

The South Carolina Second Injury Fund

February 4, 2004

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The Fund compliments the work of existing state agencies that assist the disabled workforce in South Carolina

South Carolina's Second Injury Fund in its present form was created by the Legislature on July 1, 1972. Currently the Fund is a separate state agency under the Budget and Control Board. Sections 42-7-200 and 42-7-310 outline the mission of the Second Injury Fund. The Fund compliments the work of the Commission for the Blind, Department of Disabilities and Special Needs and the Vocational Rehabilitation Depart-

ment in promoting the hiring of disabled citizens.

The Second Injury Fund annually assists tens of thousands of employees as well as the employers it is principally intended to serve. The need for the services provided by the Second Injury Fund is not eliminated by the Americans with Disabilities Act. The Fund and the Act work together to protect employers in their hiring practices, providing much needed assistance to many

South Carolinians who have had the misfortune associated with a disability that might otherwise keep them from obtaining gainful employment. While the goal of the ADA is to eliminate discriminatory barriers, the purpose of the Second Injury Fund is to provide financial incentives (and remove financial penalties) to the employer who hires disabled workers.

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The Second Injury Fund reduces workers' compensations costs for all South Carolina employers

The elimination of the Second Injury Fund will directly result in an increase in the workers' compensation premiums paid by all South Carolina employers. The South Carolina statute appropriately allows the Fund to provide its services on a cash flow basis without the necessity of

establishing reserves for future liabilities. **If the Fund is eliminated, however, claims previously covered by the Fund will be transferred to the industry along with the necessity of establishing reserves.** These reserves will result in an increase in the incurred loss ratios

which will result in immediate rate and premium increases for all employers in the State. In addition, the cost of reinsurance to individual self insured employers will increase if the financial protections provided by the Fund are eliminated.

The elimination of the Second Injury Fund will directly result in an increase in the workers' compensation premiums.

The South Carolina legislature must be presented with as much unbiased information about the Fund as is possible

It is imperative that the South Carolina Legislature be presented with as much unbiased factual information as is possible in deliberating this issue which is of great importance to tens of thousands of disabled South Carolina employees and potential employees as well as those employers who would, in the absence of the Fund, be saddled with the additional costs and burdens associated with their employment. Given the current state of the economy, rate and premium increases could have a serious impact upon the future direction and magnitude of improvements in that economy.

In a February 2002 publication of the American Insurance Association (AIA) entitled "Priority Issues and Management Team", the AIA states as one of its national "Priority Issues" the "repeal or reform of second injury funds as needed". To accomplish this objective in South Carolina, the AIA has alluded to fund closures in other states without providing the reasons behind

those closures. They have overstated the Fund's liabilities and provided information relative to the Fund's liabilities and costs that is misleading at best. They have attempted to convey that there is no longer a need for the Second Injury Fund due to the passage of the ADA without informing the legislature that the ADA does not apply to the majority of South Carolina employers, and misstating the interrelationships of the provisions of the ADA with the Second Injury Fund.

The AIA has expended substantial energy in their pursuit of the "repeal or reform of second injury funds as needed". Testimony alludes to a substantial cost reduction that will occur if the Second Injury Fund is abolished. Actually, only a small portion of the Second Injury Fund's expenses may be eliminated, and any savings will be more than offset by additional insurer and self-insured reserves and expenses. The claims paid by the Second Injury Fund will not go away, but will sim-

ply be transferred to the insurance industry. It is important that any cost differences that will occur if the Fund is abolished, are accurately calculated and presented to the Legislature. Once the true impacts are determined, the decision to abolish the Fund should include the value of the services it provides to so many South Carolina citizens.

It would be far more helpful if the AIA would expend a similar amount of energy and resources in educating their member insurers on ways to use the Second Injury Fund in a responsible manner to the benefit of the State of South Carolina and to provide the Legislature with a more balanced presentation relative to the true impacts of the Fund's closure. The AIA refers to a disadvantage to small employers who do not know how to "play the game". Perhaps the AIA and its member insurers could provide information to their small employer policyholders on how the Fund works and how they can benefit from its existence.

The ADA does not eliminate the need for the Second Injury Fund

The definition of "disability" in the ADA includes the requirement that the impairment substantially limit a major life activity. In some cases, the ADA provides no assistance to employees with disabilities, and in these cases, services provided by the Second Injury Fund become even more important.

The following excerpt from a 1997 study published in the Massachusetts Law Review describes the fallacy in thinking that the presence of the ADA eliminates the need for the services provided by the Second Injury Fund:

Approximately twenty per cent of the more than 60,000 ADA charges filed with the EEOC through February 29, 1996 came from people claiming to be disabled because of a back impairment. However, Ms. Maloney's study found no cases where back ailments were considered to be a disability under the ADA. Other significant impairments such as carpal tunnel syndrome, knee injuries and mental impairments (other than severe depression) have received the same treatment. While these may not provide the basis for an ADA claim, they are the meat and potatoes of work-

ers' compensation claims.

It becomes apparent from interpretations of the statute and case histories that the actual ability of handicapped employees to use the ADA to prevent discrimination is limited. Secondly, if the employer hires or retains the handicapped worker – with or without modification – the employer often pays a high price for following the law.

As additional evidence of the fallacy in thinking that the ADA, absent the Second Injury Fund, will protect employers and disabled employees, the following excerpt is taken

Many small South Carolina firms are not subject to The ADA – The Second Injury Fund especially needed for these employers

While the majority of South Carolinians are employed by large corporations, a full eighty percent of employers in South Carolina are small businesses with less than fifteen employees. The ADA does not apply to these employers, and the economic impacts of the elimination of the Fund on these small employers

may be even more substantial. Given the current signs of improvement in the economy, the Fund’s elimination could produce significant obstacles to a continuation of that improvement as well as substantial additional burdens on the State’s employers. Small employers (those not specifically covered by

the ADA) may see their only option to be a curtailing of their hiring of disabled employment applicants. In addition, those employers, both large and small, who have hired disabled employees, will face financial penalties for having done so.

The South Carolina Second Injury Fund ranks high in customer satisfaction

The South Carolina Second Injury Fund conducted Customer Performance Evaluation Surveys for fiscal years 2000 thru 2003. The surveys were developed to measure the Five

Dimensions of Service Quality; Reliability, Responsiveness, Empathy, Assurance and Tangibles. This surveys consisted of 10 questions, each measurable by using a 4-point

Likert-type scale, and 2 open-ended questions. It also had additional space for written comments. A full fifty percent of those surveyed provided a response to the survey with astounding results. That the Fund is operating in an exemplary manner is evidenced by the percentage of positive responses each year:

Fiscal year	2000	2001	2002	2003
% of Positive responses	99%	99%	98%	97%

Closure of second injury funds in other states is misleading – South Carolina Fund not at financial risk

Opponents of the Second Injury Fund point to the closing of sixteen similar funds during the last nine years as apparent evidence that these funds have outlived their usefulness. Absent from these discussions, however, are the reasons behind the fund closures. Many of the recently closed funds were discontinued for management or financial reasons rather than a desire to discontinue the services provided by them.

Unlike the South Carolina Second Injury Fund, the legislation relating to several of these closed state funds did not provide a procedure that would allow the Fund to operate in a fiscally responsible manner.

South Carolina’s Second Injury Fund legislation has provided the means for its long-term financial health. Comparisons of the South Carolina Fund with those in other states are incomplete without a commensurate description of any differences in the way the funds operate.

The closures of second injury funds in other states were generally due to inappropriate funding, mismanagement, or abuse of the system. These closures provide no support for the closure of the Fund in South Carolina which has been well financed and well managed throughout its existence.

The Fund is well financed and well managed

ADA Continued

from a National Council on Disability press release. The press release refers to a 2002 Supreme Court decision in *Toyota Motor Manufacturing Kentucky, Inc. v. Ella Williams*.

The National Council on Disability is deeply troubled by today's Supreme Court ruling in *Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams* (No. 00-1989), in which the Court once again narrowed the scope of the Americans with Disabilities Act (ADA) in a manner inconsistent with Congress and the American people's intent in its enactment.

In the ruling, the Court said that an assembly line worker with carpal tunnel syndrome was not entitled to special (*consideration*). Pain

and discomfort significantly restricted her ability to engage in a range of other manual activities. "Substantially limited," according to the Equal Employment Opportunity Commission's (EEOC) regulatory definition, means restricted "in the manner, condition and duration under which the major life activity is performed in comparison to the average person." There is simply no plausible basis for concluding that Ms. Williams is not significantly restricted as compared to the "average person".

The notion that, in order to be deemed "disabled" under ADA, she (*Ms. Williams*) must be severely restricted in performing manual tasks of central importance to most people's daily lives invokes a misguided notion about ADA.

It suggests that people must be "truly disabled," i.e., visibly and functionally unable to perform in certain specific, socially expected ways before they are entitled to the protection of law.

This case provides a prime example that, in the absence of the services provided by the Second Injury Fund, many disabled employees and their employers will not find protection through the ADA. In addition, an injured employee, faced with the need to prove that he or she is "disabled" under the ADA may be subjected to lengthy legal proceedings whereas the South Carolina Second Injury Fund provides assistance in a far more expeditious manner.

Opponents of Second Injury Fund providing misleading information

Testimony before the South Carolina Legislature implies that the experience of the South Carolina Second Injury Fund is "alarmingly similar" to that of funds that were abolished in other states. Opponents of the Fund fail to add that the major cause of the increased claim payments to which they refer, has been appropriately addressed by the South Carolina Legislature. Legislation which was passed in 2003 will substantially reduce the payments made by the Fund in the future. This legislation will curtail the "creative working" of the Fund by some providers of workers' compensation insurance, and will level the playing field for those providers that use the Fund responsibly and appropriately. The "alarmingly" increasing frequency and severity (average size) of claim payments described by Fund opponents will decrease by an estimated 40 - 50 per cent over the next few years. Future assessments will decrease over each of the next few

years as the claims previously covered for "unknown conditions" are eliminated. In addition, this well-drafted legislation allows the Fund to continue providing its much needed services to the employers and employees of South Carolina.

These same opponents have provided the Legislature with an estimate of the costs of the Second Injury Fund that are not recovered by insurers; alluding that these costs will disappear upon the cessation of the Fund. Absent from their analysis are any data, methods and assumptions used to arrive at their "savings". For example, it appears as though their estimates of loss adjustment expense savings may include expenses that will not go away if the Fund is eliminated, but without being given the specifics, we do not know. In addition, opponents cite the Fund's \$1.4 million of expenses as future savings, but they fail to account for the fact that the South Carolina Second Injury Fund pro-

vides services in addition to those specifically related to second injury claims. In actuality, the ultimate effect of the closure of the South Carolina Second Injury Fund will be an increase in Workers' Compensation premiums.

Opponents have previously cited "billions of dollars" in "unfunded liabilities" for the South Carolina Second Injury Fund. An actuarial analysis of the Fund's liabilities and assets has proven that those previous estimates have been substantially overstated by those who wish to eliminate the Fund. In addition, the use of the term "unfunded liabilities" is a misnomer for the future claim payment expectations of the Fund. The liabilities of the Second Injury Fund are the responsibility of insurance providers in South Carolina.

Legislative action in 2003 will substantially reduce future Fund payments and assessments.