

## HANDLING SECOND INJURY FUND CASES

### 1. Be PREPARED

- a. Have a Total Perm Report which addresses not only the last compensable disability but also the alleged pre-existing disabilities and which says Petitioner is 100% permanently and totally disabled
- b. Have records for the last compensable injury and on alleged pre-existing disabilities including prior orders and doctor/hospital/operative records including FAMILY DOCTOR'S RECORDS—DON'T SEND ANY RECORDS TO THE DAG UNLESS SHE SPECIFICALLY REQUEST A COPY
- c. Know the wage and rate
- d. Know dates and rate of Temp paid by Respondent especially THE FINAL DATE OF TEMP
- e. Have the ACE information including names and dates of birth for Auxiliaries and payments for the Auxiliaries
- f. Have the Social Security Decision and supporting medical records-KNOW THE ONSET DATE OF SSD
- g. Have Pension information including the type and breakdown between pension and annuity-KNOW THE ONSET DATE AND TYPE OF PENSION(Service, Accidental or Ordinary Disability)
- h. Have the Disability Pension Application and supporting medical records
- i. Have Temporary Disability Benefits Lien information-KNOW DATES WHEN TDB WAS PAID

- j. Have other Lien info such as Private Health Care Insurance Liens or Union Health Care Liens
- k. Have Medicare Conditional Payment information
- l. Have copies of Unpaid Medical Bills you are asking Respondent to pay
- m. Have Third Party Information including status of the case or amount of award and name of attorney handling Third Party Case and the amount of Respondent's lien to date broken down into payments for Meds, Temp and Perm
- n. Have Child Support Lien information

**2. DETERMINE IF THE PETITIONER IS TOTALLY AND PERMANENTLY DISABLED**

- a. Parties may want to hear Petitioner's testimony or meet informally with the Petitioner
- b. If the reports in the case are old, new reports mostly likely will be needed before the judge will agree to start testimony

**3. LOOK AT THE VALUE OF THE LAST COMPENSABLE ACCIDENT FIRST**

- a. Respondent is responsible to pay the full value of the last compensable accident
- b. If the last accident in and of itself renders the Petitioner totally and permanently disabled, then the Second Injury Fund does not pay benefits
- c. See Garry Quick v. Discount Oil Company and Second Injury Fund (unpublished App.Div. Opinion reversing Trial Judge who found Second Injury Fund Liability) In this case Petitioner had a serious last accident requiring three cervical surgeries including a fusion. Petitioner's young daughter was diagnosed with cancer before the Petitioner's accident and died subsequent to the accident. In addition to testimony about Petitioner's orthopedic problem, the court also heard from a psychiatrist who testified that Petitioner

had psychiatric disability not only as a result of his daughter's illness and subsequent death but also because of his work related injury. The trial Judge found that the Second Injury Fund was responsible for the psyche disability that related to the daughter's illness prior to the Petitioner's last compensable accident. The Second Injury Fund DAG argued that the Petitioner was totally disabled from the last compensable accident alone. The Trial Judge found SIF liability and the Appellate Division reversed finding Respondent alone responsible for the Total Permanent Disability Award.

**4. PRE-EXISTING DISABILITIES ALLEGED MUST MEET THE DEFINITION OF PERMANENT PARTIAL DISABILITY SET FORTH IN N.J.S.A. 34:15-36 AND AS SUCH THERE MUST BE A LESSENING OF THE PETITIONER'S ABILITY TO FUNCTION IN THE WORK PLACE OR IN ACTIVITIES OF DAILY LIFE OR BOTH**

- a. Don't just add up the value of prior injuries or prior awards especially if small and/ or remote in time (in Perez v. Pantasote, Inc., 95 N.J. 105, 109 (1984) the New Jersey Supreme Court recognized "the validity of a medical finding of a permanent injury may decrease with the passage of time.")
- b. Examine how the Petitioner was functioning prior to the last compensable accident
- c. See Ronald Nisivoccia v. County of Essex and Second Injury Fund (unpublished App. Div. Opinion reversing and remanding because Trial Judge denied the Second Injury Fund's Attorney the right to cross examine medical experts) **NOTE:** On remand the case resolved without Second Injury Fund involvement, despite the fact that the Petitioner had multiple prior awards. The Petitioner testified that prior to the last compensable accident he had been working not only in his job as a Corrections Officers but was also working at various part time jobs. The Petitioner also testified that he was physically fit and active and did 900 sit ups a day and worked out seven days a week lifting weights prior to the last compensable accident.

**5. PREPARE AND REVIEW ORDER FOR TOTAL DISABILITY WITH SECOND INJURY INVOLVEMENT CAREFULLY**

- a. Ask for help with calculating rates and dates at the conference with Second Injury Fund Deputy Attorney if needed---**MAKE SURE ALL PARTIES AGREE ON THE DATE OF TOTALITY AND REMEMBER THE SECOND INJURY FUND CAN NOT COMMENCE PAYING BENEFITS BEFORE THE DATE ON WHICH THE VERIFIED PETITION FOR SECOND INJURY FUND BENEFITS HAS BEEN FILED**
- b. Use Interactive Order Form on the Division's Web Site to prepare Order
- c. Use OSCAR or other appropriate program to calculate dates
- d. Check info given to you by DAG—they appreciate someone double checking their calculations
- e. **Make sure you review the completed Order before giving it to the DAG and Respondent's Attorney or giving it to Court**
- f. Fax completed order to Second Injury Fund DAG at 609-984-1940 for her to review in advance of the hearing date and make any corrections provided by the DAG

## HANDLING SECOND INJURY FUND

N.J.S.A. 34:15-95 et. seq.

### I. Filing of Verified Petition (N.J.A.C. 235-5.3)

#### A. Verified Petition

##### 1. Include:

- a. Name and address of petitioner
- b. Social Security number of petitioner
- c. age and date of birth of the petitioner
- d. Work- employers, duties, dates
- e. Income- earned/unearned (WC, SS, TDB, LTD, VA, PENSIONS)
- f. Medicare Eligibility
- g. Pre-existing accidents and/or disabilities.
- h. Date of last compensable accident description  
of injuries
- i. Wage/rate for last accident.
- j. Lawsuits- Civil or Workers' Compensation
- k. Dependents -- names, dates of birth.
- l. Education

NOTE: THE VERIFIED PETITION SHALL BE MADE  
UNDER OATH OR AFFIRMATION AND  
SIGNED BY THE PETITIONER

(In very rare cases, the V.P. may be signed by the Respondent)

2. Send:

a. Original and two (2) copies of Verified Petition to:

Office of Special Compensation Funds

P.O. Box 399

Trenton, NJ 08625

[Or (3) copies w/SASE for returned/stamped copy]

b. Permanency exams MUST INCLUDE ESTIMATE

of 100% TOTAL PERMANENT DISABILITY

c. Copy of VP and medicals to respondent (s)

B. Other Documents:

1. Send directly to DAG at least two (2) weeks prior to  
court listing:

Second Injury Fund

P. O. Box 105

Trenton, NJ 08625

(609) 292-3533 (PH)

(609) 777-3055 (Fax) (Or bring to court)

2. Include:

a. Respondent's exams (if done)

b. Outline of pre-existing medical records only not records themselves.

c. Prior exams

d. Prior judgments, orders, section 20's

II. General Observations

A. These are complicated cases and they take time to both conference and resolve. Don't ask to bring a case back too soon.

B. Avoid Add-ons; DAG should be made aware of add on cases.

C. Attorneys should send the DAG adjournment letters or trial/witness testimony appearances at least a week in advance of list date. (The DAG has a limited number of office days)

D. The Fund does not pay fees or costs. See statute- "No fees or costs for the applicant shall be allowed against the Fund" pursuant to N.J.S.A. 34:15-95 (last line of the 3<sup>rd</sup> from the last paragraph); THE FUND NEVER PAYS FOR MEDICAL

TREATMENT OR BILLS.

E. The Fund does not participate or pay benefits under N.J.S.A. 34:15-20.

F. Second Injury Fund benefits do not vest. They are payable by the Fund only while the Petitioner is alive. The benefits cease upon the death of the Petitioner.

G. Remember pursuant to N.J.S.A. 34:15-12 (b) Total Permanent Disability is paid over 450 weeks NOT 600 weeks. After the end of the first 450 weeks the Petitioner is reevaluated and if still totally and permanently disabled the benefits will continue.

H. The Fund will not pay benefits if a Petitioner is working. Stress this when putting the case through. There is language in N.J.S.A. 34:15-12(b) that might lead someone to think otherwise. Also stress that even if the Social Security Administration allows a person to work and receive SSD benefits the Fund and most likely the Respondent will take a dim view of such activity and may even view the Petitioner's activity as constituting FRAUD.

III. THE SECOND INJURY FUND CONFERENCE--USE  
"Second Injury Fund Review" FORM- These forms will make you better prepared and more organized and will save time in conferencing a case or moving a settled case to a successful conclusion. The form is also useful to see if you are missing any of the following essential information:

- A. A total perm report which addresses not only the last compensable disability but also the alleged pre-existing disabilities and which states that petitioner is 100% permanently and totally disabled.
- B. Records for the last compensable injury and alleged pre-existing disabilities including prior orders and doctor/hospital/operative records including FAMILY DOCTOR'S RECORDS—AN ATTORNEY SHOULD NOT SEND ANY RECORDS TO THE DAG UNLESS The DAG SPECIFICALLY REQUESTS A COPY.
- C. The wage and rate.
- D. The dates and rate of temp paid by respondent especially the FINAL DATE OF TEMP -which is needed for establishing the date of totality.
- E. The ACE information including names and dates of birth for auxiliaries and payments for the auxiliaries.
- F. The Social Security Decision and supporting medical records-INCLUDING THE ONSET DATE OF SSD.
- G. Pension Information including the breakdown between pension and annuity-INCLUDING THE ONSET DATE AND TYPE OF PENSION (service, accidental or ordinary disability).
- H. The accidental or ordinary disability pension application and supporting medical records.

I. The Temporary Disability Benefits lien information and application for TDB- KNOW DATES WHEN TDB WAS PAID.

J. Other lien info such as private health care insurance liens or union health care liens.

K. Medicaid lien or Medicare conditional payment information.

L. Copies of unpaid medical bills petitioner is asking respondent to pay.

M. Third party information including status of the case or amount of award and name of attorney handling third party case and the amount of respondent's lien to date broken down into payments for meds, temp and perm.

N. Child support lien information.

#### IV. DETERMINING IF THE PETITIONER IS TOTALLY AND PERMANENTLY DISABLED

A. Parties may want to hear petitioner's testimony or meet informally with the petitioner without the judge. Judges practices vary. Some Judges do not like to have in camera questioning of petitioner because it is off the record and may cause problems later on in the case if the matter has to be tried.

B. If the reports in the case are old, new reports may be needed before the judge will agree to start testimony.

Generally, petitioner's total report will not change and will often not need to be updated with new examination.

V. LOOK AT THE VALUE OF THE LAST COMPENSABLE ACCIDENT FIRST

A. Respondent is responsible to pay the full value of the last compensable accident; If the last accident in and of itself renders the Petitioner totally and permanently disabled, then the Second Injury Fund does not pay benefits. See Katz v. Township of Howell, 68 N. J. 125 (1975)

A former Fund Deputy/ later Judge, now retired, used to say that the parties should imagine a pitcher or beaker. If the injury from last compensable accident fills up the beaker/pitcher, then there is no Fund liability even if there are prior awards, injuries, or illnesses. In essence a Petitioner may be more than 100% disabled.

VI. PRE-EXISTING DISABILITIES ALLEGED MUST MEET THE DEFINITION OF PARTIAL PERMANENT DISABILITY SET FORTH IN N.J.S.A. 34: 15-36 AND BE A LESSENING OF THE PETITIONER'S ABILITY TO FUNCTION IN THE WORK PLACE OR A SIGNIFICANT IMPAIRMENT OF ACTIVITIES OF DAILY LIFE OR BOTH

A. Do not just add up the value of prior injuries or prior awards especially if small and/or remote in time (in Perez v.

Pantasote Inc., 95 N.J. 105, 109 (1984) the New Jersey Supreme Court recognized "the validity of a medical finding of a permanent injury may decrease with the passage of time.")

B. Examine how the petitioner was functioning prior to the last compensable accident.

VII. SECOND INJURY FUND TRIALS AND N.J.A.C. 12:235-5.1 (e) - THE BIFURCATED SECOND INJURY FUND TRIAL

A. The order of witnesses and proofs are the same in a Second Injury Trial as in any other Trial in Workers' Compensation Court.

B. N.J.A.C. 12:235-5.1(e) does indicate that a trial may be bifurcated and listed for a trial without the Fund DAG on a day when the Respondent regularly appears and, pursuant to the Director's memorandum, before the Judge who regularly handles that Respondent's Second Injury list.

C. A case may be bifurcated on the issue of compensability and for other reasons the Judge believes appropriate.

D. If at the bifurcated trial, the Judge finds the Petitioner totally and permanently disabled and that disability is not from the last accident alone, or some other factor that would preclude Second Injury Fund liability, then the case is to be listed for a conference/hearing with the

Second Injury Fund Deputy on a day when the DAG regularly appears.

E. The Judge should not allocate or apportion disability between the Respondent and the Second Injury Fund at the end the bifurcated portion of the trial.

F. If the Judge believes the Petitioner is totally and permanently disabled, the Respondent shall start paying benefits to the Petitioner. If the Respondent over pays under these circumstances, the Fund would reimburse the Respondent if there is determined to be Fund liability at the end of the trial.

G. The Second Injury Fund will want to question the Petitioner and perhaps other expert and non-expert witnesses. The rule says this shall be done at the discretion of the court. Caution: There is an unpublished opinion finding the DAG for the SIF has the right to do so. There may be costs involved if there are experts recalled, however most cases resolve after the DAG hears the Petitioner testify. Remember also that it is the Respondent who benefits from Fund participation. Finally, also be wary of the Respondent who wants to concede total permanent disability because it is cheaper to pay a Perm Total Rate with a SSD offset than a large Partial Perm Award.

IX. SECOND INJURY FUND ORDERS --- Each Judge and his/her DAG should try to establish a system that works to allow SIF orders to be reviewed and corrected in an expeditious manner and before the day when the case is listed for the settlement to be put on the record.

A. The Second Injury Fund Order is to be prepared by the petitioner's attorney but the dates and calculations should be done with involvement from all attorneys in the case. - The DAG can check the work but should not do the attorney's job.

B. BE SURE ALL PARTIES AGREE ON THE DATE OF TOTALITY AND REMEMBER THE SECOND INJURY FUND CAN NOT COMMENCE PAYING BENEFITS BEFORE THE DATE ON WHICH THE VERIFIED PETITION FOR SECOND INJURY FUND BENEFITS HAS BEEN FILED.

C. Petitioner's attorney should be required to use the Interactive Order Form on the Division's web site to prepare the Second Injury Fund order.

D. Petitioner's attorney must review the completed order before providing it to the DAG, the respondent's attorney and/or the judge.

E. Some DAG's like to have a completed order faxed to them to review in advance of the hearing date. This method will work best if the corrections are minor and the DAG has an office schedule that can accommodate this method of review. Until the DAG approves the Order, the petitioner's attorney should not schedule the petitioner to come to Court to put the settlement through.

F. If a petitioner's attorney has an order which is complicated, a review of the proposed order in court with all attorneys present (and the judge, if needed) might be the best way to handle the case. Once the order is corrected, the case could be listed the following cycle for the settlement to be put through with the completed SIF order.

H. Petitioner's attorney should be stopped by the judge from expecting the DAG to do his/her work with regard to the SIF order.

X. POSSIBLE OUTCOMES (See Hypotheticals which were formulated by the Senior Deputy Attorney Linda Schober and her fellow Second Injury Fund Deputy Attorneys General)

1. Petitioner is not totally and permanently disabled (no Fund liability) –Hypo #1
2. The alleged accident is not compensable (no Fund liability)-Hypo #2
3. The Petitioner is totally disabled from last accident or exposure alone (no Fund liability)-Hypo #3
4. The Petitioner is totally disabled from pre-existing disability alone (no Fund liability)-Hypo #4
5. The Petitioner is totally disabled from a progression of pre-existing disability (no Fund liability)-Hypo #5
6. The Petitioner is totally disabled from the last compensable accident and subsequent condition (no fund liability)-Hypo #6
7. The Petitioner is totally disabled from a combination of pre-existing disability and last compensable accident or exposure = FUND CASE-Hypo #7

JUDGES' PERSPECTIVE ON HANDLING  
OF SECOND INJURY FUND

I. General Observations

A. These are complicated cases and they take time to both conference and resolve. Don't ask to bring a case back too soon.

B. Parties Should Avoid Add-ons; Judges and DAG should be made aware of add on cases.

C. Attorneys should send the DAG adjournment letters or trial/witness testimony appearances at least a week in advance of list date. (The DAG has a limited number of office days)

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- C. The wage and rate.
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accident alone, or some other factor that would preclude Second Injury Fund liability, then the case will be listed for a conference/hearing with the Second Injury Fund Deputy on a day when the DAG regularly appears.

- E. The Judge will not allocate or apportion disability between the Respondent and the Second Injury Fund at the end the bifurcated portion of the trial.
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H. Petitioner's attorney should not expect the DAG to do his/her work with regard to the SIF order.

A copy of the Second Injury Fund Review Form is attached and is available to the attorneys on our website.

## Representing Respondents in Second Injury Fund Cases:

### A Conundrum

Defending a total disability case is a fairly simple process: The Petitioner has the burden of satisfying an amorphous set of proofs, amounting to a worker being unfit to work at any job that exists in the commercial marketplace. A loss amounts to liability proportionate to the lifespan of the Petitioner, so few ever rehabilitating or failing to qualify for the 12(b) extension. So the focus is two-fold: investigating the true capabilities of the injured worker, and exposing weaknesses in the medical proofs adduced by the Petitioner.

The demands of defending the Second Injury Fund case are far different. With a triangulation of adversaries, the wary Respondent will have to take the temperature of the Fund Deputy at the first conference, using careful analysis of the proofs and intuition concerning the Fund's position before revealing Respondent's posture. A canny Fund DAG will try to do the same, seeking Respondent's position with respect to totality before staking out the Fund's evaluation of the case.

Conceding totality on the part of the Respondent in a case where the Petitioner is likely to be found totally and permanently disabled can be done without prejudice, but not without peril. A Judge paying careful attention to the conference—if held in chambers, initially---may have a long memory. A pre-conference out of earshot of the Court is always wise.

The careful Respondent has several additional options to hedge against the indolent or inexperienced Petitioner's attorney:

1. Develop the Petitioner's medical history through your own medical expert, and ask the expert to comment upon prior functional loss from pre-existing conditions, in detail;
2. Discover the Petitioner's terms of retirement/termination from his last job;
3. Order the Social Security file BEFORE the Fund asks for it, months after the filing of the Verified Petition;
4. The Fund does not typically retain its own medical experts. An aggressive Respondent strategy would be to hire a neutral internist or neurologist, as the case may be, in order to corroborate Petitioner's pre-existing and non-compensable conditions.

Defending the Second Injury Fund case is also a math problem. Come to your first Fund Hearing with a series of calculations:

1. The cost of “straight total.”
2. The likely date of totality that the Fund will embrace, if any. Respondent will want to maximize their offset period, and that should be considered. Calculate for last date of TTD, the date of the first exam declaring totality, and the date of the Social Security Award. It’s worth the time to do the math.
3. The effect of offsets for Social Security and Ordinary Disability Pension, if applicable.
4. The financial risk of resolving the case for a high partial-total award, risking the expense of a reopener (ala Gerity/Padua)
5. This is a new age and a gig economy. Always lead with the proposition that this is not 1979. Accepting less than total means eBay, Doordash, and Etsy can still supplement a partial-total award as well as SSD, which carries an earnings ceiling just under \$10,000 these days.

For decades, the insurance industry has relied upon the Second Injury Fund as cheap reinsurance/excess insurance for the most serious cases. The choice of whether to defend a total disability claim or unite with Petitioner’s counsel in pursuit of Fund relief can be challenging one. Do the math, first!