

What the Heck is the Second Injury Fund?

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I. What is the Second Injury Fund?

The Second Injury Fund is a statutorily created fund comprised of money paid by employers and insurance carriers “to encourage employers to hire the disabled by making the current employer responsible only for the disability the current employer causes.” *Second Injury Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994). In other words, the purpose of the Fund is “to relieve employers from increased liability due to a preexisting disability.” *Second Injury Fund v. Braden*, 459 N.W.2d 467, 470 (Iowa 1990).

A. A Statutory Creation

The Second Injury Compensation Act is memorialized in Iowa Code sections 85.64 through 85.69.

B. Funding the Fund

Payments made for compensable injuries causing death: the employer or its insurance carrier must pay to the Treasurer \$12,000 in a case where there are dependents or \$45,000 in a case where there are no dependents. Iowa Code § 85.65. These amounts are statutory and therefore not negotiable.

Payments made for insufficient funds: employers may face a surcharge if the Commissioner of Insurance determines there are insufficient funds to pay the liabilities of the Fund for each of the next two fiscal years. Iowa Code § 85.65A

II. Elements of a Fund Claim

Iowa Code section 85.64 establishes the requirements for a viable Fund claim:

If 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 of 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 preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the “Second Injury Fund” created by this subchapter the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Or, in plain language, “[t]o trigger the application of section 85.64, the employee must establish that (1) the employee has either lost, or lost the use of a hand, arm, foot, leg, or eye; (2) the employee sustained the loss, or loss of use of another such member or organ through a work related—that is, compensable—injury; and (3) there must be some permanent disability from the injuries.” *Shank*, 516 N.W.2d at 812.

**For practical purposes, the Fund looks for the presence of a first qualifying injury and a second qualifying injury, and if those exist, whether the claimant’s industrial loss exceeds the scheduled disability attributable to those qualifying injuries.*

A. First Qualifying Injury

i. Must have occurred prior to the alleged second qualifying injury.

Iowa Code section 85.64 refers to a “previous” loss of use and a “latter injury,” which the Fund commonly refers to as a “first qualifying injury” and a “second qualifying injury.”

The two qualifying injuries cannot arise bilaterally and simultaneously out of a single occurrence. *Vermeer Mfg. v. Hartney*, 2002 WL 1756322 at *1 (Iowa Ct. App., July 31, 2002) (unpublished). In other words, there must be two separate and successive injuries, one occurring before the other.

A bilateral injury can still be used as a qualifying first injury, however, so long as there is a successive, subsequent second qualifying injury. See *Gregory v. Second Injury Fund*, 777 N.W.2d 395, 400 (Iowa 2010) (noting a first qualifying injury can occur simultaneously with an injury to another scheduled member). In a case with a bilateral qualifying first injury, the second subsequent injury can also be bilateral.

ii. Need not be work related.

It does not matter whether the alleged first qualifying loss was a work-related injury. *Second Injury Fund v. Neelans*, 436 N.W.2d 355, 357 (Iowa 1989).

iii. Not limited to pleading only one first injury.

A claimant can plead more than one first qualifying loss.

iv. Limited to scheduled members listed in Iowa Code section 85.64.

The only body parts that potentially qualify for benefits are those listed in Iowa Code section 85.64: a hand, arm, foot, leg, or eye. Notably, this list does not contain all of the scheduled members listed in Iowa Code section 85.34(2). The Supreme Court has deemed these omissions intentional, meaning the list contained in Iowa Code section 85.64 is inclusive and other scheduled members, such as fingers or toes, do not qualify for Fund benefits. See *Stumpff v. Second Injury Fund*, 543 N.W.2d 904 at 906-07 (Iowa 1996) (“The Iowa legislature chose to allow a hand injury to qualify as a first injury against the Fund but not allow an injury to a finger to qualify.”).

**It is the Fund’s position that shoulders are not to be treated as qualifying injuries under the new law. The Fund acknowledges that the new law, as amended, provides that a shoulder is now a*



scheduled member payable on a 400-week basis. Iowa Code § 85.34(2)(0n). What was not amended, however, was Iowa Code § 85.64, which lists the scheduled members that qualify for Fund benefits. This list is still limited to the hand, arm, foot, leg, or eye.

Under the new law, arms and shoulders are separately identified injuries. Iowa Code § 85.34(2)(m), (0n). As a result, under the same rationale as in Stumpff, it is the Fund's position that a shoulder cannot be deemed an "arm" for purposes of Fund benefits.

Importantly, an amendment was introduced but not adopted that would have added the shoulder to the list of qualifying scheduled members under Iowa Code § 85.64. See Amendment S 3173 to H.F. 518, 87th General Assembly (Iowa 2017). The fact that this amendment was introduced suggests the legislature knew the shoulder needed to be separately added to section 85.64 to make it a qualifying injury, and the fact that it was not adopted suggests it was the legislature's intent to keep the shoulder a non-qualifying injury.

Because the legislature intended only specific, scheduled body parts to qualify for Fund benefits, unscheduled injuries are not qualifying, even when they affect a scheduled member. *See Second Injury Fund v. Nelson*, 544 N.W.2d 258, 269 (Iowa 1995) ("The commissioner interpreted section 85.64 to require an injury that merely affects a scheduled member; thus, he held that Nelson's unscheduled shoulder injury that affects his arm, a scheduled member, is sufficient to make the Fund liable. This conclusion is inconsistent with the clear language of section 85.64 as well as with our prior cases interpreting the workers' compensation statute.").

However, an injury to a hand, arm, foot, leg, or eye can still be a first qualifying if it occurred at the same time as an unscheduled injury, so long as the injury to the scheduled member was a separate, quantifiable loss. *Gregory*, 777 N.W.2d at 400; *see Kratzer v. Second Injury Fund*, File No. 5004866, 2005 WL 2438532 at *1 (App. Dec., Sept. 26, 2005) ("The disability to the



right leg and left leg occurred in the same incident as the low back injury but the losses to the legs were separate components of injury that existed independently (in terms of anatomy and physiology) from the back injury. . . . Claimant’s injury of October 5, 1994, involved separate, independent injuries to multiple, distinct parts of her body.”), *affirmed at* 778 N.W.2d 42, 45 (Iowa 2010)

When the first qualifying injury occurs simultaneously with an unscheduled injury, the assessment of industrial disability against the Fund is limited to the combined effect of the two scheduled qualifying members only; in other words, the unscheduled injury is not to be considered when assessing the Fund’s liability. *Gregory*, 777 N.W.2d at 401.

v. Must be a permanent loss.

The alleged first loss ““must be permanent and must tend to act as a hindrance to the individual's ability to obtain or retain effective employment.”” *Anderson v. Second Injury Fund*, 262 N.W.2d 789, 791 (Iowa 1978) (quoting Kacena, *Workmen's Compensation in Tennessee: The Second Injury Fund*, 6 Memphis State U.L.Rev. 715, 716-719 (1976)); *see* Iowa Code § 85.64(1); *Shank*, 516 N.W.2d at 812 (noting there must be “some permanent disability” from the alleged first injury).

**It is the Fund’s position that an impairment rating from an IME, without more, is not necessarily enough to prove that an alleged first loss is a qualifying injury. In other words, an impairment rating is not a guarantee that an alleged first injury will be qualifying. The rating must be credible and consistent with the evidence, and the rating must somehow be connected to the date of first loss alleged. See, e.g., Bolton v. Second Injury Fund, 855 N.W.2d 202, 2014 WL 3748345 (Iowa Ct. App., July 30, 2014); Graham v. Second Injury Fund, File No. 5044585 (App. Dec., July 14, 2017); Moyer v. Interstate Power & Light Co. and Second Injury Fund, File No. 5047944 (Arb. Dec., Mar. 16, 2017); Hoeksema v. Second Injury Fund, File No. 5036534 (App. Dec., Oct. 13, 2014); Black v. Second Injury Fund, File No. 5044121 (Arb. Dec., Sept. 9, 2014).*

**Recent agency case law suggests the agency may be taking the stance that a claimant must have a permanent impairment rating in*

order to establish a qualifying first injury. Moyer v. Interstate Power & Light Co. and Second Injury Fund, File No. 5047944 (App. Dec., Nov. 15, 2018). The agency appears to be taking the approach that all that is required is proof of loss of use, e.g. functional loss. The Fund agrees that a claimant must have a permanent impairment rating, but disagrees that an impairment rating in and of itself is dispositive on the issue of whether an injury is qualifying.

B. Second Qualifying Injury

i. Must be a work-related loss.

Iowa Code section 85.64 refers to a “compensable” second qualifying injury, meaning “work-related.” Iowa Code § 85.64(1); *see Shank*, 516 N.W.2d at 812 (noting the second qualifying loss must have occurred “through a work related—that is, compensable—injury”).

ii. Must be a different scheduled member than the first qualifying injury.

Iowa Code section 85.64 refers to “another” hand, arm, foot, leg, or eye, meaning the first and second qualifying injuries cannot be to the same body part. Iowa Code § 85.64(1).

An alleged second injury is not disqualified merely because it is bilateral, even if it affects the same member alleged as the first qualifying loss, so long as it also affects a different scheduled member. *See Second Injury Fund v. George*, 737 N.W.2d 141, 147 (Iowa 2007) (“[T]he bilateral nature of a second injury will not disqualify the second injury . . .”).

However, if the bilateral injury causes a claimant to be permanently and totally disabled, the full award falls on the employer—not the Fund. *See* Iowa Code §§ 85.34(2)(s), 85.64; *Lorenzen v. Second Injury Fund*, File No. 5024990, 2016 WL 771145 at *9 (Arb. Dec., Feb. 24, 2016); *McCombs v. Viking Pump and Second Injury Fund*, File Nos. 5000398, 5000399, 5000400, 5000401, 5000402, 5000403, 5000404, 2004 WL 1467322 at *10 (App. Dec., May 18, 2004) (“As the second injury in this case resulted in a total industrial disability compensable



under section 85.34(2)(s) the Iowa Second Injury Fund has no liability in this case.”).

iii. Must be limited to a loss to a scheduled member.

The second qualifying injury must be limited to a scheduled member. If the second injury occurred simultaneously with an injury to the body as a whole, industrial disability is implicated against the employer, and the employer is fully responsible. *See Braden*, 459 N.W.2d at 471; *see also Means v. Second Injury Fund*, File Nos. 5033141, 5043335, 2015 WL 13306907 at **6-7 (Arb. Dec., Jan. 8, 2015); *Larson v. Second Injury Fund*, File No. 5033159 (App. Dec., Mar. 27, 2012).

iv. Must be a permanent loss.

Just like first qualifying injuries, second qualifying injuries must result in some permanent disability. Iowa Code § 85.64(1) (noting claimant must be “permanently disabled” from second qualifying injury); *see Shank*, 516 N.W.2d at 812 (noting there must be “some permanent disability” from both the first and second qualifying injuries).

C. Industrial Loss against the Fund

“It is the cumulative effect of the scheduled injuries resulting in industrial disability to the body as a whole—rather than the injuries considered in isolation—that triggers the Fund's proportional liability.” *Braden*, 459 N.W.2d at 470. Ultimately, the Fund is responsible only for the industrial disability that exceeds the scheduled disability attributable to the first and second injuries. *See* Iowa Code § 85.64; *Braden*, 459 N.W.2d at 470.

i. Credits for scheduled losses.

In practical terms, the Fund’s liability is the Claimant’s industrial loss due to the combination of the scheduled injuries minus credits for the impairment assigned for those scheduled injuries.

**When calculating credits, the Fund calculates each scheduled member separately as a scheduled member (as opposed to the BAW conversion) and then adds them together.*

*Example: 1st injury = 2% upper extremity (5 weeks)
2nd injury = 37% lower extremity (81.4 weeks)*

Total credits = 86.4 weeks

The exception is a bilateral injury under Iowa Code section 85.34(2)(s); in these cases, the Fund converts the (2)(s) bilateral injury to the BAW rating and then adds it to the other scheduled member rating.

*Example: 1st injury = 37% lower extremity (81.4 weeks)
2nd injury (bilateral CTS); 2% to each upper
extremity = 2% BAW (10 weeks)
Total credits = 91.4 weeks*

**It is the Fund's position that it is entitled to credits for all prior scheduled losses, whether pled or not. See Shank, 516 N.W.2d at 816. Agency decisions on this issue have been mixed.*

ii. Credits in excess of industrial disability.

In some instances, the Fund's credits exceed the industrial disability sustained by Claimant. In these cases, the Fund has no liability. See Iowa Code § 85.64(1); *Crudo v. Second Injury Fund*, 1999 WL 711440 at *2 (Iowa Ct. App., July 23, 1999) (unpublished).

Example: 10% industrial disability award (50 weeks)
- credit for 10% of foot (15 weeks)
- credit for 18% of upper extremity (45 weeks)
= credits exceed the industrial award

III. Miscellaneous Nuances of the Fund

A. Requirement of Established Claim against the Employer

Claimant cannot bring a claim against the Fund only (without the employer) unless there is a prior adjudication or settlement establishing the employer's liability for the alleged second qualifying injury. *Braden*, 459 N.W.2d at 473 ("Unlike ordinary workers' compensation benefits, however, the Second Injury Fund's obligation cannot be assessed until the employer's liability is fixed."); *Eaton v. Second Injury Fund of Iowa*, 723 N.W.2d 452, 2006 WL 2560854 at *4 (Iowa Ct. App. 2006) (unpublished) ("[T]he employer's liability must be established directly against the employer and not collaterally in an action against the Fund only, because the employer is an actual party in interest and the employer is in a better



position than the Fund to make an early and full investigation of the employee's claimed work injury.”).

A closed-file settlement pursuant to Iowa Code section 85.35 for the alleged second qualifying injury precludes a claimant from receiving Fund benefits, however, because the second qualifying injury must be “compensable” pursuant to Iowa Code section 85.64, and closed-file settlements do not establish compensability as against the employer. *See Rich v. Dyna Technology, Inc.*, 204 N.W.2d 867, 870 (Iowa 1973); *Brislaw v. Chapman Logging Co., Inc.*, File No. 1073973, 1999 WL 33619589 (App. Dec., Sept. 23, 1999). Conversely, because first qualifying injuries need not be compensable or work-related, they can be settled on a closed-file basis.

**It is the Fund’s position that commutations between claimants and employers may have the same preclusive effect of closed-file settlements if it is suspected that the commutation is actually serving as the functional equivalent of a closed-file settlement. In other words, the Fund will object if the claimant and employer have clearly entered into what is, for all practical purposes, a closed-file settlement that is masquerading as a commutation – such as when the dollar amount agreed upon by the parties represents an impairment rating that is significantly higher than any physician-assigned impairment rating in the record.*

B. Interest

Unlike employers, the Fund is obligated to pay interest only from the date of the final agency action. Thus, interest does not begin to accrue against the Fund until the date of the arbitration decision is issued (or appeal decision, if the arbitration decision is appealed). *See Braden*, 459 N.W.2d at 473.

C. Penalty Benefits

Penalty benefits are not available against the Fund. The statutory language within 86.13 does not include a provision for any such benefits to be recoverable as against the Fund. Further, the Fund is only obligated to pay indemnity benefits upon written order of the Commissioner. *See* Iowa Code § 85.66.

D. Commencement of Benefits



Unless a claimant is awarded permanent and total disability benefits from the Fund, the commencement date for payments from the Fund is the first day after the last date benefits are due from the employer for the second qualifying loss. *See* Iowa Code § 85.64(1).

Example: 2% upper extremity award (5 weeks); MMI is 1/1/17
Fund's commencement date: 1/1/17 + 5 weeks = 2/5/17

In cases of permanent and total disability against the Fund, the Fund's payments begin after the expiration of the employer's obligation of PPD benefits (either by award or AGFS) *and* after credit for total weeks attributable from the credit from the first injury. *Buser v. Second Injury Fund*, File No. 5021259 (App. Dec., July 18, 2012).

**For review-reopenings, the answer is less clear, but it is the Fund's position that the commencement date is the petition filing date or potentially later if there is additional permanency paid by the employer. See Searle Petroleum, Inc. v. Mlady, 842 N.W.2d 679, 2013 WL 6405393 (Iowa Ct. App. 2013) (table).*

E. Commutations

Awards against the Fund may not be commuted (this is in reference to decisions issued prior to the 2017 law change). *McKee v. Second Injury Fund*, 378 N.W.2d 920, 923 (Iowa 1985).

IV. From the Fund's Perspective: Other Common Disputes

A. The Claimant's Burden

First and foremost, the claimant carries the burden of proof to establish a claim against the Fund. *Second Injury Fund v. Bergeson*, 526 N.W.2d 543, 547-48 (Iowa 1995); Iowa R. App. P. 6.904(3)(e)-(f).

Going a step further, the Fund is not the employer and, as such, does not have the same responsibilities and duties of one. For example, while employers have a statutory duty to conduct investigations, contemporaneously convey their basis for denials, and continue to reevaluate claims, the Fund does not. *See* Iowa Code § 86.13.

**For practical purposes, this means it falls on the claimant to seek, request, and produce records and evidence relating to any alleged first qualifying injuries.*

Please also consider that unlike the employer, the Fund has no information regarding a claimant or a claimant's alleged injuries when a petition is received. In other words, every petition the Fund receives is basically a blind petition. As a result, the Fund is dependent on the other parties for providing information regarding the alleged first and second qualifying injuries.

B. Preclusive Effect of AGFS/Commutations with Employer

The Fund is not bound by settlements between the claimant and employer. *Grahovic v. Second Injury Fund*, File No. 5021995, 2009 WL 3382042 at *2 (App. Dec., Oct. 9, 2009) (“The only preclusive effect of an agreement for settlement approved by this agency is upon the parties who entered into that agreement. Such an agreement does not establish the compensability of any injury or the extent of claimant's entitlement to disability benefits in a subsequent claim against the Second Injury Fund of Iowa.”); see *Haynes v. Second Injury Fund*, 547 N.W.2d 11, 14 n. 1 (Iowa Ct. App. 1996).

**It is the Fund's position that claimants are bound by the assertions made in settlements with employers. See Iowa Code § 85.35(9) (“Approval of a settlement by the workers' compensation commissioner is binding on the parties.”); Grahovic, 2009 WL 3382042 at *2 (stating approval of a settlement has a “preclusive effect . . . upon the parties who entered into that agreement”).*

Thus, it is the Fund's position that whatever impairment is agreed upon in the AGFS with the employer is the minimum amount of credits to which the Fund is entitled. However, because the Fund is not bound by any such agreement, the Fund can argue for higher credits.

C. Cost of Expert Reports

Recent agency case law has established that the Fund cannot be assessed costs. *Hannan v. Second Injury Fund of Iowa*, File No. 5052402 (App. Dec. 7/25/18). This is because the Second Injury Compensation Act does not provide for costs to be paid from the Fund. See Iowa Code § 85.66; see also *Boles v. Enxco, Inc.*, File Nos. 5036958, 5036959 (Ruling on

Rehearing, Dec. 1, 2016); *Houseman v. Second Injury Fund*, File No. 5052139 (Arb. Dec., Aug. 8, 2016).

The Fund also takes the position that IME reports ostensibly obtained under Iowa Code § 85.39 are not reimbursable as against the Fund because the Fund has no statutory ability to direct care under § 85.27; thus, section 85.39 cannot be triggered.

D. Settling with the Fund

i. Types of settlements.

The Fund typically settles cases on a closed-file basis, though agreements for settlement will be considered in certain rare circumstances.

ii. Mediator fees.

The Fund does not contribute to mediator costs.

iii. Requesting the check.

The Fund sends a payment request form to the Treasurer once approved settlement documents are received. It can sometimes take two to three weeks before the Treasurer issues payment. The Fund cannot request early payment because, under section 85.66, payment cannot be processed until the approved documents containing the order of the Commissioner are received

iv. Child Support Lien reductions.

Upon receipt of an approved settlement, the Treasurer's office will be notified of any pending child support liens. The total amount of the settlement may be reduced by 50% or more in order to satisfy the outstanding child support lien.

E. Case Load/Scheduling Hearings

The Fund attorneys currently have around 500 total active cases. This number has been and continues to be on the rise. In turn, the Fund consistently receives a high volume of requests to schedule those cases for hearing. We would appreciate your patience as we try to find mutually acceptable hearing dates.

