahoma Supreme Court ruling, *Nease v. Hughes Stone Co*. *Nease* proved to be a landmark case regarding an employer's liability for an employee's injuries which compound a pre-existed condition.

W.A. Nease was already blind in one eye when he began work for Hughes Stone Company. During his employment, an explosion destroyed Nease's remaining eye leaving him blind and permanently and totally disabled. The employer through the insurance carrier provided 100 weeks of indemnity payments as was required by statutory provisions governing the loss of one eye. Nease argued that since he was permanently disabled not merely partially disabled he was due lifetime benefits. The Oklahoma Supreme Court agreed awarding him lifetime benefits making the employer and the insurer responsible for total disability indemnity benefits.

A US Labor Department report stated that between 7,000 and 8,000 one-eyed, one-legged and one-handed men in Oklahoma lost their job immediately following this ruling. Employers did not want to take the chance of being held financially responsible for an employee's total disability. A mechanism to relieve employers of this responsibility was required. Second injury funds were created to remedy the problems and accomplish two goals:

• Encourage employers to hire and retain workers with pre-existing injuries or conditions; and
• Provide economic relief to employers for an employee's subsequent injury.

**Threshold Requirements to Receive Benefits**

Not every injury suffered by an individual with a pre-existing injury or condition is compensable under the second injury funds still in operation. Certain requires must be met before any benefits are payable from these funds. States differ on the application of the following requirements, but each applies these requirements to varying degrees. To be eligible for second injury fund protection:

• There must be a prior injury that is a hindrance or obstacle to employment. Some states allow the prior injury to be from any cause while others require the prior injury to be work-related. Successive injuries do not have to be to the same or similar body part to be eligible for SIF protection; or

• There must be a pre-existing medical condition that affects employment. This is a list of medical conditions such as epilepsy, diabetes, Parkinson's disease, arthritis and others (a list of 34 to 37 different conditions). Some states consider the list of conditions an "exclusive list," meaning that only those conditions listed are eligible for second injury fund protection; other states consider this a "presumptive list" meaning that those listed are the only ones presumed to require second injury protection, but the compensable conditions are not limited to the list allowing others to be submitted for consideration.
• The prior injury or condition must be diagnosed and documented by the employer before the second injury occurs. Massachusetts is the only state that places a time limit on when the employer must know about the pre-existing condition; employers must document the pre-existing condition within 30 days of hire before any second injury is eligible for second injury fund protection. Other states only require that the condition be known and documented before the subsequent injury. This documentation can be as simple as a letter in the employee's file noting the condition. This is a potentially tricky situation due to the Americans with Disabilities Act (ADA) and what employers can and cannot ask or do. These conditions can be discovered and documented as a result of a post-hire physical or a medical condition questionnaire completed by the employee. Attorneys should be consulted regarding the legalities surrounding this requirement and how the data can be gathered without violating ADA or other laws.
• A few states require the prior injury to be classified as a permanent partial disability.
• Some states require a certain percentage of impairment; and others only pay if the second injury results in Permanent Total disability.
• The fund must be put on notice when an employee with a pre-existing condition is injured; regardless if it is known whether or not benefits are going to be requested.
• A waiting period must be satisfied during which time the primary workers' compensation carrier pays all disability/indemnity benefits. The waiting period can range between 52 and 104 weeks.

**Benefits Offered By Second Injury Funds**

Second injury fund states operate as either "reimbursement fund" or "take-over fund" to pay benefits owed to those qualifying for coverage. Reimbursement fund states operate on the principle that the best and most efficient mechanism for handling on-going injury claims is the insurance carrier or self-insured employers' TPA; these states reimburse the insurance carrier or self-insurer for all payments made to employees qualifying for protection. Take-over fund states, as the name suggests, remove the injured employee from the workers compensation system and take over payment of disability/benefits removing the insurance carrier or self-insured employer from the process.

Every state SIF pays the difference between the injury suffered and the cumulative effect of the trauma for qualifying employees and employers. Using the Nease ruling presented above as an example; had a second injury fund existed, the primary insurer would have only been required to pay the 100 weeks for the loss of an eye and the second injury fund would have taken over and paid all disability benefits due an individual with a permanent total disability.

Benefits offered by some but not all states include (not an all-inclusive list):
• **Lost wages from a second job** held by the employee. States providing this benefit reason that if the employee held two jobs (presumably for needed extra money) that the permanent total disability not only prevents him from working his primary job but it also prevents him from working his second job, thus a percentage of those lost wages are also paid.

• **Primary workers compensation benefits for uninsured workers**. A few states extend their second injury fund to provide primary workers' compensation benefits to injured employees of employer's that did not purchase workers' compensation coverage.
• **Continued disability payments when state-mandated benefits end**. Some states limit permanent total disability benefits to a specified number of weeks; second injury funds in some of those states pick up and continue benefits for injured employees that "outlive" the benefit period. Indiana, for example, limits permanent total disability benefits to 500 weeks; if the injured employee is still alive, the second injury fund picks up and provides continued benefits in 150 week increments.

**Financing Second Injury Funds**

Second injury funds are most commonly financed by assessments of insurers, employers and/or self-insured funds. These assessments can be in the form of a required dollar amount per claim or a percentage of each specified type of claim. These percentages range from 2.5 percent to 6 percent or more.

Statutes often specify the injuries that must be assessed. North Carolina, for example, requires a $250 assessment for all losses that result in the "loss, or loss of use, of each minor member in every case of a permanent partial disability where there is such loss;" and $750 "for 50 percent or more loss or loss of use of each major member, defined as back, foot, leg, hand, arm, eye, or hearing."

Funding is sometimes provided by death benefits owed to an employee with no legal heirs. The death benefit that was due to the employee is put into the second injury fund. In fact, this is Texas' sole means of financing its second injury fund.

**Coming Up!**

Financing and fund solvency will be a part of the next article on the death of the funds and the push to eliminate or alter the funds in the remaining states. The next commentary will present the arguments for dissolution of these funds made by the AIA and others and rebuttals proffered by those that want to keep the funds that still exist.