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## THE SECOND INJURY FUND: ENCOURAGING EMPLOYMENT OF THE HANDICAPPED WORKER IN SOUTH CAROLINA

ARTHUR B. CUSTY\*

### I. INTRODUCTION<sup>1</sup>

A, a onehanded worker, loses his remaining hand in a job accident. B, A's employer, argues that his liability should be limited to compensation only for the hand that was lost in his employment. A claims, however, that he has become permanently and totally disabled while working for B and compensation for anything less than permanent total disability would force him and his family to seek charity.<sup>2</sup>

For many years there were only two accepted solutions to the dilemma described above, one created by the judiciary and the other through legislative action. Several courts had adopted what became known as the "full responsibility rule," imposing liability for the entire disability upon the employer,<sup>3</sup> regardless of actual responsibility on the employer's part as to the extent of the disability. In those states following the rule it was not long before employers were thinking twice before hiring handicapped workers.<sup>4</sup> Many states, in an apparent effort to reduce the impact of

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1. The author would like to express his gratitude to Michael A. Zimmerman for contributing his research, writing and editing talents to this article. Mr. Zimmerman graduated in May 1973 and is now a member of the New York Bar. The author wishes also to thank Mr. Howard Victry, Director of the South Carolina Second Injury Fund, for his assistance in providing information about South Carolina's Second Injury Fund.

2. This was the problem in *Schwab v. Emporium Forestry Co.*, 216 N.Y. 712, 153 N.Y.S. 234, *aff'd*, 111 N.E. 1099 (Ct. App. N.Y. 1915). The court held that upon the loss of his second hand, the employee was permanently totally disabled and that the employer was liable for the entire disability. The holding in *Schwab* was one of the factors that prompted the New York Legislature in 1916 to adopt the first Second Injury Fund in the United States.

3. 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 59.10 (1974) [hereinafter cited as A. LARSON].

4. Although the South Carolina Supreme Court did not adopt the "full responsibility rule" by name, it did lay the groundwork for the inception of the rule. In *Cole v. State Highway Department*, 190 S.C. 142, 2 S.E.2d 490 (1939), the court relied upon a California case and a treatise in holding that although an injury aggravates a preexisting condition or disease so that a disability is more extensive than that which would result from the injury alone, the increased disability is still compensable. Although it would have been

the "full responsibility rule," passed apportionment statutes which limited the employer's liability to the injury that occurred while the handicapped worker was in his employment.<sup>5</sup> This swing of the pendulum in the opposite direction, however, created even greater problems as the legislators limited the handicapped worker's recovery to such an extent that compensation awards tended to be grossly inadequate in light of the permanency of the injury and the probable inability to obtain significant future employment. The need for an alternative approach arose when it became painfully clear that both of the traditional solutions to the subsequent injury dilemma were operating against handicapped workers. With the "full responsibility rule" in force, employers were quite hesitant to hire handicapped workers, and in some cases fired those handicapped workers already employed.<sup>6</sup> Applications of apportionment statutes,<sup>7</sup> on the other hand, were driving the handicapped into uncompensated poverty.

Finding the handicapped workers' position intolerable, the majority of the states have created funds designed to compensate such workers fully in subsequent injury situations without penalizing the employers for hiring them in the first place.<sup>8</sup> South Carolina subscribed to this policy in establishing the Second Injury Fund, effective July 1, 1972,<sup>9</sup> and modified its apportionment statutes to include the Fund in the chain of liability.<sup>10</sup> Following 3 years of amendments the question must now be raised—does the Fund actually serve the purpose for which it was designed, or is it merely another bureaucratic snarl of red tape giving rise to false hopes and promises?

## II. THE PROBLEM AND THE POLICY

Throughout the analysis of the Second Injury Fund it must

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an easy step from the *Cole* ruling to the "full responsibility rule," the progression was halted abruptly by the passage of South Carolina's apportionment statute. See note 5 *infra*.

5. 2 A. LARSON, *supra* note 3, § 59.10. South Carolina's apportionment statute was typical of such legislation. See S.C. CODE ANN. §§ 72-166 to 168 (1962).

6. Professor Larson cites as an example the situation in Oklahoma where within 30 days following the adoption of a nonapportionment rule, between 7,000 and 8,000 handicapped men were fired. 2 A. LARSON, *supra* note 3, § 59.31.

7. For a discussion of the many problems involved in the application of apportionment statutes see 2 A. LARSON, *supra* note 3, § 59.20.

8. Current research indicates that only two states, Georgia and Virginia, do not furnish some type of subsequent injury protection to physically handicapped workers.

9. S.C. CODE ANN. §§ 72-601 to -602 (Cum. Supp. 1975).

10. See S.C. CODE ANN. §§ 72-166 to -168 (Cum. Supp. 1975).

be kept in mind that the driving force behind the implementation of any subsequent injury fund is the desire to eliminate what has become a significant obstacle to employment of handicapped workers—the employer's fear of increased compensation costs should the employee suffer a subsequent injury.<sup>11</sup> While desiring to compensate injured employees fully for injuries incurred on the job, employers are not particularly anxious to absorb the costs of permanent disabilities created by unrelated compound injuries. The Second Injury Fund is designed to allay such fears by subjecting the employer to liability only for the amount of disability directly attributable to the particular injury occurring while the handicapped worker is in his employ, while, at the same time, compensating the handicapped worker for the full effect of his subsequent injury. It is the Fund that makes up the difference in compensatory value of the subsequent injury alone and that of the combined injuries, not the employer.<sup>12</sup>

The desired effect of the apportionment of liability between the employer and the Second Injury Fund is twofold. The employer must be guaranteed that he will be compensated for any economic disadvantage he might sustain as a result of hiring handicapped workers in a "full responsibility rule" jurisdiction. Additionally, the handicapped employee must be fully protected, receiving the same compensation he would have been entitled to had the employer been held liable for the entire disability.

### III. SCOPE AND OPERATION OF THE SOUTH CAROLINA SECOND INJURY FUND

#### A. *Prerequisites to Reimbursement*

The original draft of the South Carolina Second Injury Fund<sup>13</sup> was primarily taken from model legislation proposed by

11. See N.Y. WORKMEN'S COMP. LAW § 15(8)(a) (McKinney 1965), which states that the purpose of New York's Second Injury Fund statute is:

First: That every person in this state who works for a living is entitled to a reasonable opportunity to maintain his independence and self respect through self support even after he has been physically handicapped by injury or disease; Second: That any plan which will reasonably, equitably and practically break down hindrances and remove obstacles to the employment of partially disabled persons . . . is of vital importance to the state and its people and is of concern to this legislature; . . .

12. L. LARSON, THE ROLE OF SUBSEQUENT INJURY FUNDS IN ENCOURAGING EMPLOYMENT OF HANDICAPPED WORKERS 1 (1972) [hereinafter cited as L. LARSON].

13. S.C. CODE ANN. §§ 72-601 to -602 (Cum. Supp. 1975).

the Council of State Governments,<sup>14</sup> incorporating provisions from various state statutes. The Fund most closely follows subsequent injury legislation passed by the New York Legislature, especially in the aspect that an employer in South Carolina must fully compensate the injured handicapped worker in the first instance, and then prove that his case falls within the purview of the Fund to obtain reimbursement for additional amounts paid to compensate for the combined effects of the unrelated injuries.<sup>15</sup> In requiring the employer to compensate the employee fully at the outset and then placing the burden on the employer to seek reimbursement, the Legislature has ensured that the injured employee will receive his full benefits as soon as possible after the injury when compensation is most needed.<sup>16</sup> It is then up to the employer to demonstrate that he fulfills statutory requirements which place him within the scope of the Fund and make him eligible for reimbursement. It is important for the employer to realize that the Second Injury Fund is his remedy, not the employee's, therefore the employer has the burden of proof.<sup>17</sup>

### 1. *Prior Permanent Physical Impairment*

*If an employee who has a permanent physical impairment from any cause or origin . . . .*

The first step towards reimbursement from the Second Injury Fund requires a showing that, prior to employment or reemployment by the employer seeking reimbursement, the employee had a "permanent physical impairment."<sup>18</sup> The meaning given this term is crucial, since the number of handicapped workers deriving benefits from the Fund will vary according to the breadth given the interpretation of what actually constitutes a "permanent physical impairment." Keeping in mind the Fund's limited resources<sup>19</sup> and the purposes for which it was created,<sup>20</sup> it is imperative that some restrictions be placed upon the class of employees falling within the coverage of the Fund. The determi-

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14. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION: WORKMEN'S COMPENSATION AND REHABILITATION LAW 163 (1963).

15. S.C. CODE ANN. §§ 72-601(a) & (b) (Cum. Supp. 1975).

16. This procedure may also affect the running of the statute of limitations. See 2 A. LARSON, *supra* note 3, § 59.31.

17. This is not true in California. See note 59 *infra*.

18. S.C. CODE ANN. § 72-601(a) (Cum. Supp. 1975).

19. See discussion of financial support in text accompanying notes 82-89 *infra*.

20. See note 11 *supra*.

nation of exactly what restrictions are necessary has proved to be a difficult task, however, with the result that some courts and legislatures have unduly restricted the class of prior handicaps considered by the Fund's administrators.

The dominant trend in subsequent injury fund legislation has been to limit coverage to prior injuries that take the form of the loss or loss of use of a member or of an eye.<sup>21</sup> South Carolina's Second Injury Fund was initially restricted in this manner,<sup>22</sup> but the realization was not long in coming that such a narrow scope failed to protect the majority of the handicapped workers and their employers. Only a small percentage of all permanently disabled individuals were amputees or people with serious visual impairments.<sup>23</sup> The courts adhered to a narrow statutory interpretation, however, as reflected in *Bannister v. State Workmen's Compensation Commissioner*.<sup>24</sup> The West Virginia Supreme Court found that, under its state statute covering claimants having an impairment "caused by a previous injury,"<sup>25</sup> the Second Injury Fund did not apply to employees with silicosis, asthma or emphysema because such diseases were not proximately caused by their employment. If one recalls that the primary purpose of subsequent injury fund legislation is the elimination of unemployment among the handicapped by the removal of competitive disadvantages, there is little or no reason for a legislature or a court to make employment more available to one designated class of handicapped workers, while denying employment to others of equal need.<sup>26</sup> In an age of nondiscrimination, such absolute discrimination appears totally unjustified. Professor Larson points out the ironic effect that such restrictive interpretations may have on the entire compensatory scheme:

If a man has a prior history of cardiac disease, ruptured intervertebral disc, or tuberculosis, since under many existing decisions

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21. 2 A. LARSON, *supra* note 3, § 59.32.

22. No. 610, § 40, [1936] S.C. Acts & Jt. Res. 1251.

23. L. LARSON, *supra* note 12, at 4.

24. 154 W. Va. 172, 174 S.E.2d 605 (1970).

25. W. VA. CODE ANN. § 23-3-1 (1973).

26. The United States Supreme Court in *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949), held that the Second Injury Fund provisions in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 908(f)(1) (1970), were applicable to an injured employee irrespective of whether the previous disability resulted from an injury caused by an accident in industry or by a cause outside of industry. The Court stated that one would not expect Congress to distinguish between two types of handicapped workers.

an employer might be liable for the full consequences of aggravation of this preexisting condition, the hindrance to hiring such persons may be even greater than in the case of amputations.<sup>27</sup>

Following several amendments, the South Carolina Second Injury Fund now provides coverage for a large class of handicaps which qualify as a "permanent physical impairment." The class is identified in a general as well as a specific manner. Generally, a "permanent physical impairment" includes

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.<sup>28</sup>

This definition follows the New York approach<sup>29</sup> to identifying those handicaps which fall into the class of "permanent physical impairment," a concept designed to afford optimum flexibility in application of Fund resources. The definition, standing alone, permits a body of experts administering the Fund to determine, on a case by case basis, exactly what conditions constitute a prior handicap, thus allowing the Fund to adjust itself to new diseases and employment environments. Although flexibility is almost always a statutory attribute, the uncertainty that the New York approach might create could outweigh its inherent advantages as well as defeat the whole purpose of the Second Injury Fund. If an agency is the sole body charged with the identification of those prior handicaps falling within the scope of the Fund on a case by case basis, the determination would always be after-the-fact, thereby giving employers no guarantee that they will be compensated for any risks taken in hiring a worker with a particular handicap. In order to provide the South Carolina employer with some security, the Legislature has established, in addition to the general definition, a list of particular impairments that will qualify as a "physical impairment" within the scope of the Second Injury Fund.<sup>30</sup> Each item on this list carries with it a presumption

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27. 2 A. LARSON, *supra* note 3, § 59.32 at 10-303.

28. S.C. CODE ANN. § 72-601(d) (Cum. Supp. 1975).

29. N.Y. WORKMEN'S COMP. LAW § 15(8)(b) (McKinney 1965) states: "[P]ermanent physical impairment' means any permanent condition due to previous accident or disease or any congenital condition which is or is likely to be a hindrance or obstacle to employment." See also ORE. REV. STAT. § 656.638 (1967); MINN. STAT. § 176.131(8) (1966).

30. S.C. CODE ANN. § 72-601(d) (Cum. Supp. 1975). This list includes:

(1) Epilepsy

that the impairment is permanent, and that it is a hindrance or obstacle to employment, provided that the employer establishes that he knew of the handicap prior to hiring the employee.<sup>31</sup> This enumeration of "permanent physical impairments" gives the employer the necessary assurance that his liability will be limited if he chooses to hire a worker suffering from one of the listed impairments. The Fund does, however, encourage employers to hire other handicapped workers whose impairments are not listed. Following the laundry list of ailments and injuries, the Legislature has added a provision which includes in the classification "permanent physical impairment":

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- (2) Diabetes
  - (3) Cardiac disease
  - (4) Arthritis
  - (5) Amputated foot, leg, arm or hand
  - (6) Loss of sight of one or both eyes or a partial loss of uncorrected vision of more than seventy-five percent bilateral
  - (7) Residual disability from poliomyelitis
  - (8) Cerebral palsy
  - (9) Multiple sclerosis
  - (10) Parkinson's disease
  - (11) Cerebral vascular accident
  - (12) Tuberculosis
  - (13) Silicosis
  - (14) Psychoneurotic disability following treatment in a recognized medical or mental institution
  - (15) Hemophilia
  - (16) Chronic osteomyelitis
  - (17) Ankylosis of joints
  - (18) Hyperinsulinism
  - (19) Muscular dystrophy
  - (20) Arteriosclerosis
  - (21) Thrombophlebitis
  - (22) Varicose veins
  - (23) Heavy metal poisoning
  - (24) Ionizing radiation injury
  - (25) Compressed air sequelae
  - (26) Ruptured intervertebral disc
  - (27) Hodgkin's disease
  - (28) Brain damage
  - (29) Deafness
  - (30) Mental retardation provided the employee's intelligence quotient is such that he falls within the lowest percentile of the general population. However, it shall not be necessary for the employer to know the employee's actual intelligence quotient or actual relative ranking in relation to the intelligence quotient of the general population.

31. A different approach is taken in the proposed DISABLED VETERANS EMPLOYMENT ACT, H.R. 1448, 92d Cong., 1st Sess. (1971), where a permanent physical impairment is broadly defined, but the list of conditions that constitute such an impairment are merely entitled to a *rebuttable* presumption that they come within the scope of the Act.



Any other preexisting disease, condition or impairment which is permanent in nature and which:

(a) would qualify for payment of weekly disability benefits of seventy-eight weeks or more under [the Workmen's Compensation schedule] exclusive of benefits payable for disfigurement or

(b) would support a rating of seventy-eight or more weeks of weekly disability benefits . . . or combines with a subsequent injury to cause a permanent impairment rated at seventy-eight weeks or more . . . .<sup>32</sup>

This provision will aid in further identifying those impairments which may arise pursuant to developments in industrial technology and changes in the environment, and gives the South Carolina Second Injury Fund flexibility as well as certainty.

A word of caution is in order to those employers seeking to establish prior impairments under the Fund. While the enumerated impairments are given a presumption of permanency, the burden is on the employer in all other cases to prove that the prior handicap was permanent at the time of employment and that the employer knew that it was permanent.<sup>33</sup> A temporary condition will not qualify for reimbursement for the simple reason that the employer was not really taking a risk that would call for reimbursement. Therefore, the administrators of the Fund cannot be expected to be sympathetic.

## 2. *Subsequent Occupational Injury*

*incurs a subsequent disability from injury by accident . . . .*

The second step to reimbursement from the Fund requires the employer to demonstrate that his compensation and medical liability for the subsequent injury is significantly increased by the employee's preexisting permanent physical handicap. The Fund's enacting legislation provides that the accident arising out of the employment relationship must result in

liability . . . for disability that is substantially greater, by reason of the combined effects of the preexisting impairment, than that which would have resulted from the subsequent injury alone . . . .<sup>34</sup>

32. S.C. CODE ANN. § 72-601(d)(31) (Cum. Supp. 1975). The schedule for compensation is set out at S.C. CODE ANN. § 72-153 (Cum. Supp. 1975).

33. For a discussion of employer's knowledge see text accompanying notes 51-67 *infra*.

34. S.C. CODE ANN. § 72-601(a) (Cum. Supp. 1975).

The most important words here, for the employer, are "substantially greater" and "combined effects." The "substantially greater" standard of measurement<sup>35</sup> implemented by the South Carolina Legislature is designed to provide a broad basis of protection for the handicapped worker. In contrast, approximately 30 states limit the application of their subsequent injury funds to those situations in which the prior and subsequent injuries result in permanent total disability.<sup>36</sup> Such limitations have greatly reduced the effectiveness of subsequent injury funds when coupled with the fact that less than one-tenth of all occupational accidents result in permanent total disability.<sup>37</sup> There appears to be no justification for precluding recovery from the Fund on the basis of the extent of the ensuing disability. The extent of the resulting disability is irrelevant to the purpose of the Fund and any attempt to limit employers' reimbursement to permanent total disability cases serves only to impede that purpose. The South Carolina Legislature has apparently recognized this defect and cured it by adopting the "substantially greater" standard.<sup>38</sup> Even that liberal standard has an escape clause, however, for the employer who can show that, "but for" the employee's prior permanent physical impairment, the subsequent injury "most probably would not have occurred."<sup>39</sup> Again the Legislature has encouraged the hiring of the handicapped by removing the risk of increased liability for an employer when the handicap itself causes a subsequent injury, but the ensuing disability fails to satisfy the "substantially greater" test.

The fact remains that the South Carolina Supreme Court has yet to interpret any of the language of the Second Injury Fund legislation, and there are some serious pitfalls that may confront the employer seeking reimbursement from the Fund. Case law from other jurisdictions indicates that employers may have to

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35. The "substantially greater" standard was taken from the Council of State Governments suggested State Workmen's Compensation and Rehabilitation Law. See note 14 *supra*.

36. L. LARSON, *supra* note 12, at 4. But see MINN. STAT. § 176.131(8) (1966), where the disability that results in substantially greater liability is defined as "any condition causing either temporary total, temporary partial, permanent total, permanent partial, death, medical expense, or retraining."

37. L. LARSON, *supra* note 12, at 5.

38. It remains to be seen what interpretation the South Carolina Supreme Court will give the language calling for a "substantially greater" liability, but, based upon the small percentage of permanent total disabilities, the court is likely to give the language a meaning consistent with the liberal philosophy of the Second Injury Fund.

39. S.C. CODE ANN. § 72-601(g) (Cum. Supp. 1975).

wait awhile before it is known exactly what sort of "combined effects" will give rise to "substantially greater" disability. In light of the fact that the "substantially greater" standard has been the minority rule, South Carolina will most likely have to set its own monetary threshold for establishing "substantially greater" liability. The interpretation given the language "combined effects," however, may be quite troublesome and can represent a fatal trap to the unwary employer or attorney. Two problems must be considered in interpreting this language: the nature of the causal relationship between the prior impairment and the subsequent injury, and the relationship of each to the final disability. It appears to be well established in other jurisdictions that it is not necessary to show any special relationship between the injuries, so long as the existence of the former injury substantially augments the disability ensuing from the latter.<sup>40</sup>

In *Davis v. Conger Life Insurance Co.*,<sup>41</sup> the claimant suffered a compensable back injury which could not be surgically corrected due to a heart condition, and the injury resulted in total disability. The Florida Supreme Court held that even though the injuries were not physically related, a merger of successive disabilities had taken place and the claimant was entitled to an award for total disability, part being paid by the Special Disability Fund. A New York court in *Torelli v. Robert Hall Clothes*,<sup>42</sup> held that the Fund was not liable when the prior injury was partial deafness and the ultimate disability took the form of an injured hand; the prior injury was found not to be of such a degree as to constitute a hindrance or obstacle to employment. Furthermore, where there was a lack of substantial evidence that a permanent disability resulting from prior obesity and a subsequently herniated disc was materially and substantially greater than would have been suffered from the herniated disc alone, the Fund was not held to be liable.<sup>43</sup>

These cases illustrate that the inquiry should not be whether the prior injury caused or in some way *combined* with the second, but merely whether or not the prior injury in some way *contributed* to the final result. Even though the subsequent injury would have occurred without the existence of the prior one, if the prior injury causes the degree of disability resulting from

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40. 2 A. LARSON, *supra* note 3, § 59.32.

41. 201 So. 2d 727 (Sup. Ct. Fla. 1967).

42. 9 App. Div. 2d 147, 194 N.Y.S.2d 221 (1959).

43. *Shirley v. Triangle Maintenance Corp.*, 41 App. Div. 2d 800, 341 N.Y.S.2d 709 (1973).

the latter injury to be materially greater, the Fund should be liable for that excess amount, since it is at that point that the combined effects result in substantially greater disability.

The circumstances which will frequently thwart reimbursement from the Fund are those in which either the prior impairment or the subsequent injury are totally responsible for causing the increased disability. The Fund will probably not be liable if the prior impairment contributed nothing to the final disability,<sup>44</sup> or if the subsequent injuries were so severe that they alone caused the disability.<sup>45</sup> This situation in reverse will also preclude recovery. If the preexisting impairment is the overwhelming cause of the disability, the Fund will not be liable, since there is no tie-in with a compensable injury.<sup>46</sup>

Employers must also be aware that the subsequent injury must be a compensable injury under the workmen's compensation statutes to qualify for reimbursement from the Second Injury Fund. Although one jurisdiction has held that the Fund is liable when the compensable injury came first and the noncompensable injury followed,<sup>47</sup> there appears to be little doubt that the second injury must be compensable before reimbursement can be considered.<sup>48</sup>

It is important to note that South Carolina's Second Injury Fund also extends to situations in which the subsequent injury results in the death of a handicapped employee. The Fund will reimburse the employer when it is "determined that the death would not have occurred except for such preexisting permanent physical impairment . . . ."<sup>49</sup> The protection offered by this provision is significant in light of the number of handicapped individuals possessing a history of cardiac disease, or some other degenerative diseases. The employer faced with the question of employing a man who is qualified in all respects, except for a previous heart condition, may feel that he is taking a special risk, for a subsequent injury may be fatal. The death provision pro-

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44. 2 A. LARSON, *supra* note 3, § 59.32.

45. *Id.*

46. *Id.*

47. See *Bianco v. Genco Tool & Gauge Co.*, 6 Mich. App. 590, 149 N.W.2d 905 (1967). Professor Larson described the holding in *Bianco* as "a strange concatenation of a second injury statute and an amendment updating benefits" through which "a Subsequent Injury Fund was indeed transmuted into a Prior Injury Fund." 2 A. LARSON, *supra* note 3, § 59.32 n.92.

48. 2 A. LARSON, *supra* note 3, § 59.32.

49. S.C. CODE ANN. § 72-601(b) (Cum. Supp. 1975).

vides the employer with an escape clause similar to that covering the "but for" subsequent injuries discussed previously,<sup>50</sup> thus encouraging the employer to hire the employee despite his heart condition. Some problems may arise distinguishing between the preexisting condition and the final fact of death, but legislation designed to encourage the employment of the handicapped cannot merely disregard the factor of death in the compensatory scheme.

### 3. *Employer's Prior Knowledge of the Handicap*

*the employer must establish . . . knowledge of the permanent physical impairment at the time that the employee was hired . . . .*

The item of proof that cuts to the very heart of Second Injury Fund policy is the final prerequisite for recovery—the employer's knowledge. If the employer does not know an employee is handicapped when he is hired, the employer is not taking any risk for which he should be compensated from the Second Injury Fund. The commentary to the Council of State Governments Model Act states:

[I]f the purpose of the . . . [Second Injury Fund] principle is to prevent discrimination in the hiring of handicapped workers, it follows that the problem arises only when the employer knows of the preexisting impairment. He is not going to discriminate on the basis of something he does not know. However, the existence of such knowledge cannot be left to later wrangling about the state of the employer's knowledge evidenced only by conflicting assertions.<sup>51</sup>

Professor Larson has summarized the multitude of problems involved in determining the employer's intent<sup>52</sup> and South Carolina could have easily been thrust into the controversy. The Legislature has chosen instead to follow the suggestions of the Model Act<sup>53</sup> and require that

[i]n order to qualify under this section for reimbursement from the Second Injury Fund, the employer must establish *by written*

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50. See text accompanying note 39 *supra*.

51. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION 137 (1965).

52. 2 A. LARSON, *supra* note 3, § 59.33.

53. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION: WORKMEN'S COMPENSATION & REHABILITATION LAW § 20(c) (1965).

*records which shall be filed with the Commission and the fund, when claim is made for reimbursement thereunder, that the employer had knowledge of the permanent physical impairment at the time that the employee was hired, or at the time that the employee was retained in employment after the employer acquired such knowledge.*<sup>54</sup>

The present South Carolina definition of a "permanent physical impairment"<sup>55</sup> is sufficiently broad and complex that when an employer hires an individual he may never realize that the new employee has silicosis, epilepsy, diabetes or any other condition defined as a permanent impairment. This being the case, should the handicapped worker suffer subsequent injury, the employer will now try to shift some of his liability to the Second Injury Fund, even though he never had any intention of hiring a handicapped individual in the first instance. To prevent this divergence of fund resources, the requirement that the employer establish written records at the time of employment, or at the time the employee was retained after the employer acquired such knowledge, will better serve the original justification of the Second Injury Fund principle.

The most extensive controversy in this area focuses on whether an employer must have actual knowledge of the preexisting impairment before he may be reimbursed by the subsequent injury fund. The South Carolina requirement for written records would appear to force compliance with the New York rule which states that the primary purpose of the Second Injury Fund, promoting the hiring of the handicapped, requires actual knowledge on the part of the employer.<sup>56</sup> California courts, however, in interpreting the California Subsequent Injuries Fund,<sup>57</sup> refuse to require the employer to have actual knowledge of the employee's preexisting impairment.

In *Subsequent Injuries Fund v. Industrial Accident Commission*,<sup>58</sup> a partially deaf individual was involved in an accident resulting in a more serious loss of hearing. Following the accident, he applied to the Subsequent Injuries Fund for benefits.

54. S.C. CODE ANN. § 72-601(c) (Cum. Supp. 1975) (emphasis added).

55. S.C. CODE ANN. § 72-601(d) (Cum. Supp. 1975).

56. 2 A. LARSON, *supra* note 3, § 59.33.

57. CAL. LABOR CODE ANN. §§ 4750-51 (West 1971).

58. 56 Cal. 2d 842, 366 P.2d 496, 17 Cal. Rptr. 144 (1961); *accord*, *Ferguson v. Industrial Accident Comm'n*, 50 Cal. 2d 469, 326 P.2d 145 (1958); *cf.* *State Subsequent Injuries Fund v. Industrial Accident Comm'n*, 135 Cal. App. 2d 544, 288 P.2d 31 (1955).

Even though the employer hired the worker without any knowledge of his deafness, the court stated that there is no reason why the preexisting disability should be known to the employer before an injured employee can receive benefits from the Fund. The court held that the sole requirement was attaining the status of "permanently partially disabled" prior to the occurrence. Although this decision appears to be granting the employer a wind-fall by relieving him of partial liability, there are certain considerations which favor the California approach. If one assumes the exclusive purpose of the Second Injury Fund to be to encourage employment of the handicapped worker, then the actual notice requirement is defensible. If, however, the intent of the Fund is also to spread the risks associated with the prior handicap in such a way that the entire burden is not imposed upon the employee or the employer, the requirement becomes counterproductive. An equitable result cannot be achieved by requiring the employer to bear the burden of the liability unrelated to his employment merely because the employee concealed, or the employer did not inquire about, preexisting impairments. The effect of noncompliance with the actual knowledge requirement encourages the employer to put a premium on limiting his liability in any way possible, thereby resulting in inadequate compensation, and possible discharge for disabled workers. Additionally, any advance registration of the handicapped may discourage employers from employing disabled workers due to the paperwork and expense involved in ascertaining the extent of the employee's disability.<sup>59</sup>

South Carolina has chosen to follow both the New York and the California rules to some extent. The written record requirement forces the employer to establish at the outset some file or other record of an employee's physical characteristics if the employer desires any assurance that he will be reimbursed should the employee suffer subsequent injuries. It has not been established just what type of record this must be, medical records,

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59. One reason that the courts in California have not required employers to have prior knowledge of the employee's handicap may be due to their method of administering the Fund. In South Carolina, as in New York, the employer pays all benefits to the employee and then seeks his reimbursement from the Second Injury Fund. In California, however, the employee seeks compensation directly from the Subsequent Injuries Fund. As a result, California courts might have found it difficult to reconcile why the claimant employee's rights to compensation should depend upon what the employer knew and when he knew it, particularly if the employer was out of the case. See 2 A. LARSON, *supra* note 3, § 59.33.

personnel records or interviews, but under the New York rule such records should demonstrate:

- (1) that the employer believed the condition was permanent<sup>60</sup> or was one of the enumerated impairments;<sup>61</sup>
- (2) that the condition of which the employer had knowledge was the condition that figured in the final disability;<sup>62</sup>
- (3) that the employer knew that the condition was likely to be a hindrance to employment;<sup>63</sup>
- (4) that the employer's knowledge is based upon more than "vague or indirect intimations."<sup>64</sup>

Under the actual knowledge provision, South Carolina employers will be forced to become more familiar with the Second Injury Fund concept. In attempting to avoid after-the-fact discovery of handicaps, employers may eventually develop the practice of submitting prospective employees to routine medical examinations. Such an examination, by uncovering the exact extent of the handicap, will not only put the employer on notice, but will also provide an adequate written record of the employer's knowledge. Identification of the handicap will in turn lead to better and more informed placement of the handicapped worker into a position more suited to his actual or potential limitations. As a result of such efforts, the impaired worker will have less reason or ability to conceal his handicap.

The South Carolina Legislature has gone one step further than the New York rule in allowing reimbursement of an employer without actual knowledge of a preexisting physical impairment if "such condition was concealed by the employee or was unknown to the employee."<sup>65</sup> Such a provision actually flies in the face of the New York rule which assumes that the sole purpose of the Subsequent Injury Fund is to encourage the employment of the handicapped. The provision more closely resembles the

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60. See *Dubrow v. 40 West 33rd Street Realty Corp.*, 4 App. Div. 2d 896, 167 N.Y.S.2d 98 (1957).

61. See note 30 *supra*.

62. See *Jamieson v. Passarelli*, 15 App. Div. 2d 854, 224 N.Y.S.2d 454 (1962).

63. See *Ryan v. Armour & Co.*, 12 App. Div. 2d 559, 206 N.Y.S.2d 748 (1960); *Charbonneau v. Alco Prods., Inc.*, 9 App. Div. 2d 813, 192 N.Y.S.2d 684 (1959).

64. See 2 A. LARSON, *supra* note 3, § 59.33 nn. 15-20, citing *Stophibeen v. G.E. Van Vorst Co.*, 280 App. Div. 1004, 116 N.Y.S.2d 855 (1952) (change to lighter work because of feebleness); *Stein v. La Marguise Footwear, Inc.*, 9 App. Div. 2d 552, 189 N.Y.S.2d 520 (1959), *aff'd*, 8 N.Y.2d 1081, 170 N.E.2d 456, 207 N.Y.S.2d 452 (1960) (preexisting condition subject of prior compensation award).

65. S.C. CODE ANN. § 72-601(c) (Cum. Supp. 1975).



California interpretation, although it is based upon a different procedure.<sup>66</sup> It would appear that the South Carolina legislators are somewhat more concerned with risk-spreading than the New York courts and are not content merely to encourage the hiring of the handicapped at the expense of the industrial community.<sup>67</sup> Employers should be cautioned, however, not to depend upon this escape clause to qualify them for reimbursement. Administrators of the Fund are likely to accept proof of concealment or lack of knowledge on the part of the employee only after strict scrutiny.

### B. *Distribution of the Liability*

Once it is established that the employer qualifies for reimbursement from the Second Injury Fund, the next inquiry is: How is this increased liability to be allocated between the employer and the Fund? Common sense would respond that the Fund should be liable for the difference between the compensation payable for the combined injuries, and the compensation that would have been payable for the second injury alone had it happened to a healthy individual.<sup>68</sup> This formula has worked well where the liability was allocated between loss of vision in one eye and total blindness;<sup>69</sup> or loss of one leg and resulting total disability.<sup>70</sup> Administrative problems arise, however, when the formula is applied to latent or degenerative conditions. For example, how would an administrative board apportion liability between preexisting diabetes and more degenerative diabetes, or cardiac disease and resulting death? Many of the conditions that the South Caro-

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66. See note 59 *supra*.

67. It is also possible that this provision was added following the South Carolina Supreme Court holding in *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 196 S.E.2d 833 (1973). Mr. Cooper, in response to a question on a job application, stated falsely that he had never had back trouble because he knew that he would not be hired if the employer had knowledge of a previous back injury. Citing cases from other jurisdictions, the court stated as a general rule that

the following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

260 S.C. at 468, 196 S.E.2d at 835.

68. See CAL. LABOR CODE ANN. § 4750 (West 1971); KY. REV. STAT. ANN. § 342.120(3) (1972); MD. CODE ANN. art. 101 § 36(7) (1964).

69. *Cabe v. Stamps*, 429 S.W.2d 361 (Ky. Ct. App. 1968).

70. *Reliance Ins. Co. v. Watts*, 16 Md. App. 71, 293 A.2d 836 (1972).

lina statute considers to be preexisting impairments<sup>71</sup> tend to be latent and progressive diseases, situations in which apportioning compensation benefits between the liability resulting from the prior condition and the subsequent injury would be extremely difficult, possibly producing arbitrary and inequitable results. The South Carolina Legislature has effectively eliminated this problem by adopting the New York approach, which arbitrarily limits employers' liability for the compensation and medical benefits to the first 104 weeks, by limiting employers' liability in South Carolina to the first 78 weeks.<sup>72</sup> The Second Injury Fund then assumes the liability for all remaining payments that were awarded to adequately compensate the injured worker. While this formula furnishes a solution when the allocation of liability is difficult to ascertain, it may work to the disadvantage of an employer when the proportion can be determined. For example, envision a situation where the subsequent injury alone is a minor one, resulting in 52 weeks of benefits, but the combined effect with the preexisting impairment results in total and permanent disability for the employee. Is the employer liable for the extra year's compensation and medical payments or does the Fund assume them? It can be argued that when the compensation benefits for the second injury alone exceed 78 weeks, the Fund assumes them, so when they fall below this arbitrary division of liability, the employer should regard it as his *quid pro quo*. One must remember, however, that a major justification for the Second Injury Fund is the limitation of the employer's liability to the injury occurring while the handicapped worker was in his employ. Limiting the employer's liability to the subsequent injury, even if it is below the 78 week division of liability, will better serve the primary purpose of the Second Injury Fund, increased employment of the handicapped, as well as reinforcing the greatest asset of the 78 week period—the certainty it gives the employer in ascertaining the limits of his liability. The actual operation of this provision seems to work reasonably well in New York, and since any rule of distribution in these cases would undoubtedly be equally as arbitrary, considering the difficulties of proof involved, it is doubtful that a better solution can be implemented.

The South Carolina Second Injury Fund does go one step

71. See note 30 *supra*.

72. N.Y. WORKMEN'S COMP. LAW § 15(8)(d) (McKinney 1965); S.C. CODE ANN. § 72-

601.1 (Cum. Supp. 1975)

further than the Model Act by providing not only for the allocation of the compensation benefits, but also for the medical costs attendant on the combined injuries.<sup>73</sup> This additional feature takes into consideration the fact that most serious injuries require prolonged hospitalization and extensive treatment. In some cases, where a severe preexisting condition is aggravated by a second injury, the medical expenses may well exceed the employer's compensation costs. In New York the Subsequent Injury Fund also provides for allocation of medical benefits,<sup>74</sup> and the question has arisen whether the medical costs are completely distinguishable from the compensation costs. If the disability payments are merely for 28 weeks, can the Second Injury Fund still be utilized by employers when their medical costs exceed the statutory maximum number of weeks? Answering in the affirmative, the New York court in *Mastrodonato v. Pfaudler Co.*<sup>75</sup> stated that there was no legislative intent to require a claimant to receive both medical benefits and compensation for 104 weeks before a carrier or employer qualified for reimbursement for further payments of either cost. The court held, therefore, that the statute explicitly made the fund liable for medical benefits after the first 104 weeks.<sup>76</sup> With the similarities existing between South Carolina's statute and New York's, the judicial interpretation should be analogous, thereby implementing the legislative policy of encouraging employers to hire the handicapped.

### C. *Administration and Financing of the Second Injury Fund*

The South Carolina Second Injury Fund was originally established under the office of the State Treasurer with administrative duties falling upon the shoulders of the Industrial Commission.<sup>77</sup> The Fund is now established as a separate state agency,

73. S.C. CODE ANN. § 72.601(a) (Cum. Supp. 1975).

74. N.Y. WORKMEN'S COMP. LAW § 15(8)(d) (McKinney 1965).

75. 307 N.Y. 592, 123 N.E.2d 83 (1954). But see *Bruner v. Commonwealth*, 459 S.W.2d 138 (Ky. Ct. App. 1970); *Federal Mut. Ins. Co. v. Carpenter*, 371 S.W.2d 955 (Mo. Sup. Ct. 1963).

76. The South Carolina statute permits an employer to recoup 50 percent of medical expenses paid in excess of \$3000 during the first 78 weeks following the injury and then additional reimbursement for all medical expenses payable subsequent to the first 78 weeks following the injury. The employer must show, however, that his liability for medical benefits is substantially greater because of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment, than would have resulted solely from the subsequent injury. S.C. CODE ANN. § 72-601(a)(2) (Cum. Supp. 1975).

77. S.C. CODE ANN. § 72-602(a) (Cum. Supp. 1975).

much like the Workmen's Compensation Fund,<sup>78</sup> administered by a director, with the actual monies and securities being placed in trust with the State Treasurer.<sup>79</sup>

Noting the broad coverage provisions enacted by the Legislature and discussed above, it is obvious that the objectives of the Fund can never be realized without a strong, self-perpetuating financial base. While several methods of financing are available, the first impulse is to seek endowment from the State, and there are some viable arguments supporting such a proposition. South Carolina has approximately 168,000 persons between the ages of 16 and 64 years old that are afflicted with some form of work disability.<sup>80</sup> Unemployment among this group is high, which often results in their becoming public charges on the welfare rolls. Any expenditure which encourages the employment of such people would direct the taxpayer's dollar towards relieving the State of a major financial burden. Instead of pumping time and resources merely into keeping these people alive, tax revenue would be used to encourage employment, enabling the handicapped to be self-supporting citizens contributing to the economic growth of the State. The potential benefits to the State are substantial and its contribution should reflect this potential.<sup>81</sup> South Carolina's contribution to the financing of its Second Injury Fund was composed of a three-stage juggling act.<sup>82</sup> The Legislature authorized: (1) the transfer of \$100,000 from the Workmen's Compensation Fund to the Second Injury Fund; (2) the deposit of one-third of the Workmen's Compensation Premium Tax into the Fund,<sup>83</sup> and (3) the deposit of commuted death compensation into the Fund.<sup>84</sup>

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78. S.C. CODE ANN. § 72-451 (Cum. Supp. 1975).

79. S.C. CODE ANN. § 72-602(a) (Cum. Supp. 1975).

80. S.C. SECOND INJURY FUND & S.C. VOCATIONAL REHABILITATION DEPT., THE SOUTH CAROLINA SECOND INJURY FUND, WHAT IT MEANS (1973).

81. For a discussion of potential benefits see Fabing & Barrow, *Encouragement of Employment of the Handicapped—Extension of Second Injury Fund Principles to Persons Having Latent Impairments*, 8 VAND. L. REV. 575, 585 (1955) [hereinafter Fabing & Barrow]. The article also suggests that a preexisting handicap which is not a result of an industrial accident is not a product of industry and the cost of overcoming the handicap should therefore not be borne by it.

82. S.C. CODE ANN. § 72-602(c) (Cum. Supp. 1975).

83. See S.C. CODE ANN. § 72-414 (1962). This provision requires that "[e]very insurance carrier insuring employers in this State . . . shall . . . pay a tax upon the premiums received . . . at a rate of four and one half percent of the amount of such premiums . . . ."

84. See S.C. CODE ANN. § 72-165(c) & (d) (Cum. Supp. 1975). These provisions direct that if a deceased employee leaves no dependents (or only partial dependents under § 72-162) and no mother or father, certain commuted compensation paid by the employer,

These contributions were limited to the first year, however, and no further provisions were made for contributions by the State.

The heart of Second Injury Fund financing is the "continuing basis" provision<sup>85</sup> which calls for "equitable assessments" upon each insurance carrier.<sup>86</sup> This reliance on assessment upon industry within the state is similar to the New York system,<sup>87</sup> taking into account three factors: (1) replenishment; (2) growth; and (3) fair share risk-spreading. The assessment formula<sup>88</sup> calls for full replenishment of the Fund each year with a 75 percent increase in assets to be assessed on a pro rata basis reflecting each carrier's benefit from the Fund.

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beyond expenses for burial and administration of the deceased's estate, will be paid into the Second Injury Fund.

South Carolina's original Second Injury Fund was financed primarily from this source creating a financially inadequate and unutilized fund. This source of financing was severely limited by the fact that less than one percent of all job connected injuries result in death, and an even smaller percentage of the resulting death payments accrued to the Fund. See L. LARSON, *supra* note 12, at 7.

85. S.C. CODE ANN. § 72-602(d) (Cum. Supp. 1975).

86. *Id.* The term "carrier" includes insurance carriers, self-insurers and the State Workmen's Compensation Fund. *Id.*

87. N.Y. WORKMEN'S COMP. LAW § 15(8)(h) (McKinney 1965).

88. See S.C. CODE ANN. § 72-602(d) (Cum. Supp. 1975). The provision calls for an assessment on each insurer based on the following formula:

$$\text{Assessment} = [(1.75 \times \text{TD}) - \text{NA}] \frac{\text{BC}}{\text{BI}}$$

where TD = Total disbursements from Fund during previous fiscal year

NA = Net assets in Fund at end of fiscal year

BC = Total benefits paid by individual carrier during preceding fiscal year ending June 30

BI = Total benefits paid by all carriers during preceding fiscal year ending December 31

Example:	Total Disbursements	=	\$50,000
	Growth & Replenishment factor	=	<u>1.75</u>
	TOTAL NEEDED	=	\$87,500.
	Net Assets	=	<u>-10,000</u>
	TOTAL TO BE COLLECTED	=	\$77,500.

$$\text{Carrier X's share} = \frac{\text{Benefits paid by Carrier X} = 500,000}{\text{Benefits paid by all carriers} = 20,000,000} = \frac{1}{40}$$

$$\text{Assessment for Carrier X} = 77,500 \times \frac{1}{40} = \$1,937.50$$

The New York prorated assessment method has provided that state with a sound financial base for its Subsequent Injury Fund and should provide adequate and continuing financial resources. As a result, administrators need not be concerned about the possible insolvency of the Fund, thereby permitting them to encourage claims against it.<sup>89</sup> Furthermore, the limits upon the amount the Fund will be allowed to accumulate will prevent unnecessary burdens on those who support it. This crucial requirement of adequate financing, along with the broad coverage provisions of South Carolina's Fund, hopefully will diminish employers' fear of increased compensation costs when they hire the handicapped.

#### IV. PROBLEM AREAS

##### A. *Statute of Limitations*

One major problem with South Carolina's Fund is the fact that in order for an employer or carrier to come within the terms of the Fund he must notify the Industrial Commission and Director of the Second Injury Fund of any possible claim within 78 weeks of the injury,<sup>90</sup> while the injured workman is permitted 2 years to file a claim with the employer.<sup>91</sup> This double standard puts the employer in jeopardy of full liability for any unknown claims which may be brought against him after the employer's 78-week period of limitation has expired. For example, if an injured workman files a claim against his employer 100 weeks after the date of injury, the employer is automatically prevented from seeking Second Injury Fund coverage. This problem appears to be a legislative oversight and should be quickly rectified by extending to 2 years the time in which the employer must file notice of a possible claim under the Fund.

##### B. *Employer Attitudes*

An even greater problem involved in implementing the objectives of the Second Injury Fund is the removal of employers' economic fears and prejudices against hiring the handicapped. Although their liability is limited by the Fund, many employers believe that handicapped workers tend to be accident prone and

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89. L. LARSON, *supra* note 12, at 7.

90. S.C. CODE ANN. § 72-601(f) (Cum. Supp. 1975).

91. S.C. CODE ANN. § 72-303 (Cum. Supp. 1975).

less productive than unimpaired workers.

The United States Department of Labor conducted a study comparing 11,000 impaired workers with 18,000 unimpaired workers, and concluded that there is no significant difference with respect to accident frequency or level of performance.<sup>92</sup> When the handicapped worker is properly placed, the physical impairment does not affect unfavorably the quantity or quality of performance.<sup>93</sup> A commentary on this study stated that the reason why the performance and accident experience of handicapped workers compared so favorably with that of unimpaired workers is that, in the competition for jobs, the impaired worker realizes his infirmity will be regarded as a handicap, so he compensates with hard work, regular attendance and precaution against accidents.<sup>94</sup> Furthermore, the impaired individual realizes the need for conserving his remaining ability, and if there is any additional tendency to have accidents, it is overridden by the special care the handicapped exercise in their work.<sup>95</sup>

Another common excuse expressed by employers is that the hiring of handicapped workers will increase their compensation costs.<sup>96</sup> The mere employment of the handicapped, however, can never cause an increase in costs, for the workmen's compensation costs of an employer are determined by the relative hazards inherent in the type of business he conducts, along with the accident experience of the particular employer. It is only when the handicapped worker has more accidents than the unimpaired worker that the employers' premiums increase, a result proven to be unlikely.<sup>97</sup>

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92. Fabing & Barrow, *supra* note 81, at 577, citing U.S. BUREAU OF LABOR BULL. NO. 122, PROCEEDINGS OF THE NATIONAL CONFERENCE ON WORKMEN'S COMPENSATION AND REHABILITATION 19 (1950).

93. Fabing & Barrow, *supra* note 81, at 577.

94. *Id.* at 578.

95. *Id.*

96. See L. LARSON, *supra* note 12, at 16, citing U.S. BUREAU OF LABOR STANDARDS, DEPT. OF LABOR BULL. NO. 234, WORKMEN'S COMPENSATION AND THE PHYSICALLY HANDICAPPED WORKER (1961).

97. See Fabing & Barrow, *supra* note 81, at 579. See also L. LARSON, *supra* note 12, at 1, who states:

[T]he possibility of a direct increase in workmen's compensation costs exists only for those employers who are subject to experience rating. It has been estimated that about 80 percent of all employers in this country do not qualify for experience rating. Their rates are based on the experience of all employers in their class. They therefore need have no fear that their compensation costs would rise as a direct consequence of their employing handicapped workers or if the handicapped workers in their employment become further disabled.

To overcome employers' economic fears and prejudices, administrators of the Second Injury Fund must strive to inform employers about the actual operations of the Fund, and educate them about the stability of the handicapped worker. It is essential to obtain the full cooperation of private industry, for without it the purposes of a Fund will never be achieved.

#### V. CONCLUSION

Employment of the handicapped is of essential economic and social importance to every individual in South Carolina. The public will benefit, for one who might have been a public charge will now be a self-supporting, tax-paying citizen. Industry will profit since the size of its labor force will increase. But most importantly, the handicapped individual will be better able to support himself and his family. The General Assembly has created one of the most liberal and comprehensive subsequent injury funds in the country; it is now up to the public to apply it and remove the stigma from the handicapped worker.



