COMMENT

Apportionment Between Preexisting Conditions and Work-Related Injuries: Why Wyoming Needs a Second Injury Fund

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I. INTRODUCTION

Disabled workers have more difficulty obtaining and keeping their jobs than nondisabled workers.[1] In the year 2000, for example, eighty percent of worker-aged individuals in Wyoming had current employment, and thirteen percent of those employed reported disabilities.[2] On the other hand, the disabled constituted thirty-one percent of employed individuals.[3] Based on these numbers, about one out of every three unemployed workers in Wyoming is disabled, while just one out of every ten employed workers is disabled.[4]

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* Candidate for J.D., University of Wyoming, 2011. I am most grateful to my wife, Kara Hancock. I could not have written this comment without her encouragement and support. Thanks also to my advisor, Professor Michael Duff, for his patience and insight. Additionally, I would like to recognize the contributions of the *Wyoming Law Review* Editorial Board. Thank you very much for your hard work and guidance!

[1] Harry W. Dahl, *The Iowa Second Injury Fund—Time for Change*, 39 DRAKE L. REV. 101, 102 (1989).

[2] *Quick Tables: QT-P21. Disability Status by Sex: 2000*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US56&-qr_name=DEC_2000_SF3_U_QTP21&-ds_name=DEC_2000_SF3_U&-redoLog=false (last visited Apr. 29, 2011) (compiling the most recent census data for Wyoming). These statistics are not the traditional unemployment numbers as reported by the Wyoming Department of Employment but instead come from the 2000 census statistics for persons aged 21–64 in the State of Wyoming. *Id.*

[3] *Id.*

[4] *Id.*

One barrier disabled workers face when seeking employment in Wyoming is the current interpretation of the Wyoming Worker's Compensation Act (Act).[5] The Wyoming Supreme Court has interpreted the Act as disallowing employers from apportioning benefits between preexisting conditions and work-related injuries.[6] If a previously disabled worker is injured on the job, the court's interpretation results in an employer paying for both the work-related injury and the preexisting injury.[7] Because the funding for workers' compensation is sustained by employers such that premiums for employers increase if workers are injured on the job, this interpretation leads to an inequitable result for employers.[8] As a result, this interpretation disincentivizes Wyoming employers from hiring those with disabilities.[9] An alternative is necessary to encourage the hiring of disabled workers and ensure equity for employers of those with disabilities.[10]

The best alternative to Wyoming's current approach to preexisting conditions under its workers' compensation system is to adopt a second injury fund (SIF), which would alleviate the burden on employers and encourage the hiring of disabled workers. In order to understand the need for a SIF in Wyoming, this comment first examines the current approach to preexisting conditions taken by the Wyoming Supreme Court.[11] Next, a discussion follows regarding apportionment of liability between employer and employee, an alternative approach some states have taken in an effort to be fairer to employers.[12] Third, this comment discusses how a SIF would operate as a middle ground between these two approaches and help disabled workers secure employment, while simultaneously ensuring fairness to employers.[13] This comment also responds to recent criticism of SIFs, particularly that the Americans with Disabilities Act (ADA) has eliminated the need for SIFs.[14] Finally, this comment argues that Wyoming should adopt a SIF following some specific guidelines.[15]

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[5] Wyoming Worker's Compensation Act, WYO. STAT. ANN. §§ 27-14-101 to -806 (2010); *see infra* notes 46–57 and accompanying text (discussing the Wyoming Supreme Court's interpretation of the Act).

[6] State *ex rel.* Wyo. Workers' Safety & Comp. Div. v. Faulkner, 152 P.3d 394, 401 (Wyo. 2007).

[7] *See id.* (holding that because there is no express statute in Wyoming adopting apportionment, Wyoming will follow the full responsibility rule).

[8] WYO. STAT. ANN. § 27-14-201(a); *see infra* notes 46–57, 69, 71 and accompanying text.

[9] *See* Jason R. McClitis, Note, *Missouri's Second Injury Fund—Should It Stay or Should It Go?: An Examination of the Question Facing the Missouri State Legislature*, 74 MO. L. REV. 399, 416 (2009) (stating that the goal of a second injury fund is to encourage employers to hire those with disabilities and without the funds employers are discouraged from doing so).

[10] *See infra* notes 63–69 and accompanying text.

[11] *See infra* notes 46–57 and accompanying text.

[12] *See infra* notes 58–62 and accompanying text.

[13] *See infra* notes 63–114 and accompanying text.

[14] 42 U.S.C. §§ 12101–12213 (2006); *see infra* notes 115–54 and accompanying text.

[15] *See infra* notes 155–85 and accompanying text.

II. BACKGROUND

There are two methods by which workers receive money under workers' compensation in Wyoming.[16] The first method is when a worker receives benefits in the form of money paid by an employer through the workers' compensation fund to cover medical and hospital expenses.[17] These benefits follow a fee schedule set by the Wyoming Department of Employment to be paid by employers to employees for a particular amount of time.[18] This comment focuses on the second method known as employee awards. These awards are not benefits because they do not provide for medical care; instead, they serve to reimburse workers for work-related injuries.[19] Awards also follow a fee schedule set by the Wyoming Department of Employment.[20]

Disabilities are divided into two main categories, temporary and permanent, and further divided each into two subcategories, partial and total.[21] A temporary disability may heal or improve over time.[22] A permanent disability, however, is one that has reached the point of "maximum medical improvement," which means it will not heal further or improve over time.[23] Total disabilities prevent a worker from working at all in a position for which he or she is suited by training or experience.[24] Conversely, a partial disability allows a worker to continue to work, albeit at a lower rate of productivity.[25] Disability awards reimburse workers for lost earning capacity due to a work-related injury.[26] These payments compensate workers for their inability to work to the same degree as before the injury occurred.[27] Awards vary depending on which of the four categories a

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[16] WYO. STAT. ANN. §§ 27-14-401, -403 (2010).

[17] *Id.* § 27-14-401(a).

[18] *Id.*

[19] *See id.* § 27-14-403(a) (listing the injuries for which workers may receive awards under the Wyoming Worker's Compensation Act).

[20] *Id.* §§ 27-14-401, -403.

[21] *See* MODERN WORKERS COMPENSATION § 200:28 (2010) (listing and describing the various disabilities for which a person may receive benefits).

[22] *Id.* § 200:8, :28.

[23] WYO. STAT. ANN. § 27-14-102(a)(xvi), (xviii); MODERN WORKERS COMPENSATION, *supra* note 21, § 200:7.

[24] MODERN WORKERS COMPENSATION, *supra* note 21, § 200:8.

[25] WYO. STAT. ANN. §§ 27-14-102(a)(xv), -405(h) (stating that a worker is eligible for an award for a permanent partial disability if, because of the injury, he or she is unable to make wages of at least ninety-five percent of what he or she made before the injury); MODERN WORKERS COMPENSATION, *supra* note 21, § 200:28.

[26] STEVEN BABITSKY & JAMES J. MANGRAVITI, JR., UNDERSTANDING THE AMA GUIDES IN WORKERS' COMPENSATION § 1.04 (4th ed. 2008); MODERN WORKERS COMPENSATION, *supra* note 21, § 200:1.

[27] MODERN WORKERS COMPENSATION, *supra* note 21, § 200:1.

worker's disability fits within: (1) temporary partial disability; (2) temporary total disability; (3) permanent partial disability; or (4) permanent total disability.[28] A worker's family may also be paid an award if the worker dies.[29]

Wyoming does not award compensation to workers for temporary partial disability.[30] However, compensation is available for workers whose disability falls into one of the other three categories.[31] Temporary total disability occurs when a worker is totally incapacitated and temporarily unable to work at a job that he or she would normally do.[32] Permanent partial disability occurs when a worker can still do some work but not as much as he or she was previously able to do.[33] Permanent total disability occurs when a worker is unable to find suitable employment due to an injury which has reached the point of maximum medical improvement.[34] Families receive awards for death if a worker dies due to work-related causes.[35] Awards for permanent total disability are the highest awards a worker can receive, and the worker receives benefits for at least eighty months, which may be extended indefinitely.[36]

A. Preexisting Conditions

Successive injuries pose a number of problems under workers' compensation because any two disabilities combined usually result in a more severe disability classification than if each disability were classified and the worker received benefits for each individually.[37] In other words, successive injuries have synergetic effects on workers' compensation awards. For example, a lost eye typically results in a partial permanent disability classification and an accompanying award.[38] For a disabled worker who is already missing an eye (i.e., suffers from a preexisting condition), however, the loss of another eye (the second injury) will often result in a total disability classification (the combined injury) and a higher award than

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[28] WYO. STAT. ANN. § 27-14-403(a).

[29] *Id.* § 27-14-403(a)(v).

[30] MODERN WORKERS COMPENSATION, *supra* note 21, § 321:11; *see* WYO. STAT. ANN. § 27-14-403.

[31] WYO. STAT. ANN. § 27-14-403.

[32] *Id.* § 27-14-102(a)(xviii); MODERN WORKERS COMPENSATION, *supra* note 21, § 200:7.

[33] WYO. STAT. ANN. § 27-14-102(a)(xv).

[34] *Id.* § 27-14-102(a)(xvi). In order to qualify for a permanent total disability, a worker must be unable to secure employment "for which he is reasonably suited by experience or training." *Id.*

[35] *Id.* § 27-14-102(c)(iv).

[36] *Id.* § 27-14-403(b).

[37] ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION § 90.01 (2010); *see* David G. McDowell, *2004 Tennessee's Workers' Compensation Second Injury Fund: Purpose and Practice*, 34 U. MEM. L. REV. 389, 392 (2005); Catherine M. Doud, Comment, *Oklahoma's Special Indemnity Fund: A Fund Without a Function?*, 30 TULSA L.J. 745, 746 (1995).

[38] Doud, *supra* note 37, at 746.

for either the preexisting condition or the second injury by itself.[39] The question becomes to what extent the worker's previous condition should be accounted for in awarding benefits under workers' compensation.[40]

States use three approaches to determine who pays for preexisting conditions in the context of workers' compensation.[41] First, many states choose to apply the full responsibility rule, in which employers pay for the entire disability (the combined injury).[42] Second, some states apply an apportionment method, in which employers only pay for the portion of the disability caused by injuries related to the employment (the second injury) and the worker pays the remainder which was caused before employment (the preexisting condition).[43] Third, states may use a second injury or subsequent injury fund, in which injured workers receive all the benefits they would be entitled to for both injuries, but employers are only responsible for compensating the amount they would pay under an apportionment method.[44] The current approach in Wyoming is the full responsibility rule.[45]

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[39] Doud, *supra* note 37, at 746; *see* LARSON & LARSON, *supra* note 37, § 90.01 (stating that if an employee had only one eye, ear, leg, or hand and subsequently lost another, the employer would be liable for a total disability on the remaining eye, ear, leg, or hand).

[40] *See* 82 AM. JUR. 2D *Workers' Compensation* § 304 (2011) (noting the various ways in which states apportion injuries between preexisting conditions and work-related injuries); LARSON & LARSON, *supra* note 37, § 90.01 (listing methods states use to deal with issues with successive injuries).

[41] LARSON & LARSON, *supra* note 37, § 90.01; McDowell, *supra* note 37, at 392–93.

[42] *See* 82 AM. JUR. 2D *Workers' Compensation* § 304 (2011) (noting that if a state does not have a statute providing for apportionment, there is no need for the state to determine the contribution of the preexisting condition and work-related injury to the resulting disability). Eighteen states and the District of Columbia use the full responsibility rule: Alabama, Arkansas, Colorado, Florida, Georgia, Kansas, Kentucky, Maine, Minnesota, Nebraska, New Mexico, New York, Rhode Island, South Carolina, South Dakota, Utah, Vermont, and Wyoming. *See* DOUG MCCOY, WORKERS' COMPENSATION: THE SURVIVAL GUIDE FOR BUSINESS §§ 8.02, .05, .07, .10–.12, .18–.19, .21, .25, .29, .33–.34, .41–.43, .46–.47, .52 (2010) (listing the stances that the above-listed states have taken toward apportionment and SIFs); *see, e.g.*, FLA. STAT. § 440.15(5) (2010) (stating that if the preexisting condition and the work-related injury merge to create a more serious disability than either injury standing alone, the combined injury is compensable). All states listed as using the full responsibility rule, except Wyoming, previously phased out their second injury funds. *See infra* note 72 and accompanying text.

[43] LARSON & LARSON, *supra* note 37, § 90.01; McDowell, *supra* note 37, at 392; *see infra* note 58 (listing states which have used the apportionment method).

[44] LARSON & LARSON, *supra* note 37, § 90.03; McDowell, *supra* note 37, at 392–93; McClitis, *supra* note 9, at 401–03; *see infra* note 72 (listing states which currently use a SIF).

[45] State *ex rel.* Wyo. Workers' Safety & Comp. Div. v. Faulkner, 152 P.3d 394, 399–400 (Wyo. 2007) (adopting the full responsibility rule because Wyoming does not have an express statute adopting apportionment or a SIF).

B. Wyoming's Approach: The Full Responsibility Rule

The legislative intent of the Act is to provide efficient delivery of services and benefits to workers at low cost to employers.[46] One way the Act does this is by only allowing benefits or awards for a worker who suffers an injury.[47] The Act specifically provides that injuries existing before employment began do not fall under the definition of "injury" and awards are not given for preexisting injuries.[48] However, the Wyoming Supreme Court broadened the definition of injury to allow employees to receive benefits if a later work-related injury aggravated, accelerated, or combined with a preexisting condition.[49] The Wyoming Supreme Court's definition does not allow an employee to collect benefits to the extent the combined injury naturally progresses from the preexisting condition and not a work-related injury.[50] Instead, there must be a sufficient nexus between the work-related injury and the preexisting condition for the employer to pay for benefits for a preexisting condition under Wyoming's full responsibility rule.[51]

The Wyoming Supreme Court adopted the full responsibility rule because compensation should not depend on whether an individual is healthy at the time of injury.[52] A person who began employment injured should be able to receive

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[46] WYO. STAT. ANN. § 27-14-101(b) (2010). The Wyoming Legislature stated its purpose in creating the Act:

> It is the intent of the legislature in creating the Wyoming worker's compensation division that the laws administered by it to provide a worker's benefit system be interpreted to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers who are subject to the Worker's Compensation Act.

Id.

[47] *Id.* §§ 27-14-401, -403.

[48] *Id.* § 27-14-402(a)(xi)(F).

[49] *See* Lindbloom v. Teton Intl., 684 P.2d 1388, 1390 (Wyo. 1984). In *Lindbloom*, the worker had kneecaps that easily dislocated. *Id.* at 1388. He later injured his knees in a work-related incident. *Id.* The court adopted the formulation that a preexisting condition can qualify as "arising out of employment" so long as it "aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought." *Id.* at 1390 (quoting ARTHUR LARSON, 2 LARSON'S WORKMEN'S COMPENSATION § 12.20 (1984)). Although the court adopted this formulation, it held that the worker's preexisting condition did *not* aggravate the injury to the extent that it was compensable under workers' compensation. *Id.* The court changed the wording of the formulation slightly in a later case allowing an employee to recover from workers' compensation if "his employment substantially or materially aggravates that condition." *In re* Boyce, 105 P.3d 451, 455 (Wyo. 2005).

[50] *Lindbloom*, 684 P.2d at 1390 (citing LARSON, *supra* note 49, §12.20).

[51] *See* State *ex rel.* Wyo. Workers' Safety & Comp. Div. v. Faulkner, 152 P.3d 394, 397 (Wyo. 2007) ("[A] preexisting injury may present a compensable claim 'if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the . . . disability for which compensation is sought.'" (quoting *Lindbloom*, 684 P.2d at 1390)).

[52] *See Lindbloom*, 684 P.2d at 1389 ("Compensation is not made to rest under our law upon the condition of health of the employee or upon his freedom from liability to injury . . . ." (quoting

benefits as well as a person who began employment without injury.[53] The court has stated the policy behind the full responsibility rule is that the employer takes the worker as the employer finds him and stressed the importance of ensuring that workers are paid their needed benefits.[54]

The Wyoming Supreme Court also adopted the full responsibility rule because there is a "general rule disallowing apportionment."[55] The court held that full responsibility is the rule as there is no statute in Wyoming specifying a method for apportionment.[56] As a result, if one can show that a work-related injury aggravates, accelerates, or combines with a preexisting condition in a material or substantial manner, then all resulting incapacity for work is compensable injury.[57]

C. Apportioning Part of the Liability to the Employee

Unlike Wyoming, some states apportion loss between the employee and the employer if a worker's preexisting condition is exacerbated by a later work-related injury.[58] In these states, the workers' compensation fund only pays for the portion of the injury caused by the work-related incident.[59] In a state that uses apportionment, if a worker who had lost an eye loses the second eye in a work-related accident, the employer only compensates the worker for health

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In re Scrogham, 73 P.2d 300, 307 (Wyo. 1937))); Exploration Drilling Co. v. Guthrie, 370 P.2d 362, 364 (Wyo. 1962) (stating that compensation does not depend on whether the employee is healthy at the time of injury).

[53] *See Guthrie*, 370 P.2d at 364 (stating that the Wyoming Worker's Compensation Act does not distinguish between healthy and unhealthy employees).

[54] *Lindbloom*, 864 P.2d at 1388.

[55] *Faulkner*, 152 P.3d at 400. In *Faulkner*, the Wyoming Supreme Court cited multiple jurisdictions holding that full responsibility is the rule in the absence of a statute to the contrary. *Id.* (citing Poehlman v. Leydig, 400 P.2d 724, 749 (Kan. 1965); Wallace v. Hanson Silo Co., 235 N.W.2d. 363, 363 (Minn. 1975); Field v. Johns-Manville Sales Corp., 507 A.2d 1209, 1209 (N.J. Super. Ct. App. Div. 1986)); *see also* 82 AM. JUR. 2D *Workers' Compensation* § 304 (2011) ("In the absence of a provision for apportionment of the compensation between an injury and preexisting disease, there is no requirement to determine the relative contribution of the accident and the prior disease to the final result.").

[56] *Faulkner*, 152 P.3d at 399–401.

[57] *See* Straube v. State *ex. rel.* Workers' Safety & Comp. Div., 208 P.3d 41, 47–48 (Wyo. 2009).

[58] LARSON & LARSON, *supra* note 37, § 90.03. Twenty-one states have apportioned loss to the employee: Arkansas, California, Florida, Hawaii, Idaho, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Texas, Virginia, Washington, and West Virginia. *Id.* California, Hawaii, Idaho, Maryland, Michigan, Mississippi, North Carolina, North Dakota, Pennsylvania, Virginia, Washington, and West Virginia (twelve states total) have second injury funds. *Compare* LARSON & LARSON, *supra* note 37, § 90.03 n.1, *with* MCCOY, *supra* note 42, §§ 8.06, .13–.14, .22, .24, .26, .35–.36, .40, .48–.50.

[59] LARSON & LARSON, *supra* note 37, § 90.03; 82 AM. JUR. 2D *Workers' Compensation* § 304 (2011); *see, e.g.*, CAL. LAB. CODE § 4664(a) (West 2011) (stating that an employer is only liable for the percentage of permanent injury arising out of and occurring in the course of employment).

benefits for the one eye lost in the accident.[60] The worker is responsible for any needed health care resulting from the loss of the first eye, even if such needs would not have occurred but for the injury to the second eye.[61] Because of the severity of apportionment to employees, most states have tempered it by constricting its scope or by adopting second injury funds.[62]

D. Second Injury Funds

State legislatures establish SIFs to provide a middle ground between the apportionment rule and the full responsibility rule.[63] As in states that apportion injury, states that use SIFs also apportion liability for work-related injuries but between the employer and the fund.[64] The employee does not pay the portion assigned to the preexisting injury; instead a specially created fund pays for the percentage of injury due to a preexisting condition, and the employer pays for the percentage due to the work-related injury.[65]

One purpose of SIFs is to encourage employers to hire and retain disabled workers by absolving the employer of liability for injuries that occurred before the worker was hired.[66] In the past, the full responsibility rule resulted in employers discharging disabled employees to avoid responsibility for possible future injuries.[67] SIFs provide an alternative that may prevent employers from taking

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[60] LARSON & LARSON, *supra* note 37, § 90.03*; see supra* notes 37–40 and accompanying text.

[61] LARSON & LARSON, *supra* note 37, § 90.03; Doud, *supra* note 37, at 746; *see, e.g.*, KY. REV. STAT. ANN. § 342.730 (West 2010); Edwards v. Louisville Ladder, 957 S.W.2d 290, 293–94 (Ky. Ct. App. 1997) (holding that eighty percent of an employee's injury to his back was due to a preexisting condition and the employer was only responsible for the twenty percent of the work-related disability).

[62] LARSON & LARSON, *supra* note 37, § 90.03; *see, e.g.*, City & Cnty. of Denver v. Indus. Comm'n, 690 P.2d 199, 202 (Colo. 1984) (explaining that the subsequent injury fund is meant to avoid the harshness of the full responsibility rule or apportionment); *see infra* note 72 (listing states that have second injury funds in place).

[63] Zachary D. Schurin, Note, *Monkey-Business: Connecticut's Six Billion Dollar Gorilla and the Insufficiency of the Emergence of the ADA as Justification for Elimination of Second Injury Funds*, 7 CONN. PUB. INT. L.J. 135, 137 (2007).

[64] LARSON & LARSON, *supra* note 37, § 91.01[1].

[65] *Id.*; GARY PHELAN & JANET BOND ARTERTON, 1 DISABILITY DISCRIMINATION IN THE WORKPLACE § 16.8 (2010); *see* LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 133.20 (3rd ed. 2010); McDowell, *supra* note 37, at 405–06; Doud, *supra* note 37, at 746. SIFs usually accomplish this by paying the difference between the amount paid by the employer for the second injury and the amount paid for the initial injury alone. Dahl, s*upra* note 1, at 108–09.

[66] Cece v. Felix Indus., 728 A.2d 505, 508 (Conn. 1999); Doud, *supra* note 37, at 756; Schurin, *supra* note 63, at 137.

[67] LARSON & LARSON, *supra* note 37, § 91.01[1]; Schurin, *supra* note 63, at 139 (discussing an Oklahoma Supreme Court case in which the court held an employer fully responsible for a disability after a worker lost his second eye in a workplace accident and the resulting 7000 to 8000 one-eyed, one-armed, or one-handed workers who were laid off by employers around the state).

actions potentially harmful to employees suffering from preexisting conditions.[68] SIFs also avoid the inequities that occur when an employer is required to pay—through increased workers' compensation premiums—for an injury for which the employer was not responsible.[69]

SIFs began to gain popularity in 1945 and originally were created to incentivize the hiring of disabled veterans who had returned from World War II.[70] All states had a SIF in 1991 except Wyoming, which has never adopted a fund.[71] However, even though SIFs were incredibly popular, their use has declined in recent years.[72] The states which have eliminated their SIFs have done so for many different reasons: employers were not aware of the fund, so its purpose was not met; the state legislature believed large SIF assessments would discourage business in the state; the state legislature believed the SIF departed from the principle that costs should be internalized by employers; or the state legislature was concerned

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[68] RUSS & SEGALLA, *supra* note 65, § 133.20; Doud, *supra* note 37, at 746; Schurin, *supra* note 63, at 139.

[69] *See* JEFFREY V. NACKLEY, PRIMER ON WORKERS' COMPENSATION 96 (1989); Schurin, *supra* note 63, at 142 (noting that SIFs are meant to ensure that employers pay only for the share of the combined injury for which they are financially responsible).

[70] WORKERS' COMP. GUIDE § 1:42 (2010); Dahl, *supra* note 1, at 104; *Employers Must Take Measures Not to Discriminate Against Thousands of Returning, Injured Veterans*, FAM. & MED. LEAVE HANDBOOK NEWSL., Sept. 2006; David Tobenkin, *Don't Overlook Second-Injury Funds: Special State Funds for Workers with Pre-Existing Conditions Can Help Defray Long-term Costs for Workers' Compensation*, HR MAGAZINE, July 2009, *available at* http://findarticles.com/p/articles/mi_m3495/is_7_54/ai_n32406827/.

[71] Doud, *supra* note 37, at 745; Schurin, *supra* note 63, at 139–40. The Wyoming Supreme Court in *State ex rel. Wyoming Workers' Safety & Compensation Division v. Faulkner*, 152 P.3d 394, 398–99 (Wyo. 2007), mentioned that a second injury fund is an alternative to the full responsibility rule taken by many states to combat inequities created by the full responsibility rule. However, the *Faulkner* court stated that the alternative was not available at the time of the case because there was no legislation creating such a fund. *Faulkner*, 152 P.3d at 399–400.

[72] LARSON & LARSON, *supra* note 37, § 91.03[8]; *see* McClitis, *supra* note 9, at 411. Eighteen states and the District of Columbia have sunsetted their fund to new claims or have legislation phasing them out: Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Kansas, Kentucky, Maine, Minnesota, Nebraska, New Mexico, New York, Rhode Island, South Carolina, South Dakota, Utah, and Vermont. MCCOY, *supra* note 42, §§ 8.02, .05, .07, .10–.12, .18–.19, .21, .25, .29, .33–.34, .41–43, .46–.47; Barry Llewellyn, *Dramatic Decline—Second Injury Funds in the United States*, *in* 2008 NCCI WORKERS COMPENSATION ISSUE REP. 32, 32–33, *available at* http://www.ncci.com/documents/Issues-Rpt-2008-Injury-Funds.pdf; David Tobenkin, *supra* note 70. Thirty-one states retain their second injury funds: Alaska, Arizona, California, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Hampshire, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma (repealed and then reinstated in 2005), Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin. MCCOY, *supra* note 42, §§ 8.03–.04, .08–.09, .13–.17, .20, .22–.24, .26–.28, .30–.32, .35–.40, .44–.45, .48–.51; *see, e.g.*, OKLA. STAT. tit. 85, § 173 (2010).

with the poor financial conditions of the fund.[73] Every state that has repealed their SIF now uses the full responsibility rule in its place.[74]

One of the most prevalent reasons states have terminated their SIFs is because the state legislature believes that SIFs are no longer necessary as the ADA protects disabled workers from discrimination.[75] Both the ADA and SIFs have a common goal: the elimination of discrimination against disabled workers.[76] The methods used by the ADA and SIFs differ, however.[77] Under the ADA, employers may not make employment decisions if the decision is based on speculation that the prospective employee may increase workers' compensation costs for the employer in the future.[78] The ADA also provides a cause of action for workers who feel they have been discriminated against.[79] Both of these methods make the ADA a reactive approach for addressing discrimination.[80] Conversely, the method used by SIFs is to proactively induce employers to hire disabled workers by shielding employers from liability.[81] Critics of SIFs rationalize that the reactive method is enough and, because it is illegal to discriminate against disabled workers, there is no longer a need to have an incentive for employers to hire workers with disabilities.[82]

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[73] *See* LARSON & LARSON, *supra* note 37, § 91.03[8] (noting that many employers are not aware of SIFs and some states view themselves at a disadvantage when compared with other states because of the large SIF assessments to which employers within the state are subjected); Llewellyn, *supra* note 72, at 33 (stating that SIFs are criticized because they do not allocate costs to employers in proportion to the cost of injuries to their own employees); Doud, *supra* note 37, at 759–60 (noting the financial difficulties the Oklahoma SIF faces); Christopher J. Boggs, *The Decline of Second Injury Funds*, MYNEWMARKETS.COM (July 28, 2008), http://www.mynewmarkets.com/articles/92235/the-decline-of-second-injury-funds (noting the financial difficulties many SIFs face).

[74] *See supra* note 42 (listing states that currently follow the full responsibility rule and formerly used SIFs).

[75] *See* Doud, *supra* note 37, at 765–66; McClitis, *supra* note 9, at 413–16; *Second-Injury Funds Under Attack After ADA's Enactment*, 2 LEAVE & DISABILITY COORDINATION HANDBOOK NEWSL. 9 (1999), *available at* 2 No. 4 LDCHBK-NWL 9 (Westlaw); Boggs, *supra* note 73.

[76] *See* 42 U.S.C. § 12101(b)(1) (2006) (stating that it is the purpose of the ADA to eliminate the discrimination of those who are disabled); McClitis, *supra* note 9, at 413–14 (noting that the ADA and SIFs both seek to prevent discrimination against the disabled). The purpose of the ADA is further reaching than merely elimination of discrimination against disabled workers as it is meant to eliminate discrimination against all those with disabilities. *See generally* 42 U.S.C. § 12101(b).

[77] McClitis, *supra* note 9, at 413–16.

[78] Doud, *supra* note 37, at 764.

[79] 42 U.S.C. § 12101(a)(3); McClitis, *supra* note 9, at 415–16.

[80] *See* McClitis, *supra* note 9, at 415 (stating that the ADA is meant to "deter employers from discriminating" by making them liable for damages).

[81] *Id.* at 416.

[82] *See* Doud, *supra* note 37, at 766–67 ("The ADA no longer makes it necessary to bribe employers into hiring and keeping handicapped workers.").

Employer knowledge or notice of the preexisting condition is one area where SIFs and the ADA especially clash.[83] Some SIFs require employers to have notice or knowledge of the preexisting injury in order for the worker to be compensated by the SIF, yet the ADA prevents employers from asking prospective workers questions regarding their disabilities before making a job offer.[84]

E. How Second Injury Funds Function

Funding for SIFs comes from various sources.[85] The most common funding method is for states to charge an assessment against insurance carriers, employers, and/or self-insured funds.[86] Some states also require insurance carriers and self-insured employers to fund the SIF pro-rata, based on payments of workers' compensation from the previous year.[87] The pro-rata method has the benefit of distributing the costs of the program equitably among all employers around the state.[88] Another common funding method is to charge insurance carriers part of the amount of money they would retain if a person died without dependents or beneficiaries otherwise entitled to the money.[89] There are, however, some controversies involved with this method, including confusion regarding what it means to be without dependents and whether the SIF receives any money if a dependent is entitled to a partial but not full payment from the insurance company.[90] In Oklahoma, the SIF is funded partially by a five percent tax

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[83] Schurin, *supra* note 63, at 146–47.

[84] 42 U.S.C. § 12112(d)(2)(A); William D. Sheldon & N. Douglas Grimwood, *Nobody Wins: Conflicts Between the Apportionment Provisions of the Arizona Workers' Compensation Act and the Americans with Disabilities Act*, ARIZ. ATT'Y, Apr. 2000, at 36; Schurin, *supra* note 63, at 145.

[85] *See* LARSON & LARSON, *supra* note 37, § 91.01[2].

[86] *Id.*; McClitis, *supra* note 9, at 416; Christopher J. Boggs, *One-Eyed, One-Legged, and One-Armed Men Need Not Apply—The Rise of Second Injury Funds*, MYNEWMARKETS.COM (July 28, 2008), http://www.mynewmarkets.com/articles/92195/one-eyed-one-legged-and-one-armed-men-need-not-apply-the-rise-of-second-injury-funds. In Arizona, the SIF is funded by a one-and-a-half percent assessment of all workers' compensation premiums paid in the state. Sheldon & Grimwood, *supra* note 84, at 35.

[87] LARSON & LARSON, *supra* note 37, § 91.01[2]; Boggs, *supra* note 73. This method was presented by the Council of State Governments in the second injury portion of the Workmen's Compensation and Rehabilitation Law ("Model Second Injury Fund Act"). WORKMEN'S COMP. & REHAB. LAW § 20 (Council of State Gov'ts 1974); LARSON & LARSON, *supra* note 37, § 91.01[2]. The Model Second Injury Fund Act was drafted by the Council of State Governments in 1974 based on recommendations made in 1972 by the National Commission on State Workmen's Compensation Law. Dahl, *supra* note 1, at 106.

[88] LARSON & LARSON, *supra* note 37, § 91.01[2].

[89] *Id.*; KAREN A. LERNER & NANCY SAINT-PAUL, 37 TEX. PRAC., WORKERS' COMP. LAW & PRAC. § 302 (2011).

[90] LARSON & LARSON, *supra* note 37, § 91.01[2]. In a Texas case, the identity of the person was unknown at his death, and the court held the money which would normally be paid to any dependents (who were also unknown) was not to be paid to the SIF because although there was no

levied upon employee and employer (or insurance carrier) judgments against each other.[91] This method has been criticized because although the benefit the employers receive from SIFs is clear—they are indemnified against liability for future injuries—the benefits to the employee are less clear.[92] Before the states eliminated their SIFs, Arkansas and Colorado funded their SIFs from fines and penalties paid by employers for violating duties the employers have regarding workers' compensation.[93] Despite the many funding options available, many state SIFs still face financial deficits.[94]

States also vary in the methods they use to distribute the funds.[95] Some states require that the SIF pay the worker directly.[96] This can lead to delays, such as in Oklahoma where workers frequently have waited as long as one and a half years before receiving compensation.[97] Some states require the employer to pay up front because it typically has more assets than the worker, and the fund later reimburses the employer.[98] Some states also require the employer to pay up to a certain amount, or for a particular length of time, toward the benefits for the

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proof that the decedent was survived by anyone, there was also no proof that he was not. Indus. Accident Bd. v. Texas Emp'rs Ins. Ass'n, 336 S.W.2d 216, 218–19 (Tex. Ct. App. 1960); LARSON & LARSON, *supra* note 37, § 91.01[2].

[91] OKLA. STAT. tit. 85, § 173 (2010); Doud, *supra* note 37, at 757.

[92] *See* Doud, *supra* note 37, at 758 (noting that a worker who contributes to the SIF funded with this method may never have another injury which would be paid for out of the SIF and therefore does not receive a benefit from funding the SIF).

[93] *Id.* at 761. Arkansas funds its SIF in part with fines received from employers found to discriminate against disabled workers, or impede the filing of workers' compensation claims. ARK. CODE ANN. § 11-0-107(a)(1)(2) (2010); Doud, *supra* note 37, at 761. Colorado previously funded its SIF with fines collected from employers for violations of Colorado's workers' compensation provisions; the funds now go into the general fund and the workers' compensation fund. *Compare* COLO. REV. STAT. § 8-43-304(1) (1994) (providing that payments for violations of the Colorado labor laws are to be deposited in the Colorado subsequent injury fund), *with* COLO. REV. STAT. § 8-43-304(1) (2010) (providing that payments for violations of the Colorado labor laws are to be apportioned between the Colorado workers' compensation fund and the aggrieved party). These fines must come from the employer and cannot be paid by the insurance carrier in the employer's place. COLO. REV. STAT. § 8-43-304(1) (2010).

[94] Doud, *supra* note 37, at 762. Deficits in the Oklahoma SIF are blamed on tort reform, liberalization of injuries that fall under the SIF, and additional responsibilities that the SIF takes upon itself. *Id.* at 757.

[95] LARSON & LARSON, *supra* note 37, § 91.01[6].

[96] Dahl, *supra* note 1, at 108; Doud, *supra* note 37, at 760; *see, e.g.*, N.Y. WORKERS' COMP. LAW § 15(7) (McKinney 2010) (stating that disbursements from the New York SIF shall be made by the commissioner of taxation and finance).

[97] Doud, *supra* note 37, at 760.

[98] Dahl, *supra* note 1, at 108; Doud, *supra* note 37, at 761; *see, e.g.*, FLA. STAT. § 440.49 (2010) (stating that for injuries that occurred when the Florida SIF was in effect, the employer will pay benefits and then be reimbursed by the SIF).

work-related injury before the SIF compensates for the preexisting condition.[99] The Model Second Injury Fund Act only holds the employer liable for the first 104 weeks of disability awarded according to the fee schedule, after which the SIF pays the remainder.[100] Kansas used a mix of these approaches, requiring the SIF to pay the employee directly; however, if no money was available in the SIF, the employee could receive the amount from the employer, who would be reimbursed when the SIF became properly funded.[101]

States employ various approaches to determine which injuries are compensable by SIFs. One common problem with SIF funding is that if the number of disabilities eligible for reimbursement is too high, the SIF will deplete too quickly.[102] As a result, some states narrow their approaches to only allow recovery from the SIF for certain injuries.[103] For example, California requires that the preexisting condition be a permanent partial disability that accounts for thirty-five percent of the preexisting and work-related injuries combined.[104] Although Colorado's SIF does not apply to injuries after 1993, its statute only allows the SIF to pay for preexisting work-related injuries, rather than personal injuries.[105] For many jurisdictions allowing recovery for personal injuries, the SIF will only pay the worker if the preexisting injury is one that would be compensable under workers' compensation were it to occur at work.[106] Indiana only allows for payment from the SIF if the subsequent injury relates to the loss of a hand, arm, foot, leg, or eye resulting in a permanent total disability.[107] As in many other states, the SIFs in Oklahoma, Mississippi, and Indiana will only pay benefits if the combined injury

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[99] Dahl, *supra* note 1, at 108; Doud, *supra* note 37, at 760; *see, e.g.*, IOWA CODE § 85.64 (2010) (stating that the employer will pay for a period of time based upon the scheduled amount for the injury and then the SIF will pay the remainder benefits to the employee).

[100] WORKMEN'S COMP. & REHAB. LAW, *supra* note 87, § 20; Dahl, *supra* note 1, at 118.

[101] KAN. STAT. ANN. § 44-569 (1993); Doud, *supra* note 37, at 761.

[102] Doud, *supra* note 37, at 750–51.

[103] LARSON & LARSON, *supra* note 37, § 91.02; Dahl, *supra* note 1, at 104–08; Doud, *supra* note 37, at 750–51.

[104] CAL. LAB. CODE § 4751 (West 2010); MCCOY, *supra* note 42, § 8.06. Arizona's statute requires that a worker's preexisting injury has risen to a ten percent impairment under the AMA Guidelines and has created an impediment to the employment before the second injury occurs. ARIZ. REV. STAT. ANN. § 23-1065(C) (2011); Sheldon & Grimwood, *supra* note 84, at 35.

[105] COLO. REV. STAT. §§ 8-46-101(1)(a), -104 (2010) (providing that the Colorado SIF will only pay for injuries occurring after July 1, 1993, in which the preexisting condition was a work-related injury); MCCOY, *supra* note 42, § 8.07.

[106] LARSON & LARSON, *supra* note 37, § 91.02 n.7.

[107] IND. CODE § 22-3-3-13 (2010); *see* MCCOY, *supra* note 42, § 8.16. Iowa has a similar provision in its SIF and only allows the SIF to pay if an injury occurs to specified members and to the eyes. *See* IOWA CODE § 85.64(2) (2010); Dahl, *supra* note 1, at 109.

is a permanent total disability.[108] Some states only allow recovery from the fund for injuries that have caused symptoms and been treated in some way.[109] Most states require that the second injury combine with the preexisting condition in some way, similar to the Wyoming requirement that the work-related injury must aggravate, accelerate, or combine with a preexisting condition in a material or substantial manner.[110]

Depending on the jurisdiction, many states with SIFs require employers to have actual knowledge or notice of a preexisting condition. Depending on the jurisdiction, this knowledge or notice must be acquired either before the employee is hired or before the work-related injury occurs.[111] The rationale behind this requirement is that if the fund is to encourage employers to hire employees with disabilities, the employer must first be aware of the disability to have an incentive

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[108] *See* RUSS & SEGALLA, *supra* note 65, § 133:20 (noting second injury fund provisions often require that the disability resulting from successive injuries be total and permanent or be in excess of a specified percentage of disablement to render the fund liable for benefits); *see, e.g.*, IND. CODE § 22-3-3-13; MISS. CODE ANN. § 71-3-73 (2010); OKLA. STAT. tit. 85, § 172 (2010).

[109] *See* 82 AM. JUR. 2D *Workers' Compensation* § 304 (2011) (providing that some state statutes do not allow apportionment for preexisting conditions that were asymptomatic before the work-related injury); MODERN WORKERS COMPENSATION, *supra* note 21, § 200:25 (noting that there is a distinction between a "preexisting injury and a preexisting susceptibility to injury which has not yet produced an injury"); *see, e.g.*, Askew v. Indus. Claim Appeals Office of the State of Colo., 927 P.2d 1333, 1337 (Colo. 1996) (holding that because a worker's back condition had not shown any symptoms prior to the work-related injury, it was not a disability within the definition of the Colorado statute and was not apportionable).

[110] LARSON & LARSON, *supra* note 37, § 91.02; Doud, *supra* note 37, at 754; *see supra* note 51 and accompanying text (providing the Wyoming standard for a person to collect benefits for a preexisting condition).

[111] 82 AM. JUR. 2D *Workers' Compensation* § 304 (2011); JOHN ALAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4595 (1979); LARSON & LARSON, *supra* note 37, § 91.03; PHELAN & ARTERTON, *supra* note 65, § 16.8; Doud, *supra* note 37, at 748; Schurin, *supra* note 63, at 142. Nine states are included among those states with knowledge or notice requirements: Alaska, Arizona, Florida, Georgia, Idaho, Louisiana, Minnesota, New Mexico, and New York. APPLEMAN, *supra*, § 4595 (listing case law from states that have knowledge or notice requirements); *see, e.g.*, Sea-Land Servs. v. Second Injury Fund, 737 P.2d 793, 795 (Alaska 1987) (noting that Alaska law requires an employer to establish knowledge of the injury in a written record filed with the state); Special Disability Trust Fund, Fla. v. Space Coast Plastering, 695 So. 2d 1304, 1306 (Fla. Dist. Ct. App. 1997) (stating that Florida law requires actual knowledge of a preexisting condition but allows a conclusive presumption of knowledge of mental disability if the employee's preexisting intelligence quotient is within the lowest two percent of the population); Am. Motorists Ins. v. Injury Bd., 544 So. 2d 595, 599 (La. Ct. App. 1989) (concluding that although Louisiana law requires knowledge of the preexisting condition, that knowledge can be gained after employment so long as the requisite knowledge exists before the work-related injury occurs); Kennecott Copper Corp. v. Chavez, 805 P.2d 633, 637 (N.M. 1990) (stating that a court in New Mexico can infer knowledge of a preexisting condition if the injury is of such a serious nature that the inference is warranted). Arkansas, California, Connecticut, Hawaii, Kansas, Maryland, and Tennessee do not have knowledge requirements. *See* APPLEMAN, *supra*, § 4595; LARSON & LARSON, *supra* note 37, § 91.03[5]; Doud, *supra* note 37, at 748–50.

to hire or retain the person after gaining knowledge or notice of the condition.[112] For states with knowledge requirements, knowledge of the injury does not need to be detailed: knowing that the worker has injuries without knowing exactly the nature of those injuries has been held to be sufficient.[113] However, some states have more stringent requirements and mandate that a filing be made with the state before the second injury occurs.[114]

III. ANALYSIS

Wyoming's current approach to the full responsibility rule leaves employers paying for injuries unrelated to their workers' employment.[115] If a worker experiences a permanent total disability, he or she is eligible to receive a monthly payment for up to eighty months, which the Wyoming Workers' Safety and Compensation Division may extend.[116] In addition, each child of a worker with a permanent total disability is eligible to receive $250 per month.[117] After eighty months, the amount an employer would have paid to a disabled worker with no children who makes the average statewide monthly wage would total $183,280.[118] These high workers' compensation premiums discourage employers from hiring or retaining individuals who might become further disabled on the job.[119] To better accord with equitable principles and to minimize the possibility of discrimination, an employer should only be responsible for the portion of the injury sustained in the course of employment.[120]

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[112] McDowell, *supra* note 37, at 398; Doud, *supra* note 37, at 748–49.

[113] LARSON & LARSON, *supra* note 37, § 91.03[3].

[114] APPLEMAN, *supra* note 111, § 4595; Doud, *supra* note 37, at 749; *see, e.g.*, ALASKA STAT. § 23.30.205(c) (2010).

[115] *See supra* notes 37–57 and accompanying text.

[116] WYO. STAT. ANN. § 27-14-403(c) (2010). The amount of the monthly payment depends on the worker's wages and the average statewide monthly wage, as adjusted quarterly by the Wyoming Workers' Safety and Compensation Division. *Id.* A permanent total disability occurs when a person cannot find suitable employment because of an injury for which there is no ascertainable end. *See supra* note 35 and accompanying text.

[117] WYO. STAT. ANN. § 27-14-403(b). This amount must be adjusted for inflation. *Id.*

[118] *See id.* § 27-14-403(c)(iii) (stating that an employee whose wage is equal to or greater than the statewide monthly wage is eligible to receive two-thirds of his monthly wage as benefits for the permanent total disability); WYO. DIV. OF WORKERS' SAFETY & COMP., STATEWIDE AVERAGE MONTHLY WAGE (2011) (providing that the average statewide monthly wage for the second quarter of 2011 is $3463.33).

[119] *See* McClitis, *supra* note 9, at 401 (stating that before the Missouri SIF was adopted employers were hesitant to hire those with disabilities); Schurin, *supra* note 63, at 137–39 (noting the many thousands of workers laid off in Oklahoma after the Oklahoma Supreme Court held an employer responsible for the full injury of an employee who lost his second eye in a workplace accident).

[120] *See supra* notes 37–40, 69 and accompanying text.

Both the full responsibility rule and the apportionment rule produce dissatisfying results.[121] The full responsibility rule is unfair because it requires employers to pay for the combined injury when they are only responsible for the portion of the injury that occurred during employment.[122] Apportionment is harsh because the worker only receives the amount allocated to the work-related condition alone.[123] The worker receives less money than if the disability had resulted from one work-related injury.[124] Therefore, if a state apportions, employees receive less than the amount needed to compensate for their injury.[125] If a state does not apportion and chooses the full responsibility rule, employers are discouraged from hiring workers with disabilities because they are liable for the combined injury.[126]

The solution for minimizing such harsh results is to use a SIF, which functions as a compromise between the two approaches.[127] It allows an employer to avoid the inequities in the full responsibility rule and apportionment.[128] Despite these positive consequences, criticisms have been levied against SIFs.[129]

A. Common Criticisms of Second Injury Funds

There are three primary criticisms of SIFs. Broadly stated, the first criticism is that SIFs do not encourage employers to employ disabled workers.[130] There are no studies regarding the efficacy of SIFs and so this criticism is not easily addressed. Inherent in the criticism is the belief that SIFs only operate to remove the disincentive to hire disabled workers, rather than truly encourage employers

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[121] *See* LARSON & LARSON, *supra* note 37, § 91.01[1] (noting that both the full responsibility rule and apportionment are "evils" from the standpoint of a disabled worker); McDowell, *supra* note 37, at 391–92 (explaining that both employers and employees suffer a detriment when there is a successive injury if a state uses either an apportionment system or the full responsibility rule).

[122] *See* State *ex rel.* Wyo. Workers' Safety & Comp. Div. v. Faulkner, 152 P.3d 394, 398–99 (Wyo. 2007) (noting that states adopt SIFs or apportionment to eliminate inequities in the application of the full responsibility rule).

[123] *See* LARSON & LARSON, *supra* note 37, § 91.01[1].

[124] Schurin, *supra* note 63, at 139.

[125] *See* LARSON & LARSON, *supra* note 37, § 91.01[1] ("Under apportionment, [workers] received far less than their actual condition required to prevent destitution . . . ."); McDowell, *supra* note 37, at 392 (noting that apportionment leaves workers without the requisite funds to live).

[126] McDowell, *supra* note 37, at 392; Schurin, *supra* note 63, at 139.

[127] Schurin, *supra* note 63, at 138–39; *see* LARSON & LARSON, *supra* note 37, § 91.01[1] (noting that both apportionment and the full responsibility rule operate unsatisfactorily and that SIFs offer a solution by holding the employer liable for only the amount of injury that occurred during employment).

[128] LARSON & LARSON, *supra* note 37, § 90.01; Dahl, *supra* note 1, at 103–04.

[129] Doud, *supra* note 37, at 766–67; Schurin, *supra* note 63, at 135–36.

[130] Dahl, *supra* note 1, at 120; Doud, *supra* note 37, at 746–47.

to hire disabled workers.[131] Another part of this criticism is the belief that SIFs are under-inclusive in their listed compensable injuries and therefore assist so few workers that the SIF does not perform its intended function.[132] The second criticism posits that SIFs are over-inclusive and compensate workers for such a large list of disabilities that the SIF depletes too quickly.[133] The final major criticism of SIFs, which many states have used as an excuse to eliminate the funds, is that the passage of the ADA has made the need for SIFs obsolete.[134]

B. *In Defense of Second Injury Funds*

Despite the criticism leveled against them, SIFs are currently used in the majority of states.[135] Such states have likely realized that most of the criticisms against SIFs can be remedied with careful planning and legislation.[136] In response to the claim that SIFs do not encourage employers to hire disabled workers, one solution is to adjust the SIF to be more inclusive in its compensable injuries.[137] If a SIF pays for more injuries, a greater number of workers will qualify for benefits, resulting in more employers making use of the fund.[138] As employers see the benefits SIFs can offer, they may be more likely to hire those with disabilities.

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[131] *See* DAVID G. EVANS, 1 FEDERAL AND STATE GUIDE TO EMPLOYEE MEDICAL LEAVE, BENEFITS AND DISABILITIES LAWS § 7:18 (2010) ("Most states have established second-injury funds to remove the financial disincentives to hire employees with disabilities."); RUSS & SEGALLA, *supra* note 65, § 133:20 (stating that second injury funds are meant to relieve employers from liability for the preexisting condition of the disabled workers); McClitis, *supra* note 9, at 416 (stating that the purpose of the Missouri SIF is to provide incentive for employers to hire disabled workers by eliminating the financial disadvantage of doing so).

[132] *See* LARSON & LARSON, *supra* note 37, § 91.01[2] (stating that some jurisdictions with high-access thresholds for their SIFs question whether the purpose of the SIF is being met when so few workers can recover); Dahl, *supra* note 1, at 120 (stating that the Iowa SIF only applies to the loss of a hand, foot, eye, or leg and is therefore too narrow to help most disabled workers or their employers); Doud, *supra* note 37, at 752, 758 (stating that Oklahoma's SIF definition of preexisting injuries is too narrow to meet the purpose of the fund). The National Commission on State Workmen's Compensation Laws recommends that SIFs be given "broad coverage of pre-existing impairments" so that the purpose of the funds can be met. Nat'l Comm'n on State Workmen's Comp. Laws, *Major Conclusions and Recommendations*, 1 WORKMEN'S COMP. L. REV. 657, 663–64 (1974). However, the Commission also noted that coverage broad enough to cover almost any disability would defeat the fund's purpose. *Id.* at 663.

[133] LARSON & LARSON, *supra* note 37, § 91.01; Nat'l Comm'n on State Workmen's Comp. Law, *supra* note 132, at 663; Doud, *supra* note 37, at 750–51, 766.

[134] LARSON & LARSON, *supra* note 37, § 91.03[8]; *Second-Injury Funds Under Attack After ADA's Enactment*, *supra* note 75; Doud, *supra* note 37, at 765.

[135] McClitis, *supra* note 9, at 411; *see supra* note 72 (listing states with a SIF in force).

[136] *See* McClitis, *supra* note 9, at 416–21 (listing ideas for improving the Missouri SIF).

[137] WORKMEN'S COMP. & REHAB. LAW, *supra* note 87, § 20; LARSON & LARSON, *supra* note 37, § 91.01[2].

[138] *See* WORKMEN'S COMP. & REHAB. LAW, *supra* note 87, § 20.

As a result, even if a SIF does not actually encourage employers to hire disabled workers, it may succeed in minimizing the chance that employers will deny employment to the disabled.[139] Even though no statistical data exists to show an increase in the number of hired or retained disabled workers, the fact that many complain about the overuse or depletion of SIFs evidences a demand for them.[140] Finally, a SIF that does not meet its primary purpose may satisfy a secondary purpose of preventing employers from paying for injuries that employment did not cause, thereby preventing workers' compensation premium increases.[141]

Regarding the criticism that SIFs are poorly funded, the solution is to craft the set of compensable injuries to ensure that it is neither too narrow nor too broad.[142] Some common restrictions include only allowing injuries that have become permanent to be paid out of the fund because they represent the greatest detriment to employers, only allowing recovery for injuries that are symptomatic, and having a requirement that the preexisting condition and the later work-related injury combine in such a way as to create a larger injury than either injury itself.[143]

As noted above, the ADA is often cited as a reason to eliminate SIFs.[144] However, the existence of the ADA is not compelling justification for eliminating SIFs for several reasons. First, SIFs and the ADA operate differently from one another.[145] The ADA is meant to deter employers from discriminating, whereas SIFs are meant to encourage the hiring and retention of disabled workers.[146] SIFs apply not only to pre-employment activity that the ADA covers, by deterring

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[139] McClitis, *supra* note 9, at 421; *Second-Injury Funds Under Attack After ADA's Enactment*, *supra* note 75.

[140] *See* Doud, *supra* note 37, at 766 (citing Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 201 (1994) (asserting that employers "dump claims into the fund" because it does not affect their premiums); *Second-Injury Funds Under Attack After ADA's Enactment*, *supra* note 75 (noting that employers make SIFs handle the tough cases they do not want handled under regular workers' compensation).

[141] LARSON & LARSON, *supra* note 37, § 90.01; *see* Dahl, *supra* note 1, at 103–04 (describing how SIFs are created to prevent increased costs for employers related to preexisting conditions).

[142] LARSON & LARSON, *supra* note 37, § 91.03[1]; Nat'l Comm'n on State Workmen's Comp. Laws, *supra* note 132, at 663.

[143] Doud, *supra* note 37, at 750–53; *see* MODERN WORKERS COMPENSATION, *supra* note 21, § 200:25.

[144] *Second-Injury Funds Under Attack After ADA's Enactment*, *supra* note 75; *see supra* notes 76, 136 and accompanying text.

[145] Sheldon & Grimwood, *supra* note 84, at 37; Schurin, *supra* note 63, at 146–47.

[146] Sheldon & Grimwood, *supra* note 84, at 36–37; McClitis, *supra* note 9, at 415–16 (concluding that despite the pressure to eliminate the Missouri SIF, the fund should continue). SIFs function as a "carrot" to companies to encourage them to hire disabled workers, whereas the ADA acts as a "stick" to punish employers who do not do so. *See* WORKMEN'S COMP. & REHAB. LAW, *supra* note 87, § 20.

discrimination in the hiring process, but also to the period of employment, by encouraging the retention of disabled workers.[147] In addition, between SIFs and the ADA, SIFs are the only way to prevent employers from bearing the full cost for combined injuries.[148] Furthermore, some studies show discrimination in the workplace has actually increased under the ADA, while there have been no comparable findings regarding SIFs.[149] For states with employer knowledge requirements, the ADA may appear to prevent the employer from obtaining the knowledge or notice regarding previous injuries.[150] However, the ADA allows inquiry by an employer into previous injuries after making a conditional offer of employment, which would ensure an employer can gain the requisite knowledge or notice.[151] Finally, the ADA only applies to employers with more than fifteen employees.[152] This requirement does not apply to SIFs.[153] Therefore, SIFs are more inclusive than the ADA and should be retained despite the possibility of some overlap.[154]

C. Wyoming Should Adopt a Second Injury Fund

SIFs were originally created in response to the return of veterans from World War II.[155] Just as SIFs benefited veterans immediately after WWII, if Wyoming adopts a SIF now it could benefit disabled Wyoming veterans returning from

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[147] McClitis, *supra* note 9, at 415–16.

[148] *Id.* at 416.

[149] Schurin, *supra* note 63, at 151–52. The Centers for Disease Control and Prevention's National Health Interview Study, the Census Bureau and Bureau of Labor Statistics' Current Population Survey, and the Survey on Income and Program Participation have all shown a sharp decrease in disabled employment since the ADA was passed. *Id.* at 151. Some commentators claim the ADA creates disincentives for employers to hire those with disabilities and that employers are better off financially to illegally discriminate against hiring people with disabilities rather than discriminating upon termination. *Id.* at 152–53. Some have even called for the repeal of the ADA due to these results. *Id.* at 152. It is also arguably less expensive to discriminate upon hiring than to make the reasonable accommodations mandated by the ADA upon the hire of those with disabilities. *Id.* at 153.

[150] 42 U.S.C. § 12112(d)(2)(A) (2006); Sheldon & Grimwood, *supra* note 84, at 36; Schurin, *supra* note 63, at 145.

[151] MICHEAL FAILLACE, DISABILITY LAW DESKBOOK: THE AMERICANS WITH DISABILITIES ACT IN THE WORKPLACE § 13:2.4 (2009) (stating that once an employer makes a conditional job offer, he or she can inquire regarding mental or physical disabilities); PHELAN & ARTERTON, *supra* note 65, § 16.8 (stating that an employer may make inquiries regarding an applicant's medical history or require a physical examination only after conditionally offering a position if that employer also requires the examination or inquiry of all applicants); 7 EMPLOYEE DISCRIMINATION COORDINATOR FORMS, PLEADINGS AND PRACTICE AIDS § 4.2 (2010).

[152] 42 U.S.C. § 1211(5)(A); Sheldon & Grimwood, *supra* note 84, at 36; Schurin, *supra* note 63, at 148.

[153] *See* sources cited *supra* note 152.

[154] McClitis, *supra* note 9, at 416.

[155] *See supra* note 70 and accompanying text.

conflicts in Afghanistan and Iraq in addition to other disabled workers.[156] Furthermore, Wyoming has the highest rate of workplace fatalities in the nation, partly due to the risks of oil-and-gas-related employment.[157] Employers and workers in the mineral industry could benefit from a SIF because many workers have been injured on the job and still need to work to support their families.[158]

Wyoming can learn from the experience of other states, and their reasons for termination of their funds, in order to ensure the Wyoming SIF fulfills its purpose.[159] In order to develop a working fund that will accomplish its goals, the state needs to look at four main areas before it adopts a fund: (1) how to fund the SIF; (2) the method used to distribute benefits to workers; (3) the injuries to be included in the fund; and (4) whether to include a knowledge or notice requirement. Wyoming should consider each of these areas and implement the following suggestions in a pilot program that the state can reassess in a number of years.

In order to avoid funding difficulties, multiple funding sources should be used to establish a SIF.[160] One possible source of funding unique to Wyoming involves monies from the Wyoming Permanent Mineral Trust Fund (WPMTF), the market value of which is approximately $5,000,000,000.[161] Although the fund corpus cannot be used, the income from the WPMTF goes to the state general fund.[162] Wyoming also has approximately $1,000,000,000 in its Workers Compensation Fund, the income of which may be used in a like manner.[163] In addition, the funds for the Wyoming SIF would probably be placed in their own investment fund that the Wyoming State Treasurer would handle, holding the corpus inviolate and only using the income to provide for SIF needs.[164]

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[156] *Employers Must Take Measures Not to Discriminate Against Thousands of Returning, Injured Veterans*, *supra* note 70; Tobenkin, *supra* note 70.

[157] John R. Vincent & Jessica Rutzick, *Reinstating Wyoming's Joint and Several Liability Paradigm: Protecting Wyoming's Workforce, Their Families, and the Wyoming Worker's Compensation Fund from Uncompensated Injuries and Deaths*, 8 WYO. L. REV. 87, 87 (2008).

[158] *Id.*

[159] *See supra* notes 73–84 and accompanying text.

[160] *See* McClitis, *supra* note 9, at 421 (explaining that other states simultaneously use multiple funding methods for their SIFs).

[161] *See* WYO. STATE TREASURER'S OFFICE, WYOMING STATE INVESTMENT PORTFOLIO (2011), *available at* http://treasurer.state.wy.us/pdf/portfoliostatus0111.pdf (listing the market value for funds for which the Wyoming State Treasurer's Office handles the investment).

[162] *Id.*; Telephone Interview with Michael Walden-Newman, Chief Inv. Officer, Wyo. State Treasurer's Office (Mar. 11, 2011).

[163] WYO. STATE TREASURER'S OFFICE, *supra* note 161; Telephone Interview with Michael Walden-Newman, *supra* note 162.

[164] Telephone Interview with Michael Walden-Newman, *supra* note 162.

Additionally, using money from the WPMTF would not preclude additional funding sources, and Wyoming would be well advised to use multiple sources simultaneously to ensure adequate funding.[165]

Wyoming has the benefit of learning from other state's funding attempts to create more solid funding. For example, if Wyoming used monies retained by insurance companies in the case of death without dependents, it could learn from Texas's experience.[166] Texas uses the death without dependents surcharge as the sole funding source for its SIF, which remains in force.[167] Although Wyoming has a smaller population than Texas, this method may nonetheless be successful for partially funding a SIF in Wyoming. Despite controversies with funding SIFs from money retained in cases of death without dependents, the long history of SIFs using such monies means there is jurisprudence in other states to which Wyoming could look for guidance.[168] Moreover, the Wyoming legislature could clarify the definition of dependents as well as the parameters of this funding when it adopts a SIF.[169] To simplify matters even further, Wyoming could use the definition of "heir" and surrounding case law regarding intestate succession in the Wyoming Probate Code.[170]

Requiring insurance carriers and self-insured employers to fund the SIF pro-rata is also a viable option because it distributes the costs of the SIF equitably among employers.[171] If Wyoming chooses this option, it could look to Missouri's response when it found its surcharge rate of assessable premiums for self-insurers and insurance companies was too low in determining a successful rate.[172]

The next issue Wyoming would need to address is the method of distributing awards to workers. Wyoming should choose a method of compensation that ensures workers receive their benefits when they need them, instead of making them wait for bureaucratic processes.[173] The approach formerly taken by Kansas could be a successful way to accomplish this.[174] In Kansas, the SIF started with the assumption that distributions would be made from the fund directly to the

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[165] *See* McClitis, *supra* note 9, at 421 (indicating how other states use multiple methods to fund their SIFs).

[166] *See supra* notes 89–90 and accompanying text.

[167] TEX. LAB. CODE ANN. § 403.007(a) (West 2010); Tobenkin, *supra* note 70.

[168] *See supra* notes 89–90 and accompanying text.

[169] *See* LARSON & LARSON, *supra* note 37, § 91.01[2] (describing some of the difficulties states using death without dependents funding have experienced in implementing SIFs).

[170] *See* WYO. STAT. ANN. §§ 2-4-101(c), 2-16-102(a)(iii) (2010).

[171] *See supra* notes 87–88 and accompanying text.

[172] *See* McClitis, *supra* note 9, at 416–17.

[173] *See supra* notes 95–101 and accompanying text.

[174] *See supra* note 101 and accompanying text.

employee.[175] However, if the funds were not available in a timely manner, the employer distributed the funds to the workers and was later reimbursed.[176] This method prevented employers from bearing the entire burden of paying workers directly every time and also ensured workers were paid quickly. This method would benefit the many small businesses in Wyoming that do not have much working capital and is the most fair to both employers and workers.

In crafting its list of compensable injuries, Wyoming should create a list broad enough to ensure that the purpose of the SIF is met, but narrow enough to prevent the fund from depleting too quickly.[177] One way Wyoming may limit its injuries is to only allow reimbursement for combined injuries resulting in permanent disability.[178] Wyoming should not, however, limit payments from the fund to situations in which the preexisting condition is a work-related injury. Wyoming should instead accept both work-related and personal injuries as preexisting injuries.[179] Adopting such a broad definition of compensable injury will ensure that those who are injured on the job and seek later employment will be reimbursed, as well as those who are injured in a personal accident. In order to keep the SIF consistent with the workers' compensation statute, the Wyoming SIF should only compensate for injuries that would be the equivalent of a compensable disability under the existing workers' compensation statute.[180] To avoid difficulty proving that the preexisting injury existed before the work-related injury, Wyoming should only allow recovery for injuries that were symptomatic before the work-related injury occurred.[181] Wyoming could retain its current requirement that the injury aggravate, accelerate, or combine with a preexisting condition in a material or substantial manner before it will apportion from the fund.[182]

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[175] *See supra* note 101 and accompanying text.

[176] *See supra* note 101 and accompanying text.

[177] Doud, *supra* note 37, at 750–51; *see supra* notes 142–43 and accompanying text.

[178] *See* LARSON & LARSON, *supra* note 37, § 91.01[4] (stating the typical second injury fund only applies to situations where the combined injury results in a permanent total disability classification); Dahl, *supra* note 1, at 106–07 (stating that in order for the purpose of a SIF to be met, the combined disability should be severe enough that it impedes efforts to find employment).

[179] *But see* COLO. REV. STAT. § 8-46-101(1)(a) (2010) (requiring that the now defunct Colorado SIF only pay benefits where the preexisting condition was a work-related injury).

[180] LARSON & LARSON, *supra* note 37, § 91.02[4].

[181] *See supra* note 109 and accompanying text.

[182] Straube v. State *ex. rel.* Workers' Safety & Comp. Div., 208 P.3d 394, 401 (Wyo. 2009).

Finally, Wyoming should not adopt a knowledge requirement.[183] Although a requirement that an employer have notice or knowledge of the injury may appear to help meet the purpose of the fund, it would only conflict with the ADA.[184] Wyoming may also avoid litigation by not adopting a knowledge requirement.[185]

IV. CONCLUSION

Wyoming is the only state that has not passed a second injury fund since their inception in the 1940s.[186] Some states may have subsequently abolished their SIFs, but a majority of states recognize the importance of SIFs to encourage employment of the disabled, as evidenced by the continuation of their funds.[187] The Wyoming Worker's Compensation Act mandates that injured workers receive benefits as quickly as possible and at a reasonable cost to employers.[188] The current system is not consistent with this mandate because employers are responsible for the entire injury when employees with preexisting conditions are injured on the job.[189] The only other alternative to a SIF—apportionment between employer and employee—is too harsh.[190] The time for the state to follow its own legislative mandate is now, and the only reasonable way it can do so is by passing legislation creating a SIF. Because Wyoming is the last state to initiate a fund, it has the benefit of learning from others' mistakes and avoiding their repetition. It can choose options for SIF funding and compensating injuries that will most effectively serve employers and employees and ensure that the system is fair to all stakeholders.

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[183] *See* Sheldon & Grimwood, *supra* note 84, at 37–38 (stating that Arizona should eliminate the knowledge requirement for its SIF because it clashes with the ADA). Eliminating the knowledge requirement for state SIFs has been criticized because it would create a "windfall" for insurance carriers. *Id.* at 38. However, doing so would not create a windfall but would only help ensure recovery for those who deserve it without creating unnecessary barriers. *Id.*

[184] *See* Sheldon & Grimwood, *supra* note 84, at 37–38 (stating that knowledge requirements do not harmonize with the ADA); *supra* notes 83–84 and accompanying text.

[185] *See* LARSON & LARSON, *supra* note 37, § 91.03[5] (stating that a knowledge requirement causes more litigation cost and time than it is worth).

[186] *See supra* note 71 and accompanying text.

[187] *See supra* notes 72, 135 and accompanying text.

[188] *See supra* note 46 and accompanying text.

[189] *See supra* notes 115–20 and accompanying text.

[190] *See supra* note 62 and accompanying text.