

Second-Injury Funds: Still a Valuable Cost-Containment Tool

by Mark J. Nevils, J.D.

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Background to Second-Injury Funds

The debate continues on whether workers compensation second-injury funds (SIF) fulfill their intended purposes. The fact remains, however, that these funds still exist in many jurisdictions, and provide employer/carriers with a very valuable cost-containment tool when properly handled.

As the workers compensation claims process becomes increasing segmented, more companies are dedicating personnel to in-house programs or outsourced vendors to achieve maximum cost containment. An estimated \$800 million is paid out annually from these funds across the country, primarily by either reimbursement to the carrier or directly to the claimant.

The first second-injury fund was created in New York in 1916. Such statutes, however, gained more popularity across the country in the 1940s when a National Model Code was promulgated in large part to help combat employment discrimination against

disabled WWII veterans. Many jurisdictions adopted a variation of the model code to fit within their own workers compensation scheme. As these statutes found their way into each jurisdiction's workers compensation system, they developed various other names, e.g., special disability funds, subsequent injury trust funds, apportionment funds, workers compensation trust funds, handicap reimbursement funds, etc.

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These funds were created to relieve a portion of the employer's/insurer's claims costs when the employer hired a claimant with a pre-existing disability and that claimant then suffered a "second" injury, creating a greater disability because of the combined effects of the prior and subsequent disabilities. Prior to second-injury fund statutes, such a situation could create a disproportionate claim cost as it related to the industrial injury; therefore, reluctance existed on the part of employers to hire anyone with a pre-existing medical condition.

Initial funding mechanisms for these funds were essentially inadequate since they had little relationship to the actual exposure of the second-injury fund. Today, in most jurisdictions, employers/insurers are required to pay a yearly assessment based on a percentage of premiums written or losses paid the previous year. In turn, the funds pay, directly to the claimant or reimbursement to the carrier, for a portion of the claims costs when a prior impairment combines

with the industrial injury to create a greater disability and claims exposure.

For various reasons some of these funds have had a volatile life within their jurisdictions' workers compensation systems and several such statutes have been repealed. Surviving funds, however, are quite active and share many of the same characteristics while remaining consistent with their own jurisdiction's workers compensation statutes.

Common Second-Injury Fund Elements and Issues

The following are some common elements and issues found in today's more active second-injury funds:

Pre-existing Medical Condition

Most second-injury fund statutes state that in order prove a claim, there must be evidence that the claimant suffered from a known pre-existing impairment arising from a prior accident, disease, or congenital condition and that this impairment was diagnosed before the date of the second injury.

The prior impairment is generally required to have been permanent and some statutes, such as Arizona and Nevada, actually require the prior permanent impairment to qualify as a specified percentage under the AMA guidelines (10 percent and 6 percent, respectively).

Unfortunately, many qualified claims do not get filed because there is no existing documentation of a previous rating for the prior permanent impairment. However, if a statute allows prior impairments to be from any cause, then many of these conditions will not have prior ratings and, therefore, such evidence needs to be obtained from medical experts, as opposed to being found in the files or prior medical records.

To further qualify claims under this element, many statutes will list a number of exclusive or presumptive prior impairments. It is important to note the difference between an exclusive list and a

presumptive list because when a list of prior impairments is merely presumptive, a claim may still be filed with the fund if the prior impairment qualifies outside of the list.

Another qualifier commonly found with the prior impairment is that the impairment be a hindrance or obstacle to employment. This definition is usually inserted by stating that prior impairment "is or is likely to be" a hindrance or obstacle to employment or "an obstacle or hindrance to employment should the employee become unemployed." As a somewhat subjective qualifier, "hindrance" can be satisfied numerous ways, including evidence of the claimant's vocational background, medical expert records and opinions, employer statements, or a combination thereof.

Notice to Fund

Almost all active second-injury fund statutes have a notice provision that require the employer/insurer to put the fund on notice of a potential claim within a specified time, e.g., within 100 weeks from the employer's first report of injury. Failure to notify the fund within the statutory time limit is generally a complete bar to fund liability.

Notice can be as simple as filing a letter. Some jurisdictions, however, require the notice to include more specifics about the potential claim, and failure to include required information can bar a claim at a later date. For example, New York's fund requires notice within 104 weeks of the claimant's disability, and the form must specify the prior impairment upon which the employer/insurer will rely when it files the claim with the fund at a later date. Failure to list the proper prior impairment on the notice form can be corrected within a certain amount of time. If it is not corrected, then the employer/insurer will not be able to use that prior impairment later on to prove its claim.

Employer's Knowledge of the Pre-Existing Medical Condition

Most, but not all, second-injury fund statutes contain language stating that the employer must have knowledge of the prior impairment before the date of the second injury. Alaska, Arizona, Georgia,

Louisiana, New Hampshire, Nevada, South Carolina, and Massachusetts are examples of active SIF statutes with a strong employer knowledge element, although Massachusetts did not require employer knowledge until it changed its workers compensation statute in December 1991. Conversely, New York did have an employer knowledge element in its statute until 1987 when that requirement was eliminated.

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A common misconception about the employer knowledge element is that the employer's knowledge of the prior impairment must be ascertained at the time of hire. Most statutes actually allow employer knowledge to take place at any point before the time of the second injury. Massachusetts is one of the only "knowledge" jurisdictions that provides a time limit for employer knowledge from the date of hire or retention in employment (30 days). Allowing knowledge to be ascertained after the date of hire is one of the ways that the second-injury fund statutes try to dovetail with disability discrimination laws.

Jurisdictions, such as New Hampshire, Alaska, and Nevada, also require the employer's knowledge to be corroborated with some documentation from the employer. The purpose of written documentation is to verify the employer's statement that it knew of the prior medical condition before the second injury. Unfortunately, such a strict requirement disqualifies many deserving claims in these jurisdictions. Many employers do not document their employees' prior medical conditions

although they are well aware of a prior disability.

Combination of Disabilities

Most funds require medical evidence to prove that the claimant's disability after the second injury is substantially greater because of the combined effects of the prior and second injury than it would have been had the second injury happened alone. A common misconception of this element is that the prior disability must be to the same body part as the second injury, and that the second injury must somehow directly aggravate the prior disability. Direct aggravation is not always required, and many different combinations of disabilities can give rise to a fund claim.

Certain funds will even promulgate a form containing questions to be answered, preferably by the treating physician, before they will approve a claim. Careful review should be taken of these forms, as they do not always conform to the requirements under the statute. Most claims can be perfected by an expert report whose opinion mirrors the statutory language, whether or not it is the treating physician.

Point of Fund Liability

The point at which the fund has potential liability varies from state to state. Georgia, Louisiana, and South Carolina's second-injury funds allow reimbursement for medical benefits after a certain monetary threshold (\$5,000, \$5,000, and \$3,000 respectively) and indemnity after a certain amount of weeks of indemnity has been paid on the claim. For example, in Georgia, if all the statutory requirements are met, then the Subsequent Injury Trust Fund will reimburse the employer 50 percent of all medical bills paid between \$5,000 and \$10,000, and then 100 percent of those bills thereafter in addition to 100 percent reimbursement for all indemnity benefits paid after 104 weeks of disability.

New Hampshire's statute allows for reimbursement of almost all medical and indemnity benefits after the first \$10,000 of those benefits combined. Fifty percent

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of payments are reimbursed within the 104 weeks of disability, and 100 percent thereafter.

Some statutes will only allow second-injury fund liability if the claimant receives permanent benefits as in New York, New Jersey, Massachusetts (after December 1991), District of Columbia, Arizona, and longshore claims.

Some funds are liable for indemnity and medical benefits and some for indemnity only. A few funds limit indemnity liability to disability claims and exclude dependency benefits on death cases, such as New Jersey.

Types of Funds

The two major types of second-injury funds are reimbursement funds and take-over funds. In both of these situations, the employer/insurer is able to significantly write down any future reserves on a claim when the fund becomes liable. In certain jurisdictions, such as Georgia, South Carolina, and Louisiana, the fund requires the employer/insurer to sign an affidavit that it is writing down its reserves on the claim before a reimbursement check will even be issued.

Reimbursement Funds

Most of the funds noted above reimburse the carrier for indemnity and medical benefits made to or on behalf of the claimant. In those funds, once fund liability has been established, the employer/insurer remains the primary claims handler and must request periodic reimbursements from the fund (e.g., quarterly) for certain payments made on the claim.

More proactive reimbursement funds will want to be involved in any workers compensation settlement discussions between the claimant and the employer/insurer. Some jurisdictions, such as New Hampshire and New York, require the fund to be involved before the settlement between the claimant and the employer/insurer. In these jurisdictions, if the fund is not involved, then any

reimbursable amount within the settlement cannot be recovered.

Also in New York, if the fund's liability has been established, it must be involved with any third-party settlement. Not all funds want to be involved at this level, but most funds will review any third-party settlements and take appropriate credits so as not to reimburse an employer/insurer for monies on which it has already received recovery.

Take-Over Funds

Certain second-injury funds will pay the claimant directly once its liability has been determined. These funds can be referred to as "take-over" funds because the fund literally takes over the compensation payments from the employer/insurer. In New Jersey, for example, once the fund's liability has been established, it can pay the claimant's permanent and total benefits for the life of the claim. Although, the employer/insurer remains liable for the medical aspect of the claim, it can write down the indemnity reserves, which is usually a significant amount.

A charge to funds exists when a non-self-insured employer in a monopolistic jurisdiction is allowed to "charge" that portion of the claim cost caused by a combination of a prior and second disability, to a fund in that state so that the cost for that claim will not be calculated into the employer's experience modification rate. In Ohio, for example, that portion of the claim that otherwise would have been charged to the employer's experience is deducted from that claim and charged to the Statutory Surplus Fund.

Conclusion

There are many active second-injury funds in existence today, and perfecting all claims takes focused time and effort. Strict attention should be paid to the statutory requirements along with any corresponding regulations. Although no one fund is exactly the same, they were all born from the same intent. Therefore, a sound knowledge of several different funds will go a long way in handling any one jurisdiction's claims. ■