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Louisiana Workers Compensation

Chapter 19

Second Injury Fund

The Second Injury Fund is designed to encourage employers to hire employees with preexisting permanent partial disabilities by reimbursing the employer or, if insured, the insurer, for part of the compensation costs when such an employee is injured on the job.¹ The Second Injury Fund is funded by annual assessments on all workers' compensation insurers, self-insureds and self-insured funds.² An employer or insurer that qualifies for reimbursement from the Second Injury Fund is not relieved of its obligation to the injured employee. The employer must pay full and timely benefits to the employee and then seek reimbursement from the Second Injury Fund for the benefits paid.³

To be entitled to second injury relief, the employer or insurer must prove:

1. That the employee had a preexisting permanent partial disability before the subsequent job injury.
2. That the employer had actual knowledge of the employee's preexisting permanent partial disability before the subsequent job injury; and
3. That the preexisting permanent partial disability merged with the subsequent job injury to produce a greater disability.⁴

¹ La. R.S. 23:1371(A)(1).

² La. R.S. 23:1377(B)(1)

³ La. R.S. 23:1371(B)

⁴ La. R.S. 23:1378

Preexisting permanent partial disability

La. R.S. 23:1378(F) defines a permanent partial disability 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 reemployment if the employee should become unemployed. La. R.S. 23:1378(F) lists thirty-four conditions that are presumptively considered to be a hindrance or obstacle to employment. A medical condition not listed in La. R.S. 23:1378(F) may still qualify as a permanent partial disability, however, if the employer can show that the employee had a permanent condition of such seriousness as to constitute a hindrance or obstacle to his obtaining employment, to retention by an employer, or to obtaining re-employment should he become unemployed. Nat'l Fire Union Ins. Co. v. State Worker's Comp. Second Injury Bd. 168 So.3d 585, 588 (La. App. 1 Cir. 12/23/14).

In Nat'l Fire, the employee injured his left shoulder in a job accident. He was diagnosed with a torn rotator cuff with impingement syndrome. The employee's condition was not of the thirty-four conditions listed in La. R.S. 23:1378, but his treating physician confirmed that his torn rotator cuff limited the function and strength of his left arm and restricted his ability to perform his regular job. His employer accommodated his restrictions by allowing him to perform light duty work when he was unable to perform his regular job duties because of his shoulder pain. The employee aggravated his shoulder injury in a second job accident and required surgery to repair his torn rotator cuff. Based on the testimony of the treating physician, and because the employee could not perform his regular job without accommodations from his employer, the court found that the employer proved that the employee had a permanent partial disability before his second job accident.

Employer Knowledge

To be entitled to reimbursement from the Second Injury Fund, the employer must prove that it knowingly employed an employee who had a preexisting permanent partial disability. This can be proven either by showing the employer knowingly hired an employee with a permanent partial disability or that the employer acquired actual knowledge of the permanent partial disability during the employee's employment, but prior to the second injury, and retained the employee despite its knowledge of the disability. La. Workers' Comp. Corp. v. La. Workers' Comp. Second Injury Bd., 5 So.3d 211, 216 (La. App. 1 Cir. 12/23/08). In either case, an employer representative with the authority to hire and fire the employee must have had knowledge of the employee's preexisting permanent partial disability before the employee's subsequent job accident.⁵

The employer's knowledge of the employee's preexisting condition must be specific. For example, in Chandler Parts and Service, Inc. v. Louisiana Workers' Compensation Second Injury Board, 576 So.2d 1133 (La. App. 3d Cir. 5/13/91), the employer sought reimbursement from the Second Injury Fund as a result of a heart attack and subsequent

⁵ La. R.S. 23:1371.1(7)

death of an employee. A few months prior to the employee's heart attack, the employee told his employer that he had experienced several episodes of blackouts, dizziness and tunnel vision. The court held that the employer's knowledge was too general to constitute actual knowledge of the employee's preexisting permanent partial disability. *Id.* at 1136. Even if the employer could prove that employee's symptoms were consistent with pre-existing heart disease, it could not prove that the employer was aware of that fact. *Id.* at 1136.

Merger

La. R.S. 23:1371(C) provides that "[t]he merger of an injury with a preexisting permanent partial disability is limited to the following: (1) the subsequent injury would not have occurred but for the preexisting permanent partial disability; or (2) the disability resulting from the subsequent injury in conjunction with the preexisting permanent partial disability is materially and substantially greater than that which would have resulted had the preexisting permanent partial disability not been present, and the employer had been required to pay and has paid compensation for the greater disability."

The term "merger" connotes "either a specific new aggravation of a previous condition, or a new condition which couples or combines with a previous condition to create a 'materially greater' disability than that which would have resulted had the preexisting permanent partial disability not been present." *Southern Casualty Insurance Company v. Louisiana Workmen's Compensation Second Injury Board*, 478 So.2d 573, 577 (La. App. 2 Cir. 10/30/08). Therefore, under R.S. 23:1371(C)(2), the issue is whether the disabilities combine or act in concert to make the worker materially and substantially more disabled than if the worker suffered from the second injury or condition alone.

Amount of Reimbursement

When a claim qualifies for reimbursement from the Second Injury Fund, the reimbursement is not total. Reimbursement begins after the employer or insurer has reached certain thresholds. Presently, the employer is entitled to reimbursement after the first 104 weeks of disability payments and after \$25,000.00 in medical payments.⁶

⁶ La. R.S. 23:1378(A)