



JUGE NAPOLITANO

GUILBEAU RULI FRIEMAN APLC

## **Preserving and Asserting Second Injury Claims**

The Second Injury Fund was created to encourage the hiring and retention in employment of disabled employees who have a permanent, partial disability. The Second Injury Fund provides relief to employers and insurers from excess liability for compensation and medical benefits when a subsequent injury to such an employee merges with a preexisting permanent physical disability to cause a greater disability than would have resulted from the subsequent injury alone.

### **Written Claim Must be Filed**

The employer or its insurer (whichever of them makes the payments or becomes liable) must file a written claim with the Second Injury Board providing such facts and information as may be required by the Board to determine whether the employer or insurer is qualified for reimbursement from the Second Injury Fund.

### **Time for Filing**

A claim for reimbursement must be filed within one year (52 weeks) from the date of the first payment of any compensation or medical benefits (whichever comes first).

### **Appeals from Second Injury Board Decisions**

A party has 30 days from the receipt of written notice of an adverse decision by the Board to appeal. However, out of an abundance of caution, it is highly recommended to file the appeal within 30 days from the date of the denial. If an appeal is taken, the Second Injury Board shall be made a party defendant and a de novo trial shall be held.

Appeals are taken to the 19th Judicial District Court in Parish of East Baton Rouge.

### **Requirements for Recovery**

An employer must knowingly employ or knowingly retain in his employment an employee who has a permanent partial disability, and the employee is injured in a

subsequent accident at work which injury merges with the prior disability to create a greater disability than would have resulted from the job accident alone.

### **Preexisting Permanent Partial Disability**

A pre-existing, permanent partial disability for purposes of a Second Injury claim is a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment should the employee become unemployed.

1. Where the pre-existing permanent partial disability is one of the 34 conditions listed in La. R.S. 23:1378(F), and the employer establishes that he had knowledge of that condition prior to the subsequent injury, there is a presumption that the employer considered the condition to be permanent and likely to be a hindrance or obstacle to employment.
2. Note that the list includes arthritis, ruptured intervertebral discs and a spinal fusion or surgical removal of an intervertebral disc.

### **Employer Knowledge**

1. Generalized knowledge of an employee's condition(s) or complaints is insufficient.
2. The best procedure is to have the employee complete a medical history form inquiring about previous accidents, injuries or disabilities and to have the employee undergo a post-offer employment physical. Such inquiries are specifically allowed under Section 1208.1 and are required in order to take advantage of the forfeiture provisions of Section 1208.1 in which an employee can be denied all benefits if he fails to truthfully respond to questions about his/her previous injuries or medical condition. (Note: Inquiries must be post offer of employment so that the Americans with Disabilities Act is not violated.)

### **Merger**

The merger of an injury with a preexisting permanent partial disability means that:

1. The subsequent injury would not have occurred but for the pre-existing permanent partial disability, or
2. The disability resulting from the subsequent injury, in conjunction with the pre-existing permanent partial disability, is materially and substantially greater than that which would have resulted had the pre-existing permanent partial disability not

been present and the employer has been required to pay and has paid for that greater disability.

3. The merger does not necessarily have to involve an injury to the same parts of the body (e.g., a back disability can merge with mental retardation to cause a greater disability).

### Subsequent Injuries

The employee with a pre-existing, permanent partial disability must incur a subsequent injury arising out of and in the course of his employment. This injury must occur prior to the employer's knowledge of the pre-existing condition.

### Deductibles/Reimbursement Schedule

Date of Injury	Reimbursement Schedule
Before July 1, 2004 & on/after July 1, 2009, but before July 1, 2010 Before July 1, 2004 & on/after July 1, 2009, but before July 1, 2010 Before July 1, 2004 & on/after July 1, 2009, but before July 1, 2010	<p><b>INDEMNITY</b> TTD/SEB/PTD After the first 104 weeks of payment of benefits</p> <p>Death benefits after the first 175 weeks of payment of benefits</p> <p><b>MEDICAL</b> 50% of all reasonable and necessary medical expenses actually paid which exceed \$5,000.00, but no less than \$10,000.00</p> <p>100% of all reasonable and necessary medical expenses actually paid which exceed \$10,000.00</p>
On/after July 1, 2004 & before July 1, 2009 On/after July 1, 2004 & before July 1, 2009 On/after July 1, 2004 & before July 1, 2009	<p><b>INDEMNITY</b> After the first 130 weeks of payment of benefits</p> <p><b>MEDICAL</b> 100% of all reasonable and necessary medical expenses actually paid which exceed \$25,000.00</p>
On/after July 1, 2010	<p><b>INDEMNITY</b> After the first 104 weeks of indemnity</p> <p><b>MEDICAL</b> 100% of all reasonable and necessary medical expenses actually paid which exceed \$25,000 including reasonable and necessary Vocational Rehabilitation expenses, if such expenses, if such expenses are directly related to services provided in the actual retention or retention re-re-employment of employees</p>

## **Workers' Compensation Settlements**

The Second Injury Board has the option of reimbursing the settlement amount to the employer or insurer in one payment or in periodic three-month intervals until it has fully reimbursed the settlement amount.

For all accidents occurring on or after October 1, 1995, the employer or the insurer must obtain board approval for any workers' compensation settlement. Failure to do so will result in a forfeiture of the right of the employer to recover the settlement funds from the Second Injury Board.

## **Rehabilitation Expenses**

These expenses are not recoverable from the Second Injury Fund; *Employers National Ins. Co. v. Second Injury Board*, 540 So.2d 1094 (La. App. I Cir. 1989), writ denied, 546 So.2d 1219 (La. 1989).

## **Third-Party Settlements**

The 1988 Amendments provide that the Second Injury Fund shall be credited for any amounts the employer or insurer receives from third parties. The employer or insurer is required to notify the Board of any subrogation action against third parties on any claims submitted to the Board.

1. Failure of the employer or insurer to notify the Board of any pending subrogation action prior to the receipt of payment from the Board shall subject the employer or the insurer to a penalty of 20% of the amount otherwise payable from the Second Injury Fund, as well as a return of all amounts paid by the Board to the extent such amounts are recovered in the subrogation action.
2. It is recommended that employers and insurers notify the Second Injury Board of any anticipated or pending third-party claims upon the filing of the Second Injury claim and immediately upon receipt of any funds pursuant to that third-party claim.

## **Payments under Federal Acts**

The Second Injury Board is not liable for reimbursement of or required to give credit for any amounts paid as attorney's fees, penalties or sums paid under the Jones Act or Longshore and Harbor Worker's Compensation Act.

## **Certifying Reserves**

La. R.S. 23:1378(A)(5)(a) requires that insurers certify to the Board that the medical and indemnity reserves do not exceed the threshold limits provided in the reimbursement schedule.