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## Oklahoma's Special Indemnity Fund: A Fund without a Function

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# OKLAHOMA'S SPECIAL INDEMNITY FUND: A FUND WITHOUT A FUNCTION?

## I. INTRODUCTION

Many people have never heard of special indemnity funds,<sup>1</sup> unless they are involved with workers' compensation law,<sup>2</sup> or keep up with political scandals. Special indemnity funds were, as recently as 1991, found in every state<sup>3</sup> as well as in the federal arena.<sup>4</sup> These funds, sometimes referred to as second<sup>5</sup> or subsequent injury funds,<sup>6</sup> are still found in a majority of states. Created under the appropriate workers' compensation statutes, the funds are generally created to encourage the hiring of disabled or handicapped workers.<sup>7</sup> The basic premise is that employers are less likely to hire workers who already have a disability. Employers may fear that if the worker later becomes injured on the job, the employer could then be held liable for the total sum of the disability, rather than just the disability caused by

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1. H. Alston Johnson, *Workers' Compensation*, 53 LA. L. REV. 1029, 1033 (1993) (referring to the Second Injury Fund as the "little-known portion of the Act").

2. See Carol Griffiee, *Wounded Workers' Comp*, ARK. BUS., May 13, 1991, at 12. Even articles written specifically for employers concerned with workers' compensation have noted, "[t]here's also something called the Second Injury Fund, which nobody professes to be able to explain easily." *Id.*

3. Keith N. Hylton & Steven E. Laymon, *The Internalization Paradox and Workers' Compensation*, 21 HOFSTRA L. REV. 109, 166 (1992); JOHN ALAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4595 (1979); 82 AM. JUR. 2D *Workers' Compensation* § 61 (1992). However, some states do not have these provisions. For example, Colorado had a subsequent injury fund for more than 40 years, before closing that fund against injuries occurring after July 1, 1993, and against occupational diseases occurring after April 1, 1994. See COLO. REV. STAT. § 8-46-104 (1993). When all payments have been made out of this fund, the remaining balance will revert to the general fund of the state, and the subsequent injury fund will cease to exist. *Id.*

4. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988).

5. ALASKA STAT. § 23.30.040 (1994); ARK. CODE ANN. § 11-9-525 (Michie 1993); CONN. GEN. STAT. ANN. § 31-349 (West 1993); IND. CODE ANN. § 22-3-3-13 (Burns 1994); IOWA CODE ANN. § 85.55 (West 1993).

6. COLO. REV. STAT. § 8-46-101 (1994); GA. CODE ANN. § 34-9-360 (1994).

7. W. ANN. LAB. CODE § 4750 (1994); *Dow Chemical Co. v. Workmens' Compensation Appeals Bd.*, 432 P.2d 365, 372 (Cal. 1967); *Leiker v. Manor House, Inc.*, 457 P.2d 107, 108 (Kan. 1969); 82 AM. JUR. 2D *Workers' Compensation* § 61 (Supp. 1994) (citing *Beale v. Shepherd*, 809 S.W.2d 845 (Ky. 1991)); cf. Larry Williams, *High Cost of Covering Injury Claims Comes As A Shock*, HARTFORD COURANT, June 25, 1994, at C1 (discussing Connecticut's second injury fund, which was created as a "means to encourage employers to hire wounded World War II veterans"); *Don't Be Fooled By New G.I. Bill*, ST. LOUIS POST-DISPATCH, Oct. 2, 1992, at 2C. (discussing Missouri's second injury fund, which was intended to encourage the hiring of injured World War II veterans).

the on-the-job accident.<sup>8</sup> For example, an employee who is blind in one eye could be considered to be permanently partially disabled. However, if that employee subsequently loses his or her other eye in an injury on the job, the employee would then be 100% permanently totally disabled. Without a second injury fund, the employer would be liable for the 100% disability, even though without the pre-existing injury, the accident would only have resulted in a permanent partial disability.<sup>9</sup> With a second injury fund, the employer is only liable for the harm caused while on the job.<sup>10</sup> The second injury fund steps in to alleviate the employer from providing compensation for the resulting increased disability from the combination of the two injuries.<sup>11</sup>

While the purpose of second injury funds is not to provide benefits for hiring the disabled, they do provide an incentive by removing the potential financial disadvantages of hiring a disabled employee. This places the disabled worker on the same ground as the non-disabled worker since the employer is now not as likely to be deterred from hiring or retaining the worker by the possible high compensation costs.<sup>12</sup> Thus, instead of one employer paying the price for hiring a handicapped employee, the risk of injuries is spread out across all employers.<sup>13</sup> While once called "Employers' Compensation Acts,"<sup>14</sup> these funds are generally held to be for the benefit of the workers.<sup>15</sup>

Oklahoma courts have consistently found that the purpose of the Oklahoma Special Indemnity Fund (the "SPIF") is to encourage the

8. Special Indem. Fund v. Figgins, 831 P.2d 1379, 1381 (Okla. 1992).

9. Nease v. Hughes Stone Co., 244 P. 778, 780 (Okla. 1925). This was a case prior to the enactment of the Special Indemnity Fund Act where a person was hired with only the use of one eye. *Id.* at 778. He then suffered the loss of the second eye on the job and the court found that the employer was liable for the total amount of the resulting disability. *Id.* at 781; see also 2 ARTHUR LARSON, THE LAW OF WORKMENS' COMPENSATION §§ 59.31(a), 10-492.397 (1992) (noting that within 30 days of the decision in *Nease*, seven to eight thousand disabled workers were displaced in Oklahoma).

10. Reliance Ins. Co. v. Watts, 293 A.2d 836, 838 (Md. 1972).

11. Hugh O'Boyle, *Handling Your First Workers Compensation Case: Defending The Carrier Or Employer*, in LITIGATION AND ADMINISTRATION PRACTICE COURSE HANDBOOK 1, 7 (1993).

12. 33 U.S.C. § 908(f) (1988); Director, Office of Workers' Compensation Programs v. Bethlehem Steel Corp., 868 F.2d 759 (Cal. 1989); 82 AM. JUR. 2D *Workers' Compensation* § 61 (1992) (quoting *Kidder v. Coastal Constr. Co.*, 342 A.2d 729 (Me. 1975)).

13. Larry Williams, *Troubled State Fund Survives; Legislative Panel Tables Move To Abolish Second Injury Fund*, THE HARTFORD COURANT, March 1, 1994, at B9.

14. See *Hernandez v. Gerber Group*, 608 A.2d 87 (Conn. 1992). As late as 1992, courts found that the purpose of Connecticut's Second Injury and Compensation Assurance Fund was "to relieve employers from having to bear costs of pre-existing medical conditions." *Id.* at 91.

15. *Graham v. Red Ball Motor Freight, Inc.*, 262 F. Supp. 49 (D. Miss. 1966) (finding workers' compensation laws are for the benefit of employees primarily, and for employers and their insurance carriers next).

hiring of the handicapped worker,<sup>16</sup> but the reality is that Oklahoma's version of a second injury fund does very little to promote this purpose. The provisions of the SPIF legislation, restrictive when compared to most other state and federal acts,<sup>17</sup> have entirely defeated the purpose of encouraging the hiring of handicapped workers. The SPIF's onerous restrictive definition of the term "previously impaired person" results in no protection for the many seriously impaired workers from the very statute that purports to protect them.<sup>18</sup> While the original SPIF legislation was quite liberal,<sup>19</sup> the recent changes in the SPIF statutes, which limit disabilities and increase the amounts of compensable impairment, and the interpretations of those statutes by the courts, have combined to make the SPIF impotent to fulfill its purpose of promoting the hiring of handicapped workers in Oklahoma.

In this comment the author will discuss the common provisions and characteristics of second injury fund statutes and analyze the past and current state of the SPIF. This comment will show how the enabling statutes have failed to allow the SPIF to meet its stated purpose of encouraging the hiring of handicapped workers. Additionally, this comment will illustrate how the indebted SPIF is now obsolete due to the Americans With Disabilities Act (the "ADA") and will contend that the best course of reform is for the Oklahoma legislature to repeal the SPIF in Oklahoma.

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16. See, e.g., *Special Indem. Fund v. Figgins*, 831 P.2d 1379, 1381 (Okla. 1992); *Special Indem. Fund v. Treadwell*, 693 P.2d 608, 610 (Okla. 1984); *Special Indem. Fund v. Scott* 652 P.2d 278, 280 (Okla. 1982) (holding that the SPIF was created to remove barriers to employment of the disabled and handicapped, as well as to assure employers that they will not be responsible for prior disabilities); *Special Indem. Fund v. Wade*, 189 P.2d 609, 610 (Okla. 1948).

17. However, it is not as restrictive as Kansas and Colorado, which have abolished their second injury funds. See COLO. REV. STAT. § 8-46-101 (1994); KAN. STAT. ANN. § 44-567 (1993).

18. *Special Indem. Fund v. Bedford*, 852 P.2d 150 (Okla. 1993) (holding that being adjudicated as permanently partially disabled in another state is insufficient to qualify the employee as a previously impaired person); *Special Indem. Fund v. Figgins*, 831 P.2d 1379 (holding that impairment to the lungs and respiratory system did not qualify the employee as a previously impaired person); *Special Indem. Fund v. Schultz*, 831 P.2d 1385 (Okla. 1992) (holding that removal of a colon and rectum did not qualify employee as a previously impaired person); *Barclay v. Special Indem. Fund*, 864 P.2d 851 (Okla. Ct. App. 1993) (holding a shoulder injury was inadequate to qualify the employee as a previously impaired person); *Hart v. Special Indem. Fund*, 867 P.2d 1351 (Okla. Ct. App. 1993) (holding that complete binaural hearing loss is not sufficient to make an employee a previously impaired person).

19. OKLA. STAT. tit. 85, § 171 (Supp. 1994).

## II. STANDARD SPECIAL INDEMNITY FUND PROVISIONS

Second injury funds are creatures of statute and only have those powers which the legislature gives them.<sup>20</sup> However, most funds operate with the general purpose of placing the disabled worker on an even footing with the average worker. The basic criteria for determining liability of a fund is whether a successive injury, added to a prior disability, has combined to produce a disability which is greater than the total of the separate factors combined.<sup>21</sup> Beyond that criteria, different states have used assorted statutory restrictions to ensure that only those who truly have a pre-existing disability are eligible to receive compensation from the second injury fund.<sup>22</sup> These safeguards can be divided into several different categories for the purpose of discussion: notice of impairment requirements; limitations on types of impairment eligible; and limitations on amounts of impairment eligible.

### A. *Notice of Impairment Requirements*

Most states require that the employee notify the employer of the pre-existing disability at or before the time of hiring.<sup>23</sup> The purpose of this requirement goes directly to the goal of the fund. If the employer did not know of an employee's pre-existing disability at the time of hiring, then the employer could not have discriminated against that handicap. Thus, the disabled worker would already be on the same footing as the unhandicapped worker, so there would be no need to use the fund to encourage the hiring of that worker as he or she is not being discriminated against. Therefore, in many states with this requirement, if the employer can't show that he or she had notice prior to hiring, then the second injury fund is not liable for any part of the injury.<sup>24</sup> While this provision appears to penalize the employer for an employee's nondisclosure, it is necessary for the purpose of the fund

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20. See *Subsequent Injury Fund v. Pack*, 242 A.2d 506 (Md. 1968).

21. See CONN. GEN. STAT. § 31-349(a) (1993).

22. Alaska's statutes contain both a listing of impairments as well as a prior written notice requirement. ALASKA STAT. § 23.30.205 (1994).

23. APPLEMAN, *supra* note 3, § 4595; GA. CODE ANN. § 114-914 (1977); ARIZ. REV. STAT. ANN. § 23-1065(c)(2) (1993) (requiring the employer to establish by written records that the employer had knowledge of the permanent impairment at the time the employee was hired, or that employee was kept in employ after such knowledge was acquired by the employer).

24. *Claphan v. Great Bend Manor*, 611 P.2d 180, 184 (Kan. 1980); see also *Morgan v. Inter-Collegiate Press*, 606 P.2d 479 (Kan. 1980).

to be met. Most federal circuits, when interpreting the federal Longshore and Harbor Workers' Act's second injury fund provision<sup>25</sup> also require that the employee's pre-existing condition be "manifest to the employer at the time that the employee is hired to enable recovery from the second injury fund . . . ."<sup>26</sup> Additionally, some states require the filing of notice of the pre-existing impairment with the state.<sup>27</sup> If a filing is not made, the later injury is not eligible for compensation from the fund.<sup>28</sup>

Other states modify the notice provisions to only require the employer to know of the pre-existing disability before the subsequent injury.<sup>29</sup> While this goes less to the original purpose of the fund of encouraging the hiring of the physically impaired, it does put the employer on notice that an employee is disabled. The benefit to the employee of this type of requirement is that if he or she becomes disabled after being hired by some other cause, the employer has an incentive to keep that employee, rather than firing that employee to reduce potential future liability costs.<sup>30</sup> Thus, the goal of placing the disabled worker on the same ground as the average worker is met, as the employer has no more reason to fire the disabled worker than the non-disabled worker.

The Oklahoma SPIF statutes do not fall into either of these two categories. Instead, Oklahoma joins several other states<sup>31</sup> where there is no notice requirement to the employer whatsoever.<sup>32</sup> Rather, an employee simply must be a 'physically impaired person' at the time of the on-the-job accident.<sup>33</sup> Not only is no notice to the employer required, but the only notice ever required is to the SPIF by the filing of

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25. *Jacksonville Shipyards v. Director, Office of Workers' Compensation Programs*, 851 F.2d 1314, 1316 (11th Cir. 1988); *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 1222 (5th Cir. 1988).

26. APPLEMAN, *supra* note 3, § 4595. *But see* *America Ship Bldg. Co. v. Director, Office of Workers' Compensation Programs*, 865 F.2d 727 (6th Cir. 1989) (finding that there is no requirement under the Longshore and Harbor Workers' Compensation Act that the employer have knowledge of the pre-existing condition, as long as evidence is provided that the condition was manifest to someone prior to the subsequent injury).

27. *See* APPLEMAN, *supra* note 3, § 4595; ALASKA STAT. § 23.30.205(c) (1994); KAN. STAT. ANN. § 44-567 (1993).

28. *Leiker v. Manor House, Inc.*, 457 P.2d 107, 112 (Kan. 1969); *Piper v. Kansas Turnpike Auth.*, 436 P.2d 396, 401-02 (Kan. 1968).

29. *Bellucci v. Tip Top Farms, Inc.*, 248 N.E.2d 864, 865 (N.Y. 1969).

30. *Grieco v. Grieco Elec. Co.*, 383 N.Y.S.2d 684, 685 (N.Y. App. Div. 1976).

31. O'Boyle, *supra* note 11, at 7 ("Since 07-27-87, the employer need not even have known of the impairment.").

32. O'Boyle, *supra* note 11, at 7.

33. OKLA. STAT. tit 85, § 172(d) (Supp. 1994).

the appropriate Form 3-F by the employee.<sup>34</sup> Often, the employee will not even be aware of the potential SPIF benefits unless his or her attorney inquires about pre-existing injuries. Thus, the SPIF benefits have been referred to as "the icing on the cupcake or an afterthought for the injured worker,"<sup>35</sup> since the worker may not realize that he or she is even eligible for compensation from this fund until he or she is mid-way through the adjudication of the job-related injury.

By omitting an employer notice requirement, the SPIF has made it impossible to meet the oft-stated purpose of encouraging the employment of handicapped workers.<sup>36</sup> Since the employer may not know of a pre-existing handicap, there is no encouragement for employment. Thus the original stated purpose of the SPIF is frustrated by the very statutes which create the fund.

### B. *Types of Impairment Requirements*

In addition to the notice of impairment requirements, some states place limitations on the type of impairments that are allowed to be combined with the adjudicated injury against the SPIF.<sup>37</sup> Generally, all states require that the impairment be of a permanent nature.<sup>38</sup> Some states go so far as to take statutory notice of conditions which are presumed to be permanent, no longer burdening the employee with the need to prove the permanence of that condition<sup>39</sup> Other states may list the types of pre-existing physical impairments, which if not industrial-related, are still compensable if they equal or exceed a

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34. See Sidney A. Musser, Jr. et al., *Special Indemnity Fund, in ADVANCED WORKERS' COMPENSATION IN OKLAHOMA, BEYOND THE BASICS* § II, at 197 (1990). "The full significance of filing the rather new Form 3-F, Employees Claim for Benefits From the Special Indemnity Fund, has yet to be determined . . . . Some concern has been expressed that this may be deemed the necessary pleading to file to commence a claim against the Special Indemnity Fund or to toll the statute of limitations." *Id.* at 197-98.

35. *Id.* at 195.

36. See *Strong v. Insurance Co. of N. Am.*, 490 S.W.2d 162 (Tenn. 1973) (holding that an employer must either have notice of the employee's disability when he or she is hired or the employee must have continued working for the employer after disclosure of the disability to engage the second injury fund).

37. See *Appalachian Regional Hosps., Inc. v. Brown*, 463 S.W.2d 323, 326 (Ky. 1971) (holding that spondylolisthesis is a congenital condition and not a pre-existing disease); *Young v. Long*, 463 S.W.2d 326, 328 (Ky. 1971) (holding that an aging condition such as a degenerative disc is not a pre-existing disease condition); *Director, Office of Workers' Compensation Programs v. Potomac Elec. Power Co.*, 607 F.2d 1378, 1384 (D.C. Cir. 1979) (holding that self-inflicted suicide is compensable where a pre-existing mental disorder was aggravated by conditions of employment).

38. *Mayer v. Harmony Country Club*, 333 N.Y.S.2d 499, 500 (1972); *Strong*, 490 S.W.2d at 163; *Bezgenbluk v. Home Window Bldg.* 274 N.Y.S.2d 276 (1966).

39. See S.C. CODE ANN. § 42-9-400 (Law. Co-op. 1993).

designated percentage of permanent impairment evaluation under the American Medical Association Guides.<sup>40</sup>

Oklahoma places several restrictions on the types of pre-existing impairments that are eligible for compensation from the SPIF. Oklahoma requires that the permanent pre-existing disability be of a type that is combinable with the subsequent injury.<sup>41</sup> To be combinable under existing statutes, the injury must be from the loss of sight in one eye, or the loss by amputation of the whole or part of a member of his or her body.<sup>42</sup> A "member" is judicially defined in Oklahoma as hands, arms, thumbs, fingers, toes, legs, or feet.<sup>43</sup> The eyes are no longer included in that definition, as the loss of sight is clearly stated in the statute.<sup>44</sup>

If the member is not amputated, but only suffering from a partial impairment of use, then that loss of use must be "obvious and apparent from observation or examination by an ordinary layman, that is, a person who is not skilled in the medical profession . . . ."<sup>45</sup> This is accomplished in court by the use of a witness or family member who will testify that the claimant's injury is obvious and apparent to him or her.<sup>46</sup> Oklahoma is the only state with such a requirement.<sup>47</sup> An additional type of pre-existing impairment which is eligible to combine is "any pre-existing disability adjudged and determined by the Workers' Compensation Court . . . ."<sup>48</sup> Thus, an injury to the back, not a judicially defined member, is eligible to combine with a later work-related injury if the back injury also happened at work and was adjudicated. However, Oklahoma courts will not recognize a pre-existing disability

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40. ARIZ. REV. STAT. ANN. § 23-1065(C)(3) (1993).

41. Musser et al., *supra* note 34, at 196.

42. OKLA. STAT. tit. 85, § 171 (Supp. 1994).

43. Special Indem. Fund v. Figgins, 831 P.2d 1379, 1383 (Okla. 1992). This case interprets the term "major member" as hands, arms, feet and legs as a result of an earlier interpretation of the term "member" made when section 171 only mentioned "specific members." *Id.* at 1384. That section was narrowed to "major members" in the 1986 amendment. *Id.* Later, however, the language of the statute changed back to "members" in the 1993 amendment. See OKLA. STAT. tit. 65, § 171 (Supp. 1994). "Member" was also defined in this case as hands, arm, fingers, thumbs, legs, feet and toes. *Figgins*, 831 P.2d at 1384.

44. *Figgins*, 831 P.2d at 1384.

45. OKLA. STAT. tit. 85, § 171 (Supp. 1994).

46. Musser et al., *supra* note 34, at 196. While the common procedure is to take the spouse, parent or significant other to testify as to the obvious and apparent nature of the disability, injuries such as amputations and surgical scarring will probably be the subject of judicial notice, and this testimony will not be needed. Musser et al., *supra* note 34, at 196.

47. John F. Bates, *Second Injury Liability and the Application of the Special Indemnity Fund*, 4 OKLA. CITY U. L. REV. 335, 339 (1979).

48. *Id.*



which was adjudicated by an out-of-state workers' compensation court.<sup>49</sup>

As a result of these restrictions, many individuals who may be totally incapable or extremely limited in their ability to work due to their handicaps are not considered to have a pre-existing disability in Oklahoma. Any injury to the head, except for the eyes,<sup>50</sup> is not sufficient for a pre-existing disability. Mental retardation is not considered a pre-existing disability. Deafness is not considered a pre-existing disability.<sup>51</sup> A brain tumor, or cancer<sup>52</sup> of the head or body also will not qualify. Likewise, an injury to the torso,<sup>53</sup> no matter how severe, will not qualify. These non-qualifying afflictions also include severe asthma,<sup>54</sup> spinal injuries,<sup>55</sup> removal of the colon and rectum,<sup>56</sup> diabetes,<sup>57</sup> lung disease,<sup>58</sup> heart disease,<sup>59</sup> hernias<sup>60</sup> or kidney failure.<sup>61</sup> If these disabilities did not have the "good fortune" to occur at work, and thus be previously adjudicated by the courts, then they are not considered by Oklahoma's SPIF to be a pre-existing disability.

As an example of the absurdity resulting from this legislation, ponder a hypothetical. A person who walks with a slight, yet obvious

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49. See Special Indem. Fund v. Bedford, 852 P.2d 150 (Okla. 1993) (holding that a worker who has received an out-of-state award for a permanent disability does not qualify as a previously impaired person in Oklahoma).

50. OKLA. STAT. tit. 85, § 171 (Supp. 1994).

51. Hart v. Special Indem. Fund, 867 P.2d 1351, 1352 (Okla. Ct. App. 1993). Despite employee Hart being completely deaf as a result of a birth defect and suffering an obvious and apparent speech impediment from that congenital deafness, the court found that Hart was not a physically impaired person. *Id.*

52. See Special Indem. Fund v. Schultz, 831 P.2d 1385 (Okla. 1992).

53. See Barclay v. Special Indem. Fund, 864 P.2d 851 (Okla. Ct. App. 1993). A shoulder injury is not sufficient to qualify for a combinable pre-existing disability against the Special Indemnity Fund. *Id.* at 853.

54. Figgins v. Special Indem. Fund, 831 P.2d 1379 (Okla. 1992).

55. Cf. Special Indem. Fund v. Acuff, 383 P.2d 630 (Okla. 1963) (holding that where the unadjudicated pathology of the spine permanently affected a specific member of the body, such as through radiculopathy into the hips and legs, then the disability could be combined with the last injury into making an award against the Special Indemnity Fund).

56. Schultz, 831 P.2d at 1387-88. Despite her cancer-related removal of her colon and rectum, followed by a job-related hand injury resulting in 20% disability to her hand, the court found Schultz was not a previously physically impaired person pursuant to OKLA. STAT. tit. 85, § 171 (1988). Schultz, 831 P.2d at 1387-88. The court further noted that section 171 uses the word amputation in conjunction with the term major member. *Id.* However, while Schultz's colon and rectum were surgically removed, the court did not consider that to be an amputation. *Id.* at 1388.

57. Musser et al., *supra* note 34, at 196.

58. Figgins, 831 P.2d at 1384.

59. *Id.*

60. Musser et al., *supra* note 34, at 196.

61. Figgins, 831 P.2d at 1385.

and apparent, limp later loses a hand in a machine at work. This person will be considered to have a pre-existing disability. Thus, he or she may be eligible for benefits from the SPIF. However, if that worker did not have a slight limp, but instead suffered from complete and total deafness when the hand was amputated, he or she would not be eligible for consideration by the SPIF. This would mean that the state considers a one-handed person with a limp to be more disabled than a one-handed, totally deaf individual who has also lost the ability to communicate through sign language. The courts and the legislature have ignored this incongruous result. The fund administrators and the legislature are more concerned with reducing moneys paid out,<sup>62</sup> while the courts are limited to statutory interpretation, despite the unfair results.<sup>63</sup>

### C. Amount of Impairment Requirements

Another requirement found in many jurisdictions is a threshold amount of disability which must be achieved by the combination of the pre-existing disability with the subsequent adjudicated injury. In most states, the basic criteria for compensation from the second injury fund is that the pre-existing disability and the subsequent injury must combine to create more disability than the two injuries separately.<sup>64</sup> Some states originally required that the resulting combination of the disabilities must create a total permanent disability.<sup>65</sup> This appears to rarely be the case today. Instead, many states set a limit where the pre-existing injury must be such that if it were a work-related injury it would result in a certain designated number of weeks of compensation payments,<sup>66</sup> or a certain designated percentage of permanent impairment.<sup>67</sup>

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62. Patricia Bond, *Regional News*, UNITED PRESS INT'L, Jan. 13, 1988. Two years after the 1986 amendments made the SPIF requirements the most restrictive ever in Oklahoma, Michael Clingman, then-administrator of the SPIF, complained that the fund was too liberal and needed more restrictions. *Id.*

63. *Figgins*, 831 P.2d at 1384. The court attempted to resolve the incongruous results by deciding that the SPIF was meant "to reduce, not to eliminate the number of physically handicapped persons who employers might hesitate to hire because of possible liability for impairment beyond that suffered in an on-the-job injury." *Id.*

64. APPLEMAN, *supra* note 3, § 4595; Ark. Code Ann. § 11-9-525 (Michie 1987); CONN. GEN. STAT. ANN. § 31-349 (West Supp. 1994).

65. APPLEMAN, *supra* note 3, § 4595; Alaska Workmen's Compensation Bd. v. H&M Logging Co., 492 P.2d 98 (Alaska 1971).

66. See WIS. STAT. ANN. § 102.59 (West 1988).

67. See ARIZ. REV. STAT. ANN. § 23-1065 (Supp. 1994) (requiring that the pre-existing impairment must equal or exceed a ten percent permanent impairment when evaluated in accordance with the AMA Guides).

Some states have no specific limitations on the amount of impairment required. They only dictate that the pre-existing condition, in combination with the subsequent injury, causes a greater disability or loss of earnings than would have resulted from the second injury alone.<sup>68</sup> Other states only vaguely require that the pre-existing injury be serious enough to constitute a "hindrance or obstacle to obtaining reemployment if the employee becomes unemployed," as well as meet a pre-determined number of weeks of disability requirement.<sup>69</sup>

In Oklahoma, after an injured worker meets the first two SPIF requirements—having a pre-existing, combinable physical impairment, and a subsequent on-the-job injury<sup>70</sup>—he or she still must meet the hurdle of being able to combine the resulting impairment from the injuries into a total amount of disability equal to a 40% material increase of disability to the body.<sup>71</sup> This is a drastic change from the prior requirement of a 17% material increase which was required until Sept. 1, 1992.<sup>72</sup> Some attorneys have argued that this recent increase is too restrictive and arbitrary.<sup>73</sup> Regardless, many have found it difficult to meet.

### III. HISTORY OF THE FUND

#### A. *The Oklahoma Workers' Compensation System Before the Fund*

Workers' compensation statutes were first established in Germany in 1882, followed shortly thereafter in England.<sup>74</sup> They were later established in the United States by Maryland in 1902 and the Federal Employee's Liability Act of 1906.<sup>75</sup> By 1911 twelve states had adopted workers' compensation statutes.<sup>76</sup> Oklahoma adopted its Workers' Compensation Act to take effect July 1, 1915.<sup>77</sup> Although

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68. See R.I. GEN. LAWS § 28-37-4 (Supp. 1994).

69. See MO. ANN. STAT. § 287.220 (Vernon Supp. 1994).

70. Musser et al., *supra* note 34, at 195-96.

71. OKLA. STAT. tit. 85, § 172 (Supp. 1994).

72. *Id.*

73. Robby Trammell et al., *Workers Comp Fund \$16.2 Million in Red*, THE SUNDAY OKLAHOMAN, Nov. 20, 1994, at 24A. Oklahoma workers' compensation attorney Richard Bell said he anticipates that the increase in disability will be challenged in court for being arbitrary and capricious. *Id.* This argument is based on the many workers who have paid into the fund from their awards while the percentage was set at 17% material increase. *Id.* If these workers are now injured, even if they meet the 17% material increase, their claims would be denied. *Id.*

74. APPLEMAN, *supra* note 3, § 4591.

75. APPLEMAN, *supra* note 3, § 4591. Both of these enactments were bitterly disputed and later declared unconstitutional, but a later enactment of the Federal Act was approved in 1908 and found to be constitutional. APPLEMAN, *supra* note 3, § 4591.

76. APPLEMAN, *supra* note 3, § 4591.

77. OKLA. STAT. tit. 85, § 1 (1991).

threatened with numerous challenges as to the constitutionality and appropriateness of the statute, the act survived all attempts to have it withdrawn.<sup>78</sup> From 1915 to 1943, the Compensation Act operated without a special indemnity fund.

Second Injury Funds gained popularity in the early 1900s. New York adopted one of the first, to be followed shortly thereafter by the Federal Longshore and Harbor Workers' Compensation Act in 1927.<sup>79</sup> Some Second Injury Funds were adopted following World War II to encourage the employment of injured war veterans.<sup>80</sup> Before Oklahoma adopted a special indemnity fund law, there was no apportionment for pre-existing disabilities. Thus, employers or insurance carriers were liable for all of the disability when a previously impaired worker was injured on the job.<sup>81</sup> This created reluctance from employers in hiring obviously previously impaired workers.<sup>82</sup> Tragedies resulted, such as when the Oklahoma Supreme Court announced the decision against apportioning injuries in *Nease v. Hughes Stone Co.*<sup>83</sup> Within thirty days after the court ruled that the employer was liable for the totality of a disability, and not just the amount of disability caused by the employer, "[b]etween seven and eight thousand one-eyed, one-legged, one-armed and one-handed workers were displaced in Oklahoma."<sup>84</sup> The SPIF attempted to remedy this by allowing apportionment of the pre-existing disability by the fund. Thus, the fear of compensation costs which drove the employers to displace the handicapped workers was alleviated.

### B. *The Original Purpose and Enactment of the Fund*

The Special Indemnity Fund Act was enacted in Oklahoma in 1943 as House Bill No. 249.<sup>85</sup> The Act is located in Title 85 Sections 171-176 of the Oklahoma Statutes.<sup>86</sup> Prior to the creation of the SPIF,

78. See *Tom Dolan Heating Co. v. Feverston*, 73 P.2d 115 (Okla. 1937); *Home Indem. Co. v. Coin*, 61 P.2d 1067 (Okla. 1936); *Fox v. Dunning*, 255 P. 582 (Okla. 1927); *New Amsterdam Casualty Co. v. Rinehart & Donovan Co.*, 255 P. 587 (Okla. 1927).

79. Stuart Housel Smith, *The Special Fund Under The Longshore and Harbor Workers' Compensation Act*, 11 MAR. L. 71, 72 (1987).

80. See sources cited *supra* note 7.

81. *Special Indem. Fund v. Figgins*, 831 P.2d 1379, 1381 (Okla. 1992).

82. ELMER H. BLAIR, REFERENCE GUIDE TO WORKMENS' COMPENSATION § 11:14 (1973).

83. 224 P. 778 (Okla. 1925).

84. 2 LARSON, *supra* note 9, § 59.31(a).

85. *Figgins*, 831 P.2d at 1380 (citing *Grammer v. State Indus. Court*, 435 P.2d 101, 103 (Okla. 1967)); George E. Fisher, *Practice Before The State Industrial Commission*, 7 OKLA. L. REV. 189, 195 (1954).

86. OKLA. STAT. tit. 85, §§ 171-76 (1991 & Supp. 1994).

disabled workers often found it difficult to obtain employment.<sup>87</sup> "In an attempt therefore, to make it easier for handicapped, disabled, or previously injured people to obtain jobs or for those who sustained injuries to keep their jobs, the Second Injury Fund was created."<sup>88</sup>

While the SPIF's statutory language did not define the purpose of the fund, numerous court cases have attempted to do so. Across the country, the funds are generally created to encourage the hiring of disabled or handicapped workers.<sup>89</sup> Likewise, in Oklahoma, the courts have consistently found that the purpose of the SPIF is to "encourage employment of previously impaired workers by assuring employers that they will only be responsible for compensation payments stemming from a subsequent injury as though the worker were not previously impaired."<sup>90</sup> In order to meet the purpose of placing handicapped workers on the same footing as the average worker, the SPIF had to reassure employers that they would not be liable for disabilities which do not result from their employment. Thus, some cases have found that the purpose of the SPIF is to compensate employers.<sup>91</sup> However, this is analogous to saying that the purpose of putting bait on a fish hook is to feed the fish. Putting the bait on the hook is necessary to attract the fish. Similarly, compensating the employers is necessary for them to find hiring handicapped employees attractive.

### C. *Recent Changes in the Special Indemnity Fund*

In 1986, section 171 was amended so that it closely resembles its present day form.<sup>92</sup> The reference to "any part of the body" was

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87. *Figgins*, 831 P.2d at 1381.

88. *Musser et al.*, *supra* note 34, at 195.

89. *See* sources cited *supra* note 7.

90. *Special Indem. Fund v. Bedford*, 852 P.2d 150, 154 (Okla. 1993); *Figgins*, 831 P.2d at 1382; *Special Indem. Fund v. Treadwell*, 693 P.2d 608 (Okla. 1984); *Special Indem. Fund v. Scott*, 652 P.2d 278 (Okla. 1982).

91. *Petroleum Maintenance Co. v. Herron*, 206 P.2d 182, 184 (Okla. 1949).

92. *Figgins*, 831 P.2d at 1383.

The original SPIF legislation required that in order to receive compensation from the fund, the employee must be deemed a "previously impaired person." A previously impaired person was one whom suffered from "the loss of one eye, the loss by amputation of the whole, or a part of some member of his body, or the loss of the use, or partial loss of the use, of a specific member." OKLA. STAT. tit. 85, § 171 (1943). No percentage of combinable disability was required by this statute. OKLA. STAT. tit. 85, § 172 (1943). In 1975, section 171 was revised. This amendment defined a physically impaired person as "a person who has sustained an injury to any part of the body or a specific member thereof." OKLA. STAT. tit. 85, § 171 (1975). As a result of this amendment, the period from 1975 until 1986 was the most liberal period for claims against the SPIF. There was no threshold percentage requirement, and a far larger number of injuries were eligible for compensation.

deleted.<sup>93</sup> Additionally, the language of "specific member" was removed and the term "major member" was substituted in its place.<sup>94</sup> Major member, while not defined by statute, was defined by the judiciary in *Special Indemnity Fund v. Figgins*.<sup>95</sup> Thus, the SPIF narrowed from allowing unadjudicated, pre-existing disability to any part of the body, to allowing it only to the eyes, arms, hands, legs, and feet. Additionally, the SPIF was further restricted by a requirement that the combination of the two injuries had to result in a seventeen percent material increase.<sup>96</sup>

While the application of the SPIF was narrowed by the 1986 amendments, it wasn't until 1992 that the full impact of the statute was felt. In *Figgins*, a worker with a pre-existing disability of asthma was awarded benefits from the SPIF by the Workers' Compensation Court. The SPIF appealed to the three-judge panel of the Workers' Compensation Court which affirmed the award to Figgins. The SPIF appealed again to the Court of Appeals which also affirmed. The Supreme Court of Oklahoma granted certiorari and overturned the decision on the grounds that an injury to the body does not qualify under the major member meaning of section 171.<sup>97</sup>

Despite the increased restrictions on the SPIF, by 1988, the fund was deep in financial trouble.<sup>98</sup> Michael Clingman, administrator of the SPIF in 1988, blamed the financial difficulties on tort reform, liberalization of the SPIF, and additional financial responsibilities of the State Insurance Fund and Workers' Compensation Administration Fund which had previously supplemented the SPIF.<sup>99</sup> More legislative changes were not far away. In 1992, the SPIF increased the taxes levied upon the judgments, with the worker and the employer or insurance carrier each paying five percent of the judgment, up from three percent previously.<sup>100</sup> These 1992 changes were attributed to the SPIF's financial difficulty.<sup>101</sup> While many funds are funded by

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93. *Figgins*, 831 P.2d at 1383.

94. *Id.*

95. *Id.* "Under prior case law, this Court used the term 'major member' to identify the arms, hands, legs, feet, and eyes. Because Sec. 171 specifically includes the loss of sight in its definition of a physically impaired person, it is no longer necessary to include the eyes within the more general term 'major member.'" *Id.* at 1384.

96. OKLA. STAT. tit. 85, § 172 (1991).

97. *Figgins*, 831 P.2d at 1380.

98. Patricia Bond, *Regional News*, UNITED PRESS INT'L, Jan. 13, 1988.

99. *Id.*

100. OKLA. STAT. tit. 85, § 173 (Supp. 1994).

101. Trammell et al., *supra* note 73, at 24A.

unclaimed death benefits and employer contributions, few states actually have the injured employees contribute money to the fund from their injury awards. While employers and insurance carriers benefit from contributing to the fund, as they are then indemnified against liability for future injuries, it is difficult to ascertain what benefit there is for the employee. A worker could contribute five percent of his or her injury award to the SPIF, and then never have another injury. That money is gone from that individual worker for eternity. This creates a basic fairness question of whether the employees should pay to indemnify the employers, or whether the employers should bear the sole cost.

Michael Clingman advocated making the SPIF's benefits even more restrictive than their already narrow construction. "They've liberalized the use of the fund all out of proportion. It was originally designed to help handicapped workers' get jobs . . . . It should be more restrictive."<sup>102</sup> This claim by the SPIF administrator is particularly interesting since the statutes regarding injuries eligible for the SPIF had become increasingly more and more restrictive, not liberalized. Finally, Section 171 was modified again in 1993, which removed the phrase "major member" and substituted simply "member."<sup>103</sup> Now injuries to the "minor members," such as thumbs, fingers, and toes, could theoretically be eligible.<sup>104</sup> However, this is yet to be tested in an appellate case.

#### IV. THE CURRENT STATE OF THE FUND

In fall of 1994, a special session was called to deal with workers' compensation reform.<sup>105</sup> As a result of House Bill 1002 numerous workers' compensation statutes were changed.<sup>106</sup> Section 172 was amended to add a section "E" which provides that

[a]ll weekly payments for permanent partial disability shall be paid before any claim for benefits against the Special Indemnity Fund may be paid. In the case of a lump-sum permanent partial disability award or settlement, such award or settlement shall be divided by seventy percent of the employee's weekly wage up to a maximum of fifty percent of the state's average weekly wage, to determine the

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102. Patricia Bond, *Regional News*, UNITED PRESS INT'L, Jan. 13, 1988.

103. OKLA. STAT. tit. 85, § 171 (Supp. 1994).

104. See *Special Indem. Fund v. Figgins*, 831 P.2d 1379, 1383 (Okla. 1992) (citing *Special Indem. Fund v. Davidson*, 162 P.2d 1016, 1018 (Okla. 1945)).

105. 1994 Okla. Sess. Laws 1002.

106. *Id.*

number of weeks which must elapse before a claim against the Special Indemnity Fund may be paid.<sup>107</sup>

Additionally, and perhaps more significant to this discussion, a new section of the law, Title 85 Section 182,<sup>108</sup> was created. This section created the "Joint Committee on the Special Indemnity Fund."<sup>109</sup> This committee is charged with conducting a study of the SPIF. Specifically, the committee is to analyze the impact that closing down the SPIF would have on the employers of the state.<sup>110</sup> This includes determining what impact the ADA has on the SPIF. The committee is also to determine the unfunded liability of the SPIF as well as analyze the impact of the growth of the workers' compensation on the SPIF.<sup>111</sup> This committee, made up of five state representatives and five state senators, must file a report of its findings by January 1, 1996 with the Speaker of the House and the President Pro Tempore of the Senate.<sup>112</sup>

The significance of this statute is that the legislature appears to be acknowledging that all is not well with the SPIF. This is clear from a look at the SPIF today. As of November, 1994, the SPIF was \$16.2 million in debt.<sup>113</sup> Workers are waiting at least eighteen months to receive their SPIF benefits after a favorable adjudication.<sup>114</sup> Currently, more than 3,000 workers are still awaiting the payment of their awards.<sup>115</sup> Additionally, numerous workers' compensation attorneys are now filing suits against the SPIF for lump sum interest payments on the delayed awards. This is in the wake of successful test cases filed against the SPIF by attorney Richard A. Bell and settled for \$518,551 on behalf of 873 clients.<sup>116</sup> Those test cases are expected to just be the beginning of employees filing against the SPIF for interest awards.<sup>117</sup> With an interest rate of eighteen percent, the SPIF stands

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Trammell et al., *supra* note 73, at 1A.

114. Trammell et al., *supra* note 73, at 1A.

115. Trammell et al., *supra* note 73, at 24A.

116. Trammell et al., *supra* note 73, at 24A.

117. Trammell et al., *supra* note 73, at 24A. "Dozens more lawsuits against the Special Indemnity Fund are now pending at the comp court, Oklahoma County District Court, Oklahoma City Federal Court and the state Supreme Court. They involve the interest dispute or other legal issues that could cause enormous losses to the fund." Trammell et al., *supra* note 73, at 24A. The potential for interest payments from lawsuits is \$2 million a year if things go poorly for the SPIF in court. Trammell et al., *supra* note 73, at 24A.



to become much more indebted quickly.<sup>118</sup> The frustration over the financial deficits and long delays in paying claimants have caused comments like that of Oklahoma Workers' Compensation Judge Noma Gurich. She said, "[t]he Legislature should 'fess up to the fact that these folks are in the red and they ought to fund it. There ought to either be a special indemnity fund or there shouldn't."<sup>119</sup>

## V. THE FUTURE OF THE FUND—RIPE FOR CHANGE

The SPIF is ripe for change. The legislature has acknowledged that fact by creating a special task force to make recommendations on changing the SPIF. But Oklahoma is not the only state with difficulties. While some states seem to be managing their second injury funds quite well, just as many others are in as bad or worse shape as the Oklahoma SPIF. Additionally, some states are beginning to acknowledge that the ADA may have a significant impact on the operation of their second injury fund. All of these factors should be taken into consideration when proposing a reform plan for the SPIF.

### A. *Other States' Reform*

Some states have successfully avoided the long delays that Oklahoma workers face in receiving their SPIF benefits. Three typical techniques for ensuring that the employee receives compensation on a timely basis can be illustrated by the Alaska, Arizona and Kansas statutes. Alaska has opted to have the employer or insurance carrier pay all of the award of compensation for the combined injury. Then, the employer is later reimbursed from the Fund.<sup>120</sup> This has the effect of getting compensation to the injured, out of work, individual on a timely basis. Comparatively, in Oklahoma up to a year and a half will pass following a successful adjudication against the SPIF before the injured worker receives compensation. Alaska's provision makes sense, as the insurance carrier or employer can better withstand a delay in repayment from the SPIF due to their greater resources than can the individual, injured worker.

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118. Trammell et al., *supra* note 73, at 24A. However, the recent 1994 special session lowered the rate to seven percent. 1994 Okla. Sess. Laws 1002.

119. Trammell et al., *supra* note 73, at 24A. Further, Gurich, who has been the comp court's presiding judge, said the 1994 reforms are not enough. "That's going to make a difference in the next 10 years but, you know, it's like everything else, it takes a long time for that stuff to start having an impact . . . And, meanwhile, they [the legislature] should have to fund all that deficit and let them be even." Trammell et al., *supra* note 73, at 24A.

120. ALASKA STAT. § 23.30.205 (1994).

Arizona has a similar provision which provides for reimbursement to the employer or insurance carrier on a yearly basis.<sup>121</sup> The employer or carrier must apply to the Fund by November 1, of each year for reimbursement for any claims paid throughout the year. Reimbursements are paid to the employer or carrier before December 31.<sup>122</sup> Additionally, this statute has provisions for levying additional assessments on carriers and employers if the amount of claims is more than six million per year.<sup>123</sup>

Kansas, like Oklahoma, generally provides for paying the employee out of the second injury fund.<sup>124</sup> However, Kansas' statutes also provides that if there were insufficient funds to pay an employee's award, the fund must notify the employer and have the employer pay the award.<sup>125</sup> The employer would be reimbursed later, when the fund had collected sufficient monies.<sup>126</sup> Numerous other states follow these examples which allow the employee, who is injured, to receive his or her benefits as soon as possible from the employer.<sup>127</sup>

There are still states which operate their fund similarly to Oklahoma's, in that the main incoming funds are a percentage of the liability of the employer and employee paid into the fund.<sup>128</sup> These percentages may vary from one to five or more percent, which has given some of these funds the nicknames of the "one-percenter" or "two-percenter" funds.<sup>129</sup>

Other states have additional provisions for putting money into the fund. Arkansas fines employers who discriminate against employees who file workers' compensation claims up to \$10,000, which is payable directly into the fund.<sup>130</sup> Colorado also has a provision to put 25% of penalties and fines into the subsequent injury fund.<sup>131</sup> Connecticut funnels any collected fines into the second injury fund.<sup>132</sup> Missouri's fund recently acquired a balance of \$69 million, the highest

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121. ARIZ. REV. STAT. ANN. § 23-1065(F) (1994).

122. *Id.*

123. *Id.*

124. KAN. STAT. ANN. § 44-569 (1993).

125. *Id.*

126. *Id.*

127. CONN. GEN. STAT. § 31-349(b) (Supp. 1994).

128. CONN. GEN. STAT. § 31-354 (Supp. 1994).

129. APPLEMAN, *supra* note 3, § 4595.

130. ARK. CODE ANN. § 11-9-107(a)(1)(2) (Michie Supp. 1993). Additionally, this statute provides that the payments must be made from the employer itself, and not the insurance carrier. *Id.*

131. COLO. REV. STAT. § 8-43-304(1) (Supp. 1994).

132. CONN. GEN. STAT. § 31-289 (Supp. 1994).

in its history, so that the state may forego collecting the taxes for the fund in 1995.<sup>133</sup> Meanwhile, Oklahoma has steadily been taking money away from the SPIF and channeling it into other departments like the state Department of Vocational and Technical Education.<sup>134</sup> This diversion of SPIF funds into state agencies is expected to be the subject of an upcoming lawsuit that claims the diversion of funds is unconstitutional.<sup>135</sup>

Oklahoma is not alone in its financial problems. Other states have also had significant financial problems with their funds. In Tennessee, the state completely suspended payments from the state's Second Injury Fund to both one hundred percent disabled workers as well as to insurance companies.<sup>136</sup> Meanwhile, Connecticut has seen its annual costs for the fund escalate from \$40 million in 1988-89 to over \$100 million for the 1993 fiscal year.<sup>137</sup> For Connecticut to pay on all the claims already filed, without even considering paying any additional claims after June 30, 1994, the state fund would have to pay more than \$6 billion.<sup>138</sup> Minnesota's fund also has its share of problems with a 1988 unfunded liability of about \$1.5 billion.<sup>139</sup>

#### B. *The Impact of the ADA on Second Injury Funds*

The ADA was signed into law on July 26, 1990.<sup>140</sup> This Act became effective on July 26, 1992, and now Title I of the ADA applies to

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133. Terry Ganey, *Injury Fund Hits \$69 Million; State May Forgo Collecting Taxes To Finance It*, *ST. LOUIS POST-DISPATCH*, Nov. 1, 1994, at 4A. Ironically, the Attorney General of Missouri credits the health of the fund to "[a]ggressive defense of the Second Injury Fund by state attorneys." *Id.* Thus, in a system where the worker is supposed to receive quick relief, the fund is being praised for aggressively employing attorneys to fight the injured workers.

134. Trammell et al., *supra* note 73, at 24A. "But the Legislature also has made changes that have worsened the shortage. In 1993 Legislators gave 10 percent of the fund to the state Labor Department, state Department of Vocational and Technical Education and Attorney General's workers comp fraud unit." Trammell et al., *supra* note 73, at 24A.

135. Trammell et al., *supra* note 73, at 24A.

136. Bill Lewis, *Insurers Fear State's Second Injury Fund Unable To Refund Claims*, *NASHVILLE BUS. J.*, June 27, 1994, at 3.

137. Williams, *supra* note 7, at C1.

138. Williams, *supra* note 7, at C1. The \$6 billion would compensate for lost wages and medical bills and would continue to be paid out for approximately the next 50 years. Williams, *supra* note 7, at C1.

139. Meg Fletcher, *Minnesota Debates Work Comp Cuts*, *BUSINESS INS.*, April 18, 1988, at 179.

140. Robert B. Fitzpatrick, *Employers' Screening Procedures Under The Americans With Disabilities Act: What's Legal? What's Illegal? What's Debatable?*, in *ALI-ABA COURSE OF STUDY: CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 395* (1994).

all employers with fifteen or more employees.<sup>141</sup> The ADA generally extends "to persons with disabilities the same rights afforded to minorities under the Civil Rights Act of 1964."<sup>142</sup> The purpose of the Act "is no less than to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>143</sup> The ADA describes the disabled as an individual which "(1) has a physical or mental impairment which substantially limits<sup>144</sup> one or more of that person's major life activities,<sup>145</sup> (2) has a record of such an impairment, or (3) is regarded by the covered entity as having such an impairment."<sup>146</sup> Thus the purpose of the ADA is very similar to the purpose of the SPIF: to prevent discrimination against handicapped workers.

The ADA is much more liberal in its definition of disability than the Oklahoma statutes, so that more workers are covered. For example, alcoholism, drug addiction, cancer and AIDS may be considered to be disabling under the ADA. None of these conditions would merit designation as a pre-existing disability under the SPIF. However, many conditions which would merit compensation under the regular parts of the Workers' Compensation Act would not merit a label of disability under the ADA. "Work-related injuries do not always cause physical or mental impairments severe enough to 'substantially limit' a major life activity. Also, many on-the-job-injuries cause non-chronic impairments which heal within a short period of time with little or no

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141. Frank C. Morris, Jr., & Teresa L. Jakubowski, *The Americans with Disabilities Act And Other Health Issues In The Workplace*, in ALL-ABA COURSE OF STUDY: CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 345 (1994); Fitzpatrick, *supra* note 140, at 395. There are four substantive titles of the ADA: Title I (§§101-108) involves employment discrimination; Title II prohibits state and local government discrimination; Title III involves access to facilities and businesses open to the public; and Title IV requires telephone companies to make "non-voice" services available to the disabled.

142. Morris & Jakubowski, *supra* note 141, at 343.

143. Morris & Jakubowski, *supra* note 141, at 343.

144. N. Douglas Grimwood & Denise M. Blommel, *Employment Rights of Injured Workers in Arizona: The Effect of Federal Legislation*, 30 ARIZ. ATTY. 16, 17 (1994). "A worker is 'substantially limited' if he is disqualified from either a class of jobs or a broad range of jobs as compared to an average person having comparable training, skills and ability. The inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working." *Id.*

145. *Id.* "A 'major life activity' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. It is important to note that the physical functions must be examined first to determine if any of them are impaired. Only if none of the normal physical functions are impaired does one look to see whether a particular condition interferes with 'working' to determine whether an individual is disabled." *Id.*

146. *Id.*

long-term or permanent impact."<sup>147</sup> These types of short-term injuries are not considered disabilities under the ADA.<sup>148</sup> For example, if a worker falls and breaks a leg on the job, it is probably not considered to be a disability under the ADA, as it will heal relatively quickly without substantially limiting a life activity. However, if the fracture takes an abnormally long time to heal, prevents the worker from walking, or results in a limp, it might qualify the worker as disabled under the ADA.<sup>149</sup>

The ADA accomplishes the goal of non-discrimination against the employment of the handicapped by providing that an employer "may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future."<sup>150</sup> The ADA has two major impacts on second injury funds. First, most funds—although not Oklahoma—require that the employer have notice of the handicap before the employment or hiring of the worker to be eligible for the later fund benefits.<sup>151</sup> The ADA makes it very difficult to accomplish this requirement. "Pre-employment questions about disabilities, illness, and past injuries are not allowed if the inquiries have the potential to reveal the existence, nature or severity of an applicant's disability."<sup>152</sup> The only way that an employer can ask for the information which is necessary to qualify for reimbursement from the funds, is by using a medical inquiry *after* a "conditional offer of employment."<sup>153</sup> However, the employer is further restricted, in that if a medical inquiry is made after a conditional offer of employment, then the same medical inquiry must be made of all employees in the same job category. This is regardless of whether these employees have any disability or perceived disability.<sup>154</sup> To fail to test all the employees in the same job category with the same criteria used to test the conditional employee would violate the ADA.<sup>155</sup> However, employers, in states which require the submission of pre-

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147. Jeffrey C. Bannon, *Application And Enforcement Of The Americans With Disabilities Act*, in 1993 WORKERS' COMPENSATION INSTITUTE: THE LAW AND THE WORKPLACE 2 (1993).

148. *Id.*

149. *Id.* at 1.

150. *Id.* at 8.

151. *Id.*

152. Shawn Daughtridge Wallace, *The Injured or Disabled Worker: New Rights, New Duties*, 6 S.C. L. REV. 23 (1994).

153. *Id.*

154. *Id.*

155. *Id.* "The employer must show that the criteria used in determining which conditional employees are required to undergo a medical examination do not tend to single out individuals with disabilities." *Id.* (citing 42 U.S.C. § 12112(d)(3) (Supp. V 1993)).

existing disability information to the second injury funds, are allowed to submit the necessary information due to the later interpretations of the ADA regulations.<sup>156</sup>

The second major impact the ADA has on second injury funds is a result of the purpose of the ADA. Early after its enactment, the ADA was heralded as an "incredible incentive to return employees to work after an injury on the job."<sup>157</sup> Parallels were soon drawn between the second injury funds and the ADA. The ADA bans any discrimination against qualified handicapped job applicants. Thus, the philosophical basis for the second injury funds, encouraging the hiring of the handicapped, has effectively ceased to exist.<sup>158</sup> If employers are already prevented by federal law from discriminating against the hiring of disabled workers, then an additional financial incentive should not be necessary. States which have abolished<sup>159</sup> and states which have considered eliminating<sup>160</sup> their second injury funds often cite the provisions of the ADA as making the second injury funds purposeless. Some have found that the second injury funds didn't fulfill their purpose in the first place.

[T]he Second Injury Fund was created to induce employers to hire or retain injured or disabled workers. But this noble idea has long since ceased to induce employees to 'do the right thing.' It took the Americans With Disabilities Act (ADA) to make employers employ persons with handicaps. Furthermore, the ADA has made the second-injury aspect of the fund almost obsolete. The fund has become an inefficient, multi-million-dollar operation . . . .<sup>161</sup>

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156. *Id.*

157. Colleen Mulcahy, *Disability Act Incentive For Worker Return Is Seen*, NAT'L UNDERWRITER, PROP. & CASUALTY RISK & BEN. MGMT. EDITION, February 3, 1992, at 9.

158. *Id.*

159. Carey Gillam, *Kansas Insurance Commissioner Wants to Drop Second-Injury Fund*, KANSAS CITY BUS. J., March 26, 1993, at 3. Assistant Insurance commissioner Dick Brock said, "the second-injury element of the workers' compensation fund is unnecessary. It's designed to supplement workers' compensation benefits when a previously injured or disabled worker suffers a second injury on the job . . . . However the passage of the Americans with Disabilities Act, designed to protect the disabled from discrimination, lessens the need for the second-injury fund . . . ." *Id.*

160. Lewis, *supra* note 136, at 3. Tennessee's Commissioner of Finance and Administration David Manning said, "the Second Injury Fund should be abolished because the Americans with Disabilities Act accomplishes the same purpose." Lewis, *supra* note 136, at 3.

161. Matthew Shafner, *An Idea Whose Time Has Come — And Gone?*, CONN. L. TRIBUNE, April 25, 1994, at 5.

### C. *Abolishment of the Fund in Nearby States*

Second injury funds have come under increasing attack in the recent years. These funds have been criticized for creating a non-merit based pool for subsidizing injuries to disabled workers.<sup>162</sup> Thus, employers have an incentive to dump claims into the Fund since it will not effect their premiums.<sup>163</sup> Additionally, the second injury funds have been accused of being part of the reason for unsafe workplaces.<sup>164</sup> These funds spread the cost of injuries among all employers, with no distinctions for workplaces which are safety inspected.<sup>165</sup> Thus, there is no incentive to make the workplaces safe,<sup>166</sup> since any costs an employer with an unsafe workplace will have to bear are spread out across the industry.<sup>167</sup> The only incentive the funds appear to provide is to reward employers and insurance companies who are the most aggressive in applying to the fund, not the employers who have the safest workplace.<sup>168</sup>

Another strong criticism of the funds is their cost.<sup>169</sup> A staff report in Connecticut has described that state's fund as "an unfunded insurance plan with runaway costs, few controls, no prospect for a downward turn in the cost curve and an estimated financial exposure to the current and future employers of Connecticut that likely reaches into the billions."<sup>170</sup> Other states, as well as Oklahoma, are also feeling the financial crunch. Unfortunately, Oklahoma's financial difficulties are only expected to get worse.<sup>171</sup>

Perhaps the strongest criticism of the second injury funds is that they are obsolete. The ADA no longer makes it necessary to bribe employers into hiring and keeping handicapped workers. Employers cannot discriminate against these workers. With the purpose of the

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162. Emily A. Spieler, *Perpetuating Risk? Workers' Compensation And The Persistence Of Occupational Injuries*, 31 Hous. L. Rev. 119, 201 (1994).

163. *Id.* at 202. This created a significant problem in West Virginia where significant dumping occurred due to claims from previous work in hazardous industries like coal mining. *Id.*

164. Shafner, *supra* note 161, at 5.

165. Shafner, *supra* note 161, at 5.

166. Larry Williams, *Troubled State Fund Survives; Legislative Panel Tables Move To Abolish Second Injury Fund*, THE HARTFORD COURANT, March 1, 1994, at B9. "While the rest of the workers' compensation program has been set up to encourage workplace safety, . . . [t]he Second Injury Fund spreads costs without regard to safety record." *Id.*

167. Shafner, *supra* note 161, at 5.

168. Williams, *supra* note 166, at B9.

169. Williams, *supra* note 166, at B9.

170. Williams, *supra* note 166, at B9.

171. Trammell et al., *supra* note 73, at 24A.

funds better met by a different act, are the funds really necessary any longer?

Colorado has answered that question with a resounding "no." There, the legislature has recently abolished its subsequent injury fund. As of July 1, 1993, no more new cases were accepted by the Colorado fund.<sup>172</sup> While the employer is not liable for any more injury than the accident at work creates, the employee no longer receives the additional benefits from the fund.<sup>173</sup> However, in the cases where the second injury renders the employee permanently and totally disabled, the insurer may seek proportional indemnification from the previous employer.<sup>174</sup> Opponents of this type of abolishment would complain that it appears to be punishing the worker by refusing to compensate the worker for the increased percentage of disability. However, the purpose of these funds was never to pay the claimants. The purpose was to put handicapped workers on the same grounds as the non-handicapped. With that goal accomplished, there is no longer any reason to bait the hook.

Colorado is not alone in abolishing its second injury fund. Kansas, another nearby state, has also eliminated its fund. The Kansas Second Injury Fund (the "SIF") was created in 1945 with the one purpose of encouraging "the hiring of handicapped employees by relieving the employer of the cost of a second injury in certain instances."<sup>175</sup> In 1993, the Kansas legislature tackled the task of workers' compensation reform.<sup>176</sup> One of the provisions passed eliminated the SIF.<sup>177</sup> Assistant Kansas Insurance Commissioner, Dick Brock, called the SIF unnecessary due to the passage of the ADA.<sup>178</sup> The Kansas SIF will no longer accept claims for injuries which occurred after July 1, 1994.<sup>179</sup>

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172. Ruth A. Brown, *Workers' Compensation: State Enactments in 1992*, MONTHLY LAB. R. 50 (1993).

173. COLO. REV. STAT. § 8-46-109 (1993).

174. Brown, *supra* note 172, at 50.

175. David J. Rebein, *The Achilles Heel: Employer's Knowledge Of Employee Pre-Existing Handicaps In Workers' Compensation Cases*, 57 KAN. B. ASS'N. 21 (1988).

176. Cynthia Mines, *Workers' Compromise: New Legislation Contains Something For Everyone*, WICHITA BUS. J., May 21, 1993, at 1.

177. *Id.*

178. Carey Gillam, *Kansas Insurance Commissioner Wants To Drop Second-Injury Fund*, KANSAS CITY BUS. J., March 26, 1993, at 3.

179. KAN. STAT. ANN. § 44-567 (1993).



#### D. *Reform Plan for the Fund*

The Oklahoma SPIF has been amended numerous times since its creation in 1943. Each time the restrictions on the amount and type of disability have changed, at times depending on how badly the SPIF was in need of finances. Recently, workers' compensation reform created a task force to review the SPIF. That task force could try various types of reform proposals.

The task force could reform the funding for the SPIF. Rather than bleeding funds off of the SPIF to help finance other departments, the SPIF could be left intact, with additional help from the general fund. The task force could also choose from other reforms. It could alter the type and restrictions on handicaps so that fewer claims are paid. However, currently the SPIF is at its most restrictive and the financial problems have not abated. Making the SPIF more restrictive only serves to eliminate more handicapped people from the fund. This makes the SPIF even more unable to serve its stated purpose of encouraging the hiring of handicapped employees.

As a different option, the task force could alter the way claims are paid to the workers. The task force could consider having the employer or insurance carrier pay the SPIF claim, and then later reimburse the employer. This type of reform has a great deal of potential, as it gets the money to the injured worker when it is needed, not eighteen months or more down the line. However, with no other type of reform accompanying it, this requires insurance carriers to receive their reimbursements over a year later. The odds of the strong insurance industry allowing a measure like this to pass are unlikely, despite the fact that it would benefit the workers in Oklahoma.

The real question the task force must address is whether Oklahoma's SPIF is ripe for reform or repeal. The purpose of the SPIF, many times reiterated by the courts, is to encourage employers to hire previously injured workers. A test put to the Missouri legislature by the St. Louis-Dispatch editorial board is worth considering in determining the value of the Oklahoma SPIF.<sup>180</sup>

Does the antiquated Second Injury Fund serve its intended purpose . . . ? The appropriate inquiry for the legislature is whether the fund serves that purpose. I suggest the legislature ask those who purportedly benefit from the fund—employees and employers. Do not involve the rogue attorneys who ride the fund's gravy train. Begin with two fundamental questions: Has the would-be employee ever

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180. *Don't Be Fooled by New G.I. Bill*, ST. LOUIS POST-DISPATCH, Oct. 2, 1992, at 2C.

notified the employer in advance of the employment decision of a pre-existing injury? Has the would-be employer ever hired an injured worker on the assurance that the fund would minimize its workers' compensation exposure? If a significant number of employees and employers answer yes, then, . . . reform of the Second Injury Fund is needed. However, if the answer is an overwhelming no, then the solution is not reform, but repeal.<sup>181</sup>

The Oklahoma SPIF would not pass such a test. Oklahoma employers do not have to be notified of the pre-existing injury, thus it fails question one. Secondly, the employer only pays for the amount of injury created by the workplace. The answer to question number two would also be no. While various types of reform have worked in other states, most of those states were actually working toward achieving the purpose of encouraging the hiring of the handicapped. Oklahoma's SPIF does not encourage the hiring of the handicapped due to its lack of notice requirement and excessive restrictions. Additionally, the ADA mandates that employers not discriminate against the handicapped. In light of these two factors, reform of the SPIF seems pointless. If it doesn't achieve its purpose of encouraging the hiring of the handicapped, what purpose does it serve? It does, eventually, bring certain injured workers more money. It does, eventually, generate more fees for attorneys. But neither of these actions are the purpose of the SPIF. Unless the SPIF can be reformed to meet the goal of encouraging the hiring of the handicapped, it should be repealed.

At least two states have eliminated their second injury funds. Other states have made strong attempts to eliminate them, but have failed to overcome the strong objections of the insurance industry.<sup>182</sup> These states all contend that the ADA better meets the purpose of the Fund.

## VI. CONCLUSION

The Special Indemnity Fund in Oklahoma is no longer needed. It had one purpose, to encourage the hiring of handicapped workers. That mission statement was never fulfilled by the SPIF as it failed to require the employer's knowledge of the pre-existing handicap. Additionally, the severe limitations on the definition of pre-existing disability excluded many individuals who should logically be considered

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181. *Id.*

182. *See Williams, supra note 7, at B9.*

handicapped. Thus, the purpose of the SPIF was never achieved. More importantly, the recently adopted ADA meets the goal of eliminating discrimination against employing the handicapped, and meets it more successfully than the SPIF ever did. The SPIF is now an archaic, purposeless liability to the state of Oklahoma. It is time for Oklahoma to follow in the steps of other states which have found the burdensome second injury funds obsolete, and eliminate the SPIF entirely.

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