THE IOWA SECOND INJURY FUND—TIME FOR CHANGE

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I. Introduction

Millions of Americans are physically handicapped. Some are seriously disabled, such as the worker whose right arm was crushed by a roller in a rubber mill, the veteran who lost his leg after stepping on a land mine in Vietnam, and the printer who was born with only one eye. Others are less seriously handicapped. Some were disabled in factories, some on the highways, some in war, some at home, and some by disease. Some were just born that way. Whatever the nature or cause of their disabilities, America's handicapped citizens want to lead normal, productive lives, and they want to support themselves and their families.

Job hunting is not easy for the physically handicapped. A deformed arm, an irregularly beating heart, or a laminectomy scar often stamps "finished" on the work application. Contrary to popular belief, rehabilitation and job placement experts agree that disabled workers are no more likely to have job accidents than other workers in the shop. Additionally, handicapped workers have better overall attendance records and are less likely to "job hop" than non-handicapped workers. Most important to many employers, workers' compensation insurance premiums do not automatically increase when the employer hires a handicapped worker.

This article first explores the purpose and use of second injury funds. The article then analyzes the recommendations of the National Commission on State Workmen's Compensation Laws and the draft of a "model" second injury fund prepared by the Council of State Governments' Advisory Committee on Workmen's Compensation Laws. Last, the article recommends changes in Iowa law.[1]

II. What is the Second Injury Fund?

A second injury fund is a special fund established within the administrative framework of a state workers' compensation system. The fund is designed to insure that an employer who hires a handicapped worker will not be responsible for disability benefits for a greater disability than actually occurred while the handicapped worker was employed by that employer, in the event such a worker suffers a subsequent or second injury on the job.[2] The theory of the system is that the employer pays only the benefits that are due for the subsequent or second injury. The employee is nevertheless fully compensated because the fund pays the difference between the amount the employee actually receives from the employer for the second injury and the amount the employee would have received for the resulting condition if

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1. *See also* Jackwig, *The Second Injury Fund of Iowa: How Complex Can a Simple Concept Become?*, 28 Drake L. Rev. 889 (1978-79); H. Dahl, *The Iowa Second Injury Fund*, In Proceedings of 18th Annual Workers' Compensation Symposium 72, 73 (1980).

2. U.S. Dep't of Labor, Bulletin 190, Second Injury Funds 3 (1957) [hereinafter U.S. Dep't of Labor Bulletin 190].

there had been no prior disability.

The coverage of a second injury fund may be broad enough to protect workers from many types of prior disabilities, such as polio, epilepsy, arthritis, heart disease, or diabetes. Alternatively, coverage may be narrow and apply only to such handicaps as the loss of use of a hand, arm, foot, leg, or eye. Iowa has a narrow second injury fund.[3]

By removing an employer's fear of increased workers' compensation costs, second injury funds are intended to enhance employment opportunities for disabled workers. By paying the worker full benefits for resulting disability, second injury funds free the handicapped worker from the need and humiliation of seeking charity for himself and his family.

III. Background of Second Injury Fund Legislation

In 1910 delegates from ten states held a historic conference in Chicago to discuss the implications and consequences of the adoption of workmen's compensation systems. When the delegates turned to England for guidance, the delegates learned that "a hundred and fifty thousand English workmen . . . could not get employment . . . by reason of . . . some partial disability" after the English workmen's compensation law went into effect.[4] The American delegates recognized that some provision was needed in this country to protect the jobs of men and women with physical handicaps. Consequently, a committee appointed by the delegates at the conference recommended the following standard: "[I]f the employer could clearly establish that any injury was due in whole or in part to the employee's previous physical condition, then 'and to that extent only' benefits otherwise payable should be reduced."[5]

In the following decade "the principle of workmen's compensation spread so rapidly that by the end of 1920, all the Territories and all but six states had a workmen's compensation act."[6] For some unknown reason the specific second injury provision that had been recommended at the 1910 conference did not gain wide acceptance. A few states followed the recommendation in spirit by providing that in cases involving prior handicaps, the employer's liability should be limited to the amount of compensation payable for the second injury only.[7] A few states, including Iowa, tried to solve the problem by permitting physically handicapped workers to enter into contracts with their employers in which the employee "waived" his or her rights under the workmen's compensation law if the second injury was due to a prior physical defect.[8] Other states had no statutory provision for sec-

3. *See* Iowa Code § 85.64 (1989).
4. U.S. Dep't of Labor Bulletin 190, *supra* note 2, at 5.
5. *Id.*
6. *Id.*
7. *See, e.g.*, Pappas v. North Iowa Brick & Tile Co., 201 Iowa 607, 206 N.W. 146 (1925).
8. *See, e.g.*, Iowa Code § 85.55 (1989).

ond injury cases.

In the absence of a special second injury provision,

> [s]ome workmen's compensation agencies . . . were hesitant to hold employers responsible for the entire resulting disability in second injury cases because of the effect such a decision would have on the jobs and employment opportunities of other handicapped workers. . . .
>
> The problem was a difficult one. There seemed to be no way to do justice both to the employer and to the employees. If the law made employers responsible for full benefits in second injury cases, [employers] would refuse to hire physically handicapped workers. On the other hand, if it cut off the employer's liability beyond the second accident, the employee received "grossly inadequate compensation."[9]

Waivers were deemed to be unacceptable as a solution because the waivers "made the [workmen's] compensation law a dead letter for the handicapped worker and threw [the worker] upon public charity in the event of a second injury."[10]

In 1916 the State of New York devised a workable solution that was fair to both employers and employees. The impetus for the legislation was a decision by Appellate Division of the New York Supreme Court in 1915.[11] A worker who had lost one hand subsequently lost the other in a job related accident. The court held the employer responsible for permanent total disability rather than disability for the loss of the second hand.[12]

The New York legislature responded in 1916 with a second injury fund law which was the first in the country.[13] The law provided that

> if a worker with one hand, arm, foot, leg, or eye lost a second such member or organ in a work accident, [the worker's] employer would be liable only for the second loss, and any remaining compensation due for the combined injury would be paid from a special fund.[14]

Funds were obtained "by requiring an employer to make a $100 payment whenever an employee was fatally injured on the job and left no dependents to whom death benefits were payable."[15]

Second injury funds became popular at the end of World War II as an attempt to remove obstacles facing disabled veterans who were re-entering the job market. The Iowa fifty-first General Assembly copied the New York Act in 1945.[16] The Iowa Supreme Court described the purpose of the second injury fund as follows:

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9. U.S. DEP'T OF LABOR BULLETIN 190, *supra* note 2, at 6.
10. *Id.*
11. *See* Schwab v. Emporium Forestry Co., 167 A.D. 614, 153 N.Y.S. 234 (1915).
12. *Id.* at 236.
13. U.S. DEP'T OF LABOR BULLETIN 190, *supra* note 2, at 7.
14. *Id.*
15. *Id.*
16. *See* 1945 Iowa Acts 104.

> The authorities are in virtual unanimous agreement that the primary end sought to be achieved by the enactment of second injury fund legislation is to encourage the employment of handicapped persons by removing some of the principal objections that employers have to hiring them. If employers no longer need to fear greatly increased workmen's compensation costs as a result of hiring handicapped employees, then at least there is little rationale for their financial objections . . . .[17]

IV. Coverage Provisions

A. *"Broad" vs. "Narrow" Coverage*

Most American jurisdictions have second injury fund laws which cover all types of pre-existing permanent impairment, regardless of time or cause.[18] These second injury fund laws are classed as having "broad coverage."

Many other laws, including Iowa's second injury fund law, limit pre-existing disability coverage to loss or loss of use of a hand, arm, foot, leg, or eye.[19] Laws in other jurisdictions extend coverage to certain additional impairments, but not to all impairments.[20] These are generally classified as "narrow coverage" laws.

If a law covers only the loss or loss of use of a hand, arm, foot, leg, or eye, the law will fail to protect the majority of handicapped workers or the employers who provide those workers with jobs. Only a small percentage of all permanent disabilities consist of permanent losses to the limbs or serious eye impairments.[21]

B. *Limitations on Cause of Disabilities*

After World War II broad second injury fund laws unrestricted as to type or cause became increasingly important. The developing use of atomic energy in private industry which may have subjected workers to radiation hazards also led to liberalized coverage. A current trend toward broad coverage second injury fund laws reflects a growing recognition of the importance of these provisions in encouraging the employment of handicapped workers.

The federal Occupational Safety & Health Act of 1970[22] authorized the President to appoint an eighteen-member National Commission on State Workmen's Compensation Laws to determine the adequacy of state laws.

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17. Anderson v. Second Injury Fund, 262 N.W.2d 789, 792 (Iowa 1978).
18. *See* U.S. Chamber of Commerce, Analysis of Workers' Comp. Laws, Chart XII (1989) [hereinafter U.S. Chamber of Commerce Chart XII].
19. *See, e.g.*, Iowa Code § 85.64 (1989).
20. *See* U.S. Chamber of Commerce Chart XII, *supra* note 18.
21. U.S. Dep't of Labor Bulletin 190, *supra* note 2, at 9.
22. Occupational Safety & Health Act of 1970, 29 U.S.C. § 661 (1976 & Supp. 1979).

After a year-long study and several hearings held around the country,[23] the National Commission on State Workmen's Compensation Laws filed a report in July of 1972. The report made eighty-four recommendations and designated nineteen of them as essential for the states to meet on or before July 1, 1975.[24] One of the National Commission's recommendations was that "each State establish a second-injury fund with broad coverage of pre-existing impairments."[25] In 1974 a special committee of the Council of State Governments drafted a Workmen's' Compensation and Rehabilitation Law containing all of the eighty-four recommendations ("Model Act"). The Model Act contained a broad second injury fund provision.[26]

Today, most American jurisdictions have progressed beyond the "hand, arm, foot, leg, or eye" limitation. Most jurisdictions still have the limitation, however, that the combination of the first and second injuries results in permanent total disability. The State of Iowa liberalized its second injury fund law by removing the total disability limitation in the Second Injury Compensation Act.[27]

C. *Extent of Disability*

Substantial agreement exists that disability should not be limited to limbs or eyes, but that all types of disability should be covered. Nevertheless, the operation of the second injury fund should be limited to disabilities which are fairly significant. In other words, the extent of the first or second disability should meet a certain minimal test before the employer's responsibility is shifted to the fund.

In states with active broad coverage second injury funds, experience has shown that the failure to set minimum standards for the extent of disability of both the prior disability and subsequent disability results in pyramiding claims. The claims include " 'cases where the pre-existing [sic] condition was merely a latent, asymptomatic and nondisabling pathology.' "[28]

Rationally, if the purpose of a second injury fund is to encourage the employment of the handicapped, the handicap or disability should be suffi-

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23. The author testified three times before the National Commission on State Workmen's Compensation Laws and presented a study of state compliance with standards for workers' compensation laws recommended by the International Association of Industrial Accident Boards and Commissions (IAIABC), the organization of workers' compensation government administrators.

24. *See* REPORT OF THE NAT'L COMMISSION ON STATE WORKMEN'S LAWS (1972). *See also* Dahl, *The Iowa Workmen's Compensation Law and Federal Recommendations*, 24 DRAKE L. REV. 336 (1975).

25. REPORT OF THE NAT'L COMMISSION ON STATE WORKMEN'S COMP. LAWS R4.10, at 84.

26. WORKMEN'S COMP. & REHAB. LAW § 20 (Council of State Gov'ts 1974).

27. 1951 Iowa Acts 88, 90.

28. U.S. DEP'T OF LABOR BULLETIN 190, *supra* note 2, at 12-13 (*citing* CAL. SENATE COMM. ON LABOR, PARTIAL REP. RELATING TO WORKMEN'S COMP. 42 (1955)).

ciently severe to impede obtaining employment.[29] The Iowa Second Injury Compensation Act does not require that either the first or second injury result in total loss or total loss of use or that the overall disability be permanent and total.[30] Without a minimum threshold for either the first or second injury, the possibility exists that the fund would have to pay on the basis of the minor loss of use of one eye for the first disability, such as for astigmatism, and the loss of only two or three percent of the eye for the second injury. The benefits paid from the second injury fund would be small, but would result in delay, litigation costs, and drainage of funds better spent for the seriously disabled.

Some workers' compensation boards and commissions also require that the employer have knowledge of the handicap. If the employer does not have knowledge of the handicap, the handicap obviously was not an obstacle or hindrance to employment.[31] Accordingly, the second injury fund had nothing to do with encouraging the hiring of the handicapped and the purpose of the fund has been defeated.

If the employer is not required to have actual knowledge of a handicap before the handicapped employee has a job-related injury, the Second Injury Compensation Act becomes merely a method of paying additional compensation benefits to the handicapped worker who suffers a greater disability from the combination of an earlier handicap and a second injury than would be expected from the second injury alone.

D. *Death Cases*

Most workers' compensation second injury funds do not apply to cases in which the second injury results in death.[32] In at least eight states, however, the second injury fund does apply to such cases.[33] The Model Act of the Council of State Governments applies the second injury principle to

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29. As the first state legislature to enact a "broad coverage" law, the Wisconsin legislature recognized from the start that some "threshold qualifying requirement" was needed for both the first and second losses. The Wisconsin law covers only such prior disabilities as would, if they occurred in employment, be entitled to at least 200 weeks of benefits and only such second injuries as are entitled to at least 200 weeks. *See* WIS. STAT. ANN. § 102.59 (West 1988).

30. IOWA CODE § 85.64 (1989); *see also* Irish v. McCreary Saw Mill, 175 N.W.2d 364 (Iowa 1970).

31. The New York State Workers' Compensation Board requires that employers have knowledge of the handicap. In the case of a latent and obscure pathological condition, the New York law requires that employers must have acted in some way on this knowledge. *See* N.Y. WORK. COMP. LAW § 15(2) (McKinney 1965 & Supp. 1989).

32. *See* U.S. CHAMBER OF COMMERCE CHART XII, *supra* note 18. The Iowa Second Injury Compensation Act, IOWA CODE §§ 85.63-85.69 (1989), does not apply in death cases.

33. U.S. CHAMBER OF COMMERCE CHART XII, *supra* note 18. The following state laws provide some second injury fund benefits in death cases: FLA. STAT. ANN. § 440.15 (West 1989); HAW. REV. STAT. § 386-33 (1989); LA. REV. STAT. ANN. § 23:1378 (West 1989); MONT. CODE ANN. § 39-71-703 (1989); N.M. STAT. ANN. § 52-2-9 (1987); N.Y. WORK COMP. LAW § 15(7) (McKinney 1989); R.I. GEN. LAWS § 28-37-7 (1986); S.C. CODE ANN. § 42-9-400 (Law. Co-op. 1985).

heart cases and allows benefits to be drawn from the second injury fund because heart cases commonly result in death.[34]

V. Apportioning Liability Between Employer and Fund

Second injury fund legislation is not intended to relieve an employer of all liability when a handicapped worker is further disabled on the job. The legislation's purpose, rather, is to divide or apportion liability between the employer and the fund. The employer pays only for an injury which occurs while the worker is in his employment, and the fund pays the balance of benefits allowed for the combined effect of the first disability and the second injury.[35]

In general, most state laws provide that the employee collects benefits due for the second injury directly from the employer.[36] When these benefits have been paid, the employee collects the balance from the fund. In some states, however, the employer pays all benefits due for the combined first and second injuries and is reimbursed from the fund for any payments over and above the liability set by the second-injury law.[37] In other states, the employer pays benefits for the second injury and then the second-injury fund takes over for the balance of payments due.[38]

In order to allocate the amount payable from the employer and the amount payable from the fund, a determination must be made as to how much of the combined disability is due to the pre-existing condition and how much is due to the subsequent injury. In the states such as Iowa which limit coverage to specific "schedule" losses, the first and second injuries are easily separable and the employer's and fund's share of the combined disability can be ascertained.[39] Almost every state sets a certain "schedule" of value for a hand, arm, foot, leg, or eye. When the second-injury fund law applies exclusively to a specific member or organ, the workers' compensation agency can consult the schedule to ascertain how much the employer should pay for the second "schedule" loss. After the employer has paid the prescribed benefits for the second loss, the fund will generally pay the difference between the employer's payment and the total benefits allowed by the workers' compensation law for permanent total disability.[40]

Ideally, a second injury fund should pay the difference between: (1) the amount the employer paid for the second injury; and (2) the amount pay-

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34. Workmen's Comp. & Rehab. Law § 20(b) (Council of State Gov'ts 1974).

35. *See* 2 A. Larson, The Law of Workmen's' Compensation § 59.31(a) (1989).

36. *See, e.g.*, N.Y. Work. Comp. Law § 15(7) (McKinney 1989).

37. *See, e.g.*, Fla. Stat. Ann. § 440.15 (West 1989); La. Rev. Stat. Ann. § 23:1378 (West 1989).

38. *See, e.g.*, Iowa Code § 85.64 (1989).

39. *See supra* notes 42-61 and accompanying text (Iowa computation method).

40. *See, e.g.*, Iowa Code § 85.34(2) (1989); *see also* Irish v. McCreary Saw Mill, 175 N.W.2d 364 (Iowa 1970).

able for the combined disability. Iowa's Second Injury Compensation Act amends that equation by first deducting "the compensable value of the previously lost member or organ" from the amount payable for the combined disability.[41]

VI. Characteristics and Peculiarities of the Iowa Second Injury Compensation Act

Prior to 1945 Iowa did not have a second injury act. Under an existing statute and one case interpreting that statute, an employer was responsible to pay compensation only for the second loss when an employee who had previously lost a foot, leg, hand, arm, or eye, lost a second such member or organ.[42] Theoretically, under this practice, persons with missing members or organs could obtain work more readily since no additional burden was placed on the employer in case of additional injury. When such a person was injured, however, recovery was inadequate.

To cure the inadequacy, the Iowa legislature enacted the Second Injury Compensation Act ("Iowa Act") in 1945.[43] The current Iowa Act provides that when a hand, arm, foot, leg, or eye, or the use thereof is lost as a result of a compensable injury, the employer pays only the schedule award provided for the second injury, and the fund pays remaining compensation according to the degree of actual disability incurred.[44] The Iowa Act requires that the compensable value of the previously lost member or organ be deducted from payments by the fund. The deduction is required even if the employee was not compensated for the first loss.[45] Consequently, the second injury fund is surcharged only to the extent that the disability is attributable to employment.

The applicable provisions of the Iowa Act were amended in 1951 to remove all reference to total disablement.[46] Consequently, the Iowa Second Injury Fund clearly compensates permanent partial disabilities arising from employment related second injuries, as well as permanent total disabilities.

Under *Pappas v. North Iowa Brick & Tile Co.*,[47] the Iowa Act allowed apportionment. The court rejected the "full-responsibility" rule imposing liability for the entire disability upon the employer. Under the statute, the employer paid only for the single member or organ lost during employment.[48]

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41. Iowa Code § 85.64 (1989); *see also* Irish v. McCreary Saw Mill, 175 N.W.2d at 366.
42. Pappas v. North Iowa Brick and Tile Co., 201 Iowa 607, 206 N.W. 146 (1925).
43. 1945 Iowa Acts ch. 81.
44. Iowa Code § 85.64 (1989).
45. *Id. See also* Irish v. McCreary Saw Mill, 175 N.W.2d at 366.
46. 1951 Iowa Acts ch. 59. The Iowa General Assembly struck the words "permanent total disability" and substituted "the degree of permanent disability involved." *Id.*
47. Pappas v. North Iowa Brick & Tile Co., 201 Iowa 607, 206 N.W. 146 (1925).
48. *Id.* at 611, 206 N.W. at 148. For a discussion of the "full-responsibility" rule, see 2 A.

The Iowa Act is not all inclusive. The Act covers only the specified members and eyes. Furthermore, if the second injury to a part of the body not listed on the schedule in Iowa Code section 85.34(2) causes permanent disability to a part of the body listed on the schedule, the second injury fund is not liable.[49]

The Iowa formula divides responsibility between the Second Injury Fund and the employer. The Second Injury Fund pays the percentage of industrial disability of the body as a whole as found by the deputy industrial commissioner, less the functional disability lost from compensable injury, and less the compensable value of the earlier loss, whether or not compensable.[50]

Several cases illustrate this traditional approach. In *Irish v. McCreary Saw Mill*[51] the claimant was injured on April 29, 1965, resulting in 90% permanent partial disability of his left arm.[52] The claimant was entitled to compensation for 207 weeks. On July 21, 1965, the claimant incurred an injury to his right arm, resulting in 37.5% permanent partial disability, for which he received compensation for 65 5/7 weeks.[53] The Deputy Industrial Commissioner found that the claimant incurred 75% permanent, partial industrial disability of the body as a whole, which entitled the claimant to 375 weeks compensation. In calculating the contribution by the Second Injury Fund, the Deputy Industrial Commissioner deducted 207 weeks and an additional 65 5/7 weeks from the 375 weeks granted for permanent, partial disability. Accordingly, the Deputy Industrial Commissioner ordered the Second Injury Fund to pay compensation for 102 2/7 weeks.[54]

In *Second Injury Fund v. Neelans*[55] the claimant injured his right hand twice—first in a house fire in 1979 and then in a car accident in 1981.[56] In a second injury fund proceeding, the Industrial Commissioner found the disability resulting from these injuries was 10% impairment of the right hand, which entitled Neelans to nineteen weeks of compensation.[57] Neelans later injured his left knee while employed at John Deere. The Industrial Commissioner determined that this injury resulted in 20% impairment of the left leg, which entitled Neelans to forty-four weeks of permanent partial disabil-

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LARSON, THE LAW OF WORKMEN'S' COMPENSATION § 59 (1989).

49. Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300 (Iowa 1979).

50. IOWA CODE § 85.64 (1989).

51. Irish v. McCreary Saw Mill, 175 N.W.2d 364 (Iowa 1970).

52. *Id.* at 365.

53. *Id.* at 366.

54. *Id.*

55. Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989). On the same date the court decided Second Injury Fund v. Fulton, No. 87-1567 (Iowa Feb. 2, 1989), which clarifies *Neelans*. *Fulton*, however, is an unpublished opinion and should not be cited or relied upon as authority in any litigation.

56. Second Injury Fund v. Neelans, 436 N.W.2d at 356.

57. *Id.* at 356-57.

ity compensation. The Industrial Commissioner determined that "the cumulative effect of Neelans' two scheduled injuries (his hand and leg) was 'industrial disability of 65% of the body as a whole,'" which entitled the Neelans to 325 weeks of compensation for permanent partial disability.[58] The Commissioner ordered the Second Injury Fund to pay compensation for 262 weeks: 325 weeks minus nineteen weeks minus forty-four weeks. Accordingly, the court affirmed the Commissioner's order that the Second Injury Fund should be responsible for the industrial disability, less the total of the scheduled injuries, or a total of 262 weeks."[59]

The Iowa Act does not apply when the employment injury is to a separate part of the previously impaired member or organ. For example, in *Anderson v. Second Injury Fund*,[60] a worker lost part of his right *hand* in a non-compensable injury in 1963 and part of his right *arm* in a compensable injury in 1973. The second loss was not the "loss or loss of use of another such member or organ" as required by Iowa Code section 85.64.[61]

A. *Indecently Exposing the Employer to More Than the Schedule*

Since second injury funds were first considered in 1910, the employer's liability in narrow fund jurisdictions like Iowa has been limited to the compensable schedule of loss.[62] Early decisions which permitted job-injured workers to recover more than the scheduled loss from their employers led to wholesale firing of the handicapped.[63] The purpose of the second injury fund, as explained in *Second Injury Fund v. Mich Coal Co.*,[64] is to limit the employer's responsibility to the schedule, while providing additional benefits from the state fund for workers with pre-existing disabilities which combine

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58. *Id.* at 357.

59. *Id.* at 357-58. The court tacitly approved the agency's interpretation that the previous loss or loss of use may result from more than one event, such as birth or prior injury. *Id.* at 357. In *Neelans* the court also approved of the agency interpretation of the method of computing benefits used in Irish v. McCreary Saw Mill, 175 N.W.2d 364 (Iowa 1970). *Id.* The author concurs with both of these interpretations.

60. Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978).

61. *Id.* at 791-92.

62. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 59.32(d) (1989).

63. U.S. DEP'T OF LABOR BULLETIN 190, *supra* note 2, at 6. *See also* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 59.31(a) n.49 (1989) ("It has been said, for example, that within the thirty days following the announcement of the nonapportionment rule in *Neese v. Hughes Stone Co.*, 114 Okla. 170, 244 P. 778 (1925), between seven and eight thousand one-eyed, one-legged, one-armed, and one-handed men were displaced in Oklahoma."). *Neese* was decided before passage of the Iowa Civil Rights Act. Under the Iowa Civil Rights Act, IOWA CODE § 601A.6(1)(a) (1989), it is an unfair or discriminatory practice for an employer to refuse to hire, to discharge any employee, or to otherwise discriminate in employment against an applicant for employment or an employee because of disability, unless based upon the nature of the occupation. The provision applies only to employers who regularly employ four or more individuals. IOWA CODE § 601A.6(2)(a) (1989).

64. Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300, 301 (Iowa 1979).

with compensable disabilities and result in disabilities greater than their combined value. *Second Injury Fund v. Mich Coal Co.* has been misinterpreted to undercut this purpose.

In *Mich Coal* the claimant, Lewis, was injured in 1963, resulting in 54% permanent partial disability of the left leg. Lewis was paid workers' compensation for 108 weeks.[65] In 1972, Lewis was injured again resulting in 55% permanent partial disability of the right leg. Lewis was paid 110 weeks of disability compensation.[66] Based on the evidence at trial before the Deputy Industrial Commissioner, the deputy found that the claimant had sustained a permanent "industrial disability of 80% of the body as a whole" and was therefore entitled to 400 weeks compensation.[67] The deputy ordered the Second Injury Fund to pay Lewis 182 weeks compensation for permanent partial disability. The deputy computed the 182 weeks by "taking 400 weeks less the total previously paid 108 weeks and 110 weeks."[68]

Up to this point the deputy's order complied with the procedure recognized and tacitly approved in *Irish v. McCreary Saw Mill*.[69] The Iowa Supreme Court went on to draw some unusual conclusions in *Mich Coal*. First, the court criticized the Deputy Industrial Commissioner because the deputy did not make a "finding of fact as to the degree of disability related to the body as a whole which resulted from the 1972 injury."[70] Second, the court noted that "[d]isposition before the deputy commissioner and the district court was based on incomplete testimony and fact findings regarding the causation of Lewis' current disability."[71] Additionally, there was "evidence from which the degree of present industrial disability from the 1972 injury could be fixed at less than 80% of the body as a whole."[72] Finally, the court concluded that in a second injury fund case under Iowa Code section 85.64, when the Industrial Commissioner finds the claimant's present condition as an industrial disability of the body as a whole, "the [industrial] commissioner must also make a factual finding as to the degree of disability to the body as a whole . . . caused by the second injury."[73] Consequently, the court was "unable to determine whether the employer or the Fund should be liable for the 182 weeks of compensation without a finding of fact as to the

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65. *Id.* at 302.

66. *Id.*

67. *Id.*

68. *Id.* at 303.

69. Irish v. McCreary Saw Mill, 175 N.W.2d 364 (Iowa 1970). At the time of the decision, the author was Iowa Industrial Commissioner and named as appellant. As the Court pointed out, the appeal was taken in the name of the Iowa Industrial Commissioner as appellant, but was being prosecuted by the Attorney General. The author certainly did not direct the Attorney General to appeal in an effort to overturn the decision the author made.

70. Second Injury Fund v. Mich Coal Co., 274 N.W.2d at 303.

71. *Id.*

72. *Id.* at 304.

73. *Id.*

degree of disability to the body as a whole resulting from the 1972 injury."[74] The Iowa Supreme Court remanded the *Mich Coal* case to the Industrial Commissioner to determine whether the second injury affected the body as a whole.[75]

If the Deputy Industrial Commissioner had substantial evidence to support the finding that the claimant sustained 55% permanent, partial disability of the right leg, that substantial evidence should have been sufficient to establish that the employer/carrier was responsible only for the scheduled loss. The degree of disability that the right leg represented to the body as a whole should be immaterial because the injury did not extend beyond the schedule.

The rule in Iowa has been that if an employee sustains a permanent disability of a body part scheduled in Iowa Code section 85.34(2), compensation is limited to the schedule.[76] The Iowa Supreme Court did not mention any of the cases supporting this rule in *Mich Coal*. One may conclude that the court was more interested in a finding by the Deputy Industrial Commissioner as to whether or not the effects of the right leg injury extended beyond the schedule and into the body as a whole. Indeed, the two cases cited by the court as authority involved the issue of the extent of bodily injury.[77] The question which disturbs some lawyers is whether the court hinted that a worker with a pre-existing permanent disability of a leg, arm, hand, foot, or eye (compensable or not) who suffers a second injury, causing permanent disability to another such part, has a remedy to recover more than the scheduled amount from his employer for the second injury.

Since *Mich Coal* the Iowa Supreme Court has unequivocally concluded that when a worker suffers a second scheduled injury which, standing alone, does not amount to a disability of the body as a whole, the employer is only liable for the scheduled benefits for the most recent injury.[78] The court has rejected the argument that the employer must always pay a pro rata share of the benefits payable for the worker's disability to the body as a whole to the extent that the second injury contributed to the disability to the body as a whole.[79] No sound reason exists to believe that the Iowa Supreme Court will conclude that disability of a scheduled member or organ can be compensated on the body as a whole if there was pre-existing permanent disability of another similar part.

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74. *Id.*

75. *Id.*

76. *See, e.g.*, Kellogg v. S & L Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964); Schell v. Central Eng'g Co., 232 Iowa 421, 4 N.W.2d 399 (1942); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936); Moses v. Nat'l Union Coal Co., 194 Iowa 819, 184 N.W. 746 (1921).

77. Second Injury Fund v. Mich Coal Co., 274 N.W.2d at 301-02.

78. *See, e.g.*, Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989).

79. *Id.* at 358.

B. *Limitations on Types and Causes of Disability*

The Iowa Supreme Court has never decided whether a worker is qualified for second injury fund benefits where the second injury permanently disabled two or more organs or extremities. At least one decision by a deputy industrial commissioner has held that such a worker qualifies[80] but the provisions and the intent of the second injury fund indicate otherwise. The generally accepted rule is that an employee is entitled to second injury fund benefits only if the employee has lost one member or eye and then loses one more such member or eye. The first sentence of section 85.64 of the Iowa Code provides:

> [i]f an employee who has previously lost, or lost the use of, *one* hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss or loss of use of *another* such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability.[81]

"Another" means "a second; a further, an additional."[82] The term is singular and means "only one more." Therefore, requiring both the first and second loss be to just one member or eye to qualify the claimant for second injury benefits seems reasonable.

The Iowa Supreme Court has held that the schedule provisions foreclose weekly compensation for permanent industrial disability greater than the scheduled amount.[83] Accordingly, a consistent reading of section 85.64 would limit the award against the employer or carrier and hold the fund not responsible at all.

Serious questions remain as to whether the base for the total two-member scheduled loss is 500 weeks maximum and whether the test is functional disability or "industrial" disability.[84] In one case before the Industrial Com-

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80. Saylor v. Swift & Co., 34 Iowa Industrial Commissioner Biennial Report 282, 285-86 (Appeal Decision 1979). The deputy industrial commissioner found that the claimant had 20% permanent partial disability of the left leg from a 1972 injury, 6% functional permanent disability of the body as a whole from a single 1978 injury, resulting in permanent functional disability of 10% of the left leg and 5% of the right leg, and 30% overall permanent industrial disability of the body as a whole due to the combined 1972 and 1978 permanent disabilities. The deputy industrial commissioner concluded that the 6% body rating should be determined strictly on a functional basis under Iowa Code § 85.34(2)(s). This author believes the deputy was wrong in concluding that permanent disability of more than one named part as the second injury entitles the claimant to second injury funds benefits.

81. Iowa Code § 85.64 (1984) (emphasis added).

82. The Random House Dictionary of the English Language (unabridged ed. 1971).

83. *See supra* note 75 and accompanying text.

84. *See supra* note 81. The Iowa Supreme Court has hinted that a scheduled injury, even if not permanent, may entitle the claimant to determination of industrial disability if the claimant had to take employment at reduced wages after injury. *See* Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

missioner, an employee sustained a compensable injury resulting in permanent disability of 20% of the right arm.[85] The claimant's previous permanent disability was 100% of the left hand from childhood polio.[86] The Industrial Commissioner found permanent total industrial disability,[87] relying on *Diederich v. Tri-City Ry. Co.*[88] and *Dailey v. Pooley Lumber Co.*[89] Consequently, the Industrial Commissioner ordered the employer/carrier to pay forty-six weeks of benefits for the second compensable disability and the Second Injury Fund to pay 230 weeks.[90] Although the Industrial Commissioner found permanent total "industrial" disability, the Commissioner also concluded that permanent total industrial disability in scheduled cases supports benefits for only 500 weeks and not a lifetime.[91]

In *McKee v. Second Injury Fund* the Iowa Supreme Court reviewed an award in which the Iowa Industrial Commissioner found the claimant totally and permanently disabled, awarded the claimant lifetime benefits, and directed the employer to pay the first 300 weeks and the Second Injury Fund to pay the remainder.[92] This holding is peculiar because the most the employer could be ordered to pay under a fair reading of section 85.64 of the Iowa Code for the second injury is 250 weeks of compensation for total and permanent lost of the arm.[93] Accordingly, *McKee v. Second Injury Fund* should not be used as precedent to support the view that an employer is obliged to pay more than 250 weeks permanent disability in second injury fund cases.

VII. Proposals for Change

The purposes of a second injury fund have not been fulfilled in Iowa. The Iowa Supreme Court has clarified the intent and purpose of the Iowa Second Injury Fund Act, but the decisions of the court and the Industrial Commissioner have focused attention upon the problems employers may confront if they do hire persons who are handicapped. Additionally, most employers are not even aware of the existence of the Second Injury Fund.

After the report of the National Commission on State Workmen's Com-

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85. Asay v. Indus. Eng'g Equip. Co., 33 Iowa Industrial Commissioner Biennial Report 224 (Appeal Decision 1977).

86. *Id.* at 225.

87. *Id.* at 226-27.

88. Diederich v. Tri-City Ry., 219 Iowa 587, 258 N.W. 899 (1935).

89. Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

90. Asay v. Indus. Eng'g Equip. Co., 33 Iowa Industrial Commissioner Biennial Report at 227.

91. *Id.* The deputy industrial commissioner ordered compensation computed on a basis of 500 weeks rather than as a permanent total disability payable as a matter of law for life. A question of fact exists as to whether the payment should be for life.

92. McKee v. Second Injury Fund, 378 N.W.2d 920 (Iowa 1985).

93. Iowa Code § 85.34(2)(m) (1989).

pensation Laws was published in 1972,[94] a committee of the Council of State Governments drafted proposed legislation to bring state laws into conformity with the National Commission's recommendations ("Model Act").[95] Not all of the parts of the Model Act are necessary or desirable for the State of Iowa. Nevertheless, the Model Act deserves serious attention by lawyers and lawmakers.

The Model Act of the Council of State Governments corrects the restrictions, problems, and deficiencies of most second injury fund provisions. The first problem is that most second injury funds are restricted to obvious impairments, such as loss of members or eyes. This restriction excludes a large range of pre-existing impairments which impede the hiring of persons who are handicapped. The Model Act is a broad second injury fund provision which applies to all impediments.[96] One legal commentator has pointed out that a person with a prior history of a less obvious impairment, such as cardiac disease, ruptured intervertebral disc, or tuberculosis, probably has a greater hindrance to employment than a person with an amputation. This hindrance exists because under many existing decisions, an employer may be liable for the full consequences of aggravation of the pre-existing condition:[97]

> Specifically, now that many jurisdictions make the employer liable for heart attacks resulting from normal exertion on the job when applied to a diseased heart, it would not be surprising to discover that men with histories of heart trouble would have increasing difficulty in obtaining any kind of employment. This problem could eventually become a greater one than the problem relating to amputation.[98]

The second problem in most second injury fund provisions is the limitation of application to second injuries which result in permanent total disability. The Model Act "broadens the range of pre-existing impairments, and does not limit second injuries to those causing total permanent disability."[99] The committee which drafted the Model Act defined the pre-existing "permanent physical impairment" as "any 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 reemploy-

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94. *See supra* note 24.

95. *See* WORKMEN'S COMP. & REHAB. LAW (Council of State Governments 1974). The author was a member of the draft committee. For the author's application of the draft language to the Iowa Law, see Dahl, *The Model Iowa Workers' Compensation Act—Time for Change*, 30 DRAKE L. REV. 693 (1980-81).

96. WORKMEN'S COMP. & REHAB. LAW § 20 (Council of State Gov'ts 1974).

97. Larson, COMMENTARY TO THE WORKMEN'S COMP. AND REHAB. LAW, SUGGESTED STATE LEGISLATION 136 (Council of State Gov'ts 1974).

98. *Id.*

99. *Id.* The Iowa Act does not require that either the first or second injury result in total disability or the overall combination disability be total. Irish v. McCreary Saw Mill, 175 N.W.2d 364, 369 (Iowa 1970).

ment if the employee should become unemployed."[100] This definition excludes non-disabling minor impairments. Second injury under the Model Act must be one of those listed in the Model Act or a condition which "would support a finding of disability of 200 weeks or more if evaluated according to standards applied in compensation claims."[101] This threshold requirement avoids claims against the fund for minor second injuries.

Another common restriction is that most second injury funds do not apply where the second injury results in death. The Model Act goes beyond most existing provisions in its application to death cases.[102]

To carry out the court-announced purpose of encouraging employment of the handicapped, the Model Act requires that the employer have knowledge of the permanent physical impairment. Written records must establish that the employer had knowledge "at the time the employee was hired, or at the time the employee was retained in employment after the employer acquired such knowledge."[103] If the purpose of the second injury fund is to prevent discrimination in the hiring of handicapped workers, logically, the problem arises only when the employer knows of the pre-existing impairment. The employer cannot discriminate on the basis of something the employer does not know. Nevertheless, the existence of such knowledge should not be determined by conflicting circumstantial evidence about the state of the employer's mind. The Model Act therefore requires that the knowledge be established by written records.[104]

The final problem is the apportionment of the enhanced liability resulting from second injury between the employer and the Second Injury Fund.[105] One solution holds the Second Injury Fund liable for the difference between the compensation payable for the combined injuries and the compensation which would have been payable for the second injury alone if the second injury had happened to a healthy person. The defect in this solution is that the formula poses almost insuperable problems when an attempt is made to apply the formula to the various new kinds of conditions covered by the Model Act. The formula can work reasonably well in cases of simple amputation and blindness. But how can liability be allocated when the disability involves pre-existing tuberculosis and aggravated tuberculosis, or a rather mild herniated disc and a later more severe herniated disc? How can

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100. WORKMEN'S COMP. & REHAB. LAW § 20(d) (Council of State Gov'ts 1974).

101. *Id.* Iowa's Second Injury Compensation Act contains no threshold as to disability.

102. *Id.* § 20(b).

103. *Id.* § 20(c). Iowa's Second Injury Compensation Act contains no requirement that the employer have notice or knowledge of the prior disability.

104. *Id.* ("In order to qualify under this section for reimbursement from the Special Fund, the employer must establish by written records that the employer had knowledge of the permanent impairment at the time that the employee was hired, or at the time the employee was retained in employment after the employer acquired such knowledge.").

105. For a description of how Iowa Second Injury benefits are calculated under IOWA CODE § 85.64 (1989), see *supra* notes 42-80 and accompanying text.

a line be drawn between a pre-existing heart condition and the final indivisible fact of death?

Because of these difficulties, the drafters of the Model Act adopted the formula of the New York Act. This formula allocates liability to the employer for the first 104 weeks of disability, and allocates the excess to the Second Injury Fund.[106] The formula is an arbitrary solution, and no particular eternal wisdom is reflected in the selection of the figure of 104 weeks. The provision, however, seems to work reasonably well in New York. Any allocation formula would undoubtedly have to be arbitrary due to the difficulties of proof involved. Consequently, a substantially better solution probably can not be invented.

Under the present Iowa Second Injury Compensation Act, the employer or its insurance carrier compensates the last scheduled loss and pays healing period and medical benefits. Subsequently, the Second Injury Fund takes over payments.[107] Under the Model Act, the employer or its insurance carrier pays the medical benefits and healing benefits. The employer continues to pay the claimant but is reimbursed from the Second Injury Fund for all compensation benefits subsequent to those payable for the first 104 weeks of disability or death benefits.[108] Clearly, a great incentive exists for employers to conduct pre-employment examinations and to keep records of the condition of any employees who suffer injury or disease after original employment.

The Model Act provides for the establishment of a Special Fund in the state treasury for the purpose of making payments in accordance with the provisions of the second injury fund act.[109] The Model Act provides for an assessment on workers' compensation insurance carriers and self-insured employers to fill the Special Fund from which second injury fund claims are paid.[110] Under existing Iowa law the Second Injury Fund receives payments from self-insured employers or insurance carriers in death cases.[111]

VIII. A Comparison of the Present Iowa Second Injury Compensation Act and the Model Act of the Council of State Governments

A. *A Summary of the Present Iowa Second Injury Compensation Act*

The Iowa Second Injury Compensation Act can be summarized as follows. The first loss or loss of use need not be compensable or even result

106. Workmen's Comp. & Rehab. Law § 20(a) (Council of State Gov'ts 1974).
107. *See* Iowa Code §§ 85.34(1), 85.27, 85.64 (1989).
108. Workmen's Comp. & Rehab. Law § 20(b) (Council of State Gov'ts 1974).
109. *Id.* § 55(a).
110. *Id.* § 55(c).
111. Iowa Code § 85.65 (1989). In 1989 the General Assembly increased the assessment for job-related deaths to $4,000 when the deceased leaves dependents and $15,000 when there are no dependents. 1989 Iowa Legis. Serv. H.F. 655.

from injury. The loss may be a hereditary disease.[112] The first loss may even be from more than one injury.[113] The first loss must be to one scheduled part named in the Iowa Act, that is, one arm, one hand, one foot, one leg, or one eye.[114] The first loss must cause permanent disability,[115] but need not cause total disability of the part.[116] As dictated by the purpose of the Iowa Act, the first loss "must tend to act as a hindrance to the individual's ability to obtain or retain effective employment."[117]

The second loss or loss of use *must* be compensable.[118] The second loss must also be to a scheduled part named in the Iowa Act.[119] Although the second loss must cause permanent disability,[120] the second loss need not cause total disability of the part,[121] nor is the second loss required to cause permanent total disability.[122] The second loss, however, must not be to the same part which was lost or had loss of use.[123] Again, to fulfill the purpose of the Iowa Act, the second loss also "must tend to act as a hindrance to the individual's ability to obtain or retain effective employment."[124]

Apportioning the benefits, the employer or the employer's insurance carrier pays the following for the second and compensable loss:

(a) Healing period benefits;[125]

(b) The degree of disability resulting from the second injury as if there had been no pre-existing disability;[126] and

(c) Medical, hospital and related benefits.[127] For the second loss, the Second Injury Fund pays compensation based on the degree of disability to the body as a whole from the combination of the prior loss, plus the subsequent compensable scheduled loss, minus the compensable value of disability for the subsequent compensable loss, plus compensable value of disability from the prior scheduled loss.[128] In addition, second injury fund benefits may not be commuted.[129]

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112. Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978).
113. Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989).
114. IOWA CODE § 85.64 (1989).
115. *Id.*
116. Irish v. McCreary Saw Mill, 175 N.W.2d 364, 369 (Iowa 1970).
117. Anderson v. Second Injury Fund, 262 N.W.2d 789, 791 (Iowa 1978).
118. IOWA CODE § 85.64 (1989) (emphasis added).
119. *Id.*
120. *Id.*
121. Irish v. McCreary Saw Mill, 175 N.W.2d 364, 369 (Iowa 1970).
122. *Id.*
123. Anderson v. Second Injury Fund, 262 N.W.2d at 790.
124. *Id.* at 791.
125. IOWA CODE § 85.34(1) (1989).
126. Second Injury Fund v. Neelans, 436 N.W.2d at 356.
127. IOWA CODE § 85.27 (1989).
128. Irish v. McCreary Saw Mill, 175 N.W.2d at 369.
129. McKee v. Second Injury Fund, 378 N.W.2d 920, 923 (Iowa 1985).

B. *Inadequacies of the Present Iowa Second Injury Compensation Act*

The Iowa Act is inadequate in many respects. First, the Iowa Supreme Court has announced that the first loss "must tend to act as a hindrance to the individual's ability to obtain or retain effective employment."[130] However, no statute requires proof of a "hindrance" as a threshold to receiving Second Injury Fund Benefits.

Second, the Iowa Act does not fulfill the purpose of a Second Injury Fund. The Iowa Act does not encourage employment of the handicapped because employers are not required to produce written documentation as to knowledge of an employee's prior impairment at the time of hiring or at the time of retention after such knowledge. Most employers do not even know about the Second Injury Compensation Act.

By applying only to the loss or loss of use of an eye, hand, arm, foot, or leg, the Iowa Act is too narrow to assist most handicapped persons and their present or potential employers. The Iowa Act is also too narrow because it does not apply to death cases.

Last, the Iowa Act does not permit an employer or its insurance carrier to initiate a claim for Second Injury Fund Benefits on behalf of an employee under agency principles. Such a claim by an employer or its insurance carrier may be unusual, but tactical reasons may exist and the employers should be given that right.

C. *How Enactment of the Council of State Governments' Model Act Would Change Iowa Law*

If the Model Act is enacted in Iowa, the list of applicable first conditions will be expanded to include twenty-six named conditions or any condition supporting compensation for 200 weeks. The second loss or loss of use will not be required to be permanent.

The employer or carrier pays all compensation and is then reimbursed from a Special Fund for all compensation payments subsequent to those payable for the first 104 weeks of disability or death benefits. In order to qualify for reimbursement, the employer has to establish by written records that the employer had knowledge of the permanent impairment at the time the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge.

If death resulted from a compensable injury and if the death would not have occurred except for the pre-existing impairment, the employer or the employer's insurance carrier pays death benefits. Nevertheless, the employer or carrier is reimbursed by the Special Fund for all compensation payable in excess of 104 weeks.

If enacted in Iowa, the Model Act will establish procedural require-

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130. Anderson v. Second Injury Fund, 262 N.W.2d 789, 791 (Iowa 1978).

ments. The Special Fund will not be bound by any question of law or fact by reason of an award or an adjudication to which the Special Fund was not a party or where the administrator of the Special Fund was not notified at least three weeks prior to the award or adjudication that the Special Fund might be subject to liability. The employer or carrier will be required to notify the workers' compensation agency of any possible claim against the Special Fund as soon as practicable, but in no event later than 100 weeks after the injury or death.

IX. Conclusion

Recent years have produced considerable litigation and discussion about the purpose and interpretation of the Iowa Second Injury Compensation Act. The Iowa Second Injury Compensation Act establishes only a narrow fund, which does not provide coverage for most severe and incapacitating disabilities. The Iowa Supreme Court has clarified the Act, but the executive and legislative branches of government in Iowa now have a responsibility—to workers, employers, insurance companies, the bar, and the bench—to expand the Act by broadening types of conditions covered, providing benefits in death cases when appropriate, and setting thresholds for entry to second injury fund benefits. The Model Act of the Council of State Governments provides a draft of a broad second injury compensation act for use in Iowa and other states.