

# **MULTIPLE INJURY TRUST FUND**

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## **MITF's PURPOSE:**

In 1943, the Oklahoma legislature created the Multiple Injury Trust Fund (MITF), formerly the Special Indemnity Fund, with a dual purpose: to encourage the hiring of individuals with a preexisting disability and to protect those employers from liability for the preexisting disability. It does so by carrying the responsibility for a portion of the benefits if the disabled worker suffers a subsequent injury.

When the workers' compensation court makes an award for benefits, those benefits are based upon the individual's percentage of disability. MITF applies to situations where a physically impaired person suffers an on-the-job injury and those two injuries (or disabilities), in combination, result in a percentage of disability greater than that which would apply if there had been no preexisting disability. In other words, the employer is only liable for the benefits that would have been due for the subsequent injury alone. MITF picks up the remainder of the liability for the combined disability.

## **HOW MITF WORKS:**

MITF is a small ten (10) person state agency and creature of statute that limits employers' liabilities by paying permanent total disability benefits to thousands of disabled Oklahomans who have suffered multiple injuries.

Insurers (including own risk and self-insurers) writing workers' compensation insurance in Oklahoma, pay a yearly premium assessment into the Fund for its obligations. **By law, the assessment is capped at six percent (6%).**

Benefits from MITF are not received automatically, but can be obtained by a worker by filing a claim against MITF. In order to make a claim, the combined percentage of disability must be greater than 40% to the body as a whole for injuries occurring prior to November 2, 1999. There are no such thresholds for injuries occurring on or after November 1, 1999.

- The majority of states have a second injury fund comparable to Oklahoma's MITF, while a smaller number of states have abolished theirs due to overuse and/or funding deficiencies.
- States with successful second injury funds have healthy funding mechanisms and/or protections against overuse.

Effective January 1, 2002, the OTC assesses and collects from each uninsured employer 5% of their total compensation paid for permanent disability and death awards. Also effective January 1, 2002, the Workers' Compensation Court Administrator assesses an amount and the OTC collects such assessments from each mutual or interinsurance association, stock company, CompSource, employers carrying their own risk including group self-insurance associations, and other insurance carriers writing workers' compensation insurance in the State of Oklahoma up to 6% of total direct written premiums for workers' compensation on risks located in this state.

The enacted rate schedule since inception of the law is as follows:

Effective Date	Rate
January 1, 2002	6.00%
July 1, 2003	2.95%
July 1, 2004	3.63%
July 1, 2005	3.83%
July 1, 2006	3.46%
July 1, 2007	2.14%
July 1, 2008	2.50%
July 1, 2009	2.60%
July 1, 2010	2.59%
July 1, 2011	1.98%
July 1, 2012	3.39%
July 1, 2013	5.18%
July 1, 2014	6.00%
July 1, 2015	6.00%

#### **HISTORICAL FUNDING ISSUES:**

By May 2000, MITF was burdened by five (5) years of unpaid PPD orders and thirteen (13) years of "slow-pay" PPD orders; and was the respondent to a class action lawsuit on the issue of interest payment calculations. PTD orders were paid timely, and as such were not at issue.

The class action lawsuit, known as *Dean v. Special Indemnity Fund*, made its way to the Oklahoma Supreme Court four (4) times:

- *Dean v. Special Indemnity Fund*, 1998 OK CIV APP 30, 00956 P.2d 945
- *Multiple Injury Trust Fund v. Dean*, 2001 OK CIV APP 30, 24 P.3d 861
- *Dean v. Multiple Injury Trust Fund*, 2003 OK CIV APP 34, 67 P.3d 356
- *Dean v. Multiple Injury Trust Fund*, 2006 OK 78, 145 P.3d 1097

## **ABOLISHMENT AND REINSTATEMENT OF MITF;**

### **HISTORY REPEATS ITSELF:**

Multiple injury liability was shifted back to employers from 2000 to 2005. Known as the “**full responsibility rule**”, employers paid for both on-the-job injuries and multiple injury claims, which, not surprisingly, proved unpopular with respondent employers and their insurers. MITF was reinstated in 2005. While the troublesome PPD liability was repealed, many qualifications for PTD benefits were also repealed. Minimum benefits were increased by ten (10) years, and statutory authority to close PTD claims (for discounted lump sums) was repealed.

### **These changes have threatened MITF’s solvency:**

- Between 2008 and 2013 new claims ballooned to over 3,000, representing a 408% increase; and unfunded liability swelled to nearly \$400,000,000.
- MITF was not designed to pay all of Oklahoma’s PTD awards, yet it pays roughly 90% of them. **Half of MITF awards are the result of injuries caused by a single employer.**
- The rise of mediations and the simultaneous rise of MITF PTD awards is no coincidence.
  - 2005: Five mediations were ordered in underlying cases.
  - By 2012, nearly 6,500 mediations had been ordered (2012 is the last year of available CEC statistics).
  - As fewer cases were tried, and more mediators found ways to defer PTD liability to MITF, multiple injury claims grew at alarming rates.

### **MITF’s FINANCIAL CONDITION:**

Repeal of MITF’s authority to close costly PTD awards was another disastrous change to MITF laws in 2005. From a claims perspective, this created an ever-growing and unsustainable inventory of new claims. Without the ability to manage claims growth, the cost to pay weekly benefits soared.

Not until 2011 did MITF regain its authority to close PTD awards at lump sum discounts. The **MITF LUMP SUM SETTLEMENT PROGRAM** uses revenue not allocated to pay benefits and other obligations. From a financial standpoint, the claimant gains the advantage of a lump sum payment, while MITF is better able to manage its benefits inventory and reduce its unfunded debt. Not only has the program proven successful at slowing claims growth, it has also reduced MITF’s unfunded debt by more than **\$53million**. **The program’s primary purpose is to keep the Fund viable and prevent default on its obligations.**

The continued success of MITF’s settlement program depends entirely upon available revenue. Based on fourth quarter CY 2015 collections by the Oklahoma Tax Commission, **MITF revenue declined 18%, because of decreasing workers’ compensation premiums.**

## **FY 2015 INDEPENDENT FINANCIAL AUDIT:**

### **Eide Bailly CPA's and Business Advisors**

**“At December 31, 2015, MITF had a net deficit of approximately \$397,280,000 primarily due to court awards exceeding the apportionment of special tax revenue collected.** Currently, MITF pays all awards for permanent partial and permanent total claims as they become due. However, cash and cash equivalents at December 31, 2015 are not sufficient to pay all current and non-current liabilities.” (Emphasis supplied.)

“If the maximum assessment does not provide in any one year an amount sufficient to make all necessary payments for obligations of MITF, the unpaid portion shall be paid as soon thereafter as funds become available. Effective July 1, 2014, the MITF tax was increased from 5.18% to 6.00%, the maximum assessment. The rate used during the year ended December 31, 2015 was 6%.”

“At December 31, 2015 long-term liabilities of **\$406.5 million** related to court awarded claims payable which comprised 96% of the total liabilities. At December 31, 2014 long-term liabilities of \$386.3 million related to court awarded claims payable which comprised 96% of the total liabilities. **The increase is due to an increase in court orders.**” (Emphasis supplied.)

## **TWO SIMPLE SOLUTIONS:**

- **Abolish MITF and return to the FULL RESPONSIBILITY RULE** where respondent employers pay for both on-the-job injuries and multiple injury PTD liability; or
- **Restore MITF's original purpose without dilution for special interests:** create clear statutory guidelines to eliminate abuse and decrease costs; and restore original minimum benefit period. This option allows MITF to become financially viable without creating an undue burden on employers.

## **MITF's MISSION:**

MITF's mission is a fiduciary one; that is **“to protect the Fund within the scope of its statutory authority and to pay benefits as ordered by the court”**. MITF has an expert staff with over 100 cumulative years of workers' compensation experience. History however has proven MITF needs sound legislation to survive. It cannot rely on a changing environment for stability, be it general reform to workers' compensation, or the drift of the judiciary. Without proper funding and clear statutory limits, like many other funds nationwide, Oklahoma's MITF will fail; and multiple injury liability will return to respondent employers under the full responsibility rule.

## MITF (FORMERLY SPIF) CHRONOLOGY OF STATUTORY CHANGES

-MITF statutes have changed significantly at least 13 times since its inception.-

“The law in effect at time of subsequent injury is law to be used in fixing liability of [MITF]”.

*SPIF v. Archer*, 847 P. 2d 790 (OK 1993).

### April 12, 1943

- First SPIF / MITF statute, Title 85 O.S., § 171, et seq.

### November 1, 1986

- Established a minimum **threshold of 17%** as a jurisdictional prerequisite to proceed against SPIF. See, 85 O.S., § 172(C).
- Non-adjudicated claims (i.e. any claim not adjudicated by the OK WCC, inclusive of *Crumby* findings) are not combinable for purposes of claims against SPIF, unless a **“major” member (i.e., hand, arm, foot, or leg)** had a pre-existing disability, which was easily observable to an ordinary lay person. See, *SPIF v. Carson*, 1993 OK 64, 852 P.2d 157. See also, *Whaley v. SPIF*, 1976 OK 9, 545 P.2d 775, wherein only the “member” impairment is combinable and not the whole body part such as a heart or back condition that may have caused the “member” disability.

### September 1, 1992

- Minimum **threshold increased to 40%**. See, 85 O.S., § 172(C).
- **Attorney fees for PTD vested** and paid periodically with recoupment at 20% of each weekly check to claimant. (Previously, the attorney fee was paid in a lump sum with recoupment at 10%). See, 85 O.S., § 30; *Hix v. White Swan Food Service*, 1996 OK 132, 930 P.2d 208. See also, *Batt v. SPIF*, 1993 OK 163, 865 P.2d 1244 on attorney fees and abatement of the award.

### September 1, 1993

- Any prior non-adjudicated “member” (hand, arm, foot, leg or ear) disability which was easily observable to an ordinary lay person or any pre-existing disability adjudicated by the WCC, inclusive of a *Crumby* finding, is combinable. (**Delete word “major” and made a *Crumby* finding an adjudication.**) See, 85 O.S., § 171; *SPIF v. Richardson*, 1996 OK CIV APP 163, 941 P.2d 532.
- **Changed number of weeks per each percentage of disability** (1-9% = 4 weeks, 10-20% = 5 weeks, 21-50% = 6 weeks, and 51-100% = 5 weeks). See, 85 O.S., § 22(3) (b); *SPIF v. Jones*, 1997 OK CIV APP 73, 949 P.2d 1220; *Alhjouj v. SPIF*, 1997 OK CIV APP 68, 947 P.2d 1117.\*  
**SEE CHARTS** at [http://www.owcc.state.ok.us/charts\\_rules.htm](http://www.owcc.state.ok.us/charts_rules.htm).

#### **November 4, 1994**

- **Attorney fees in PTD cases are based on a maximum of 400 weeks** of compensation. See, 85 O.S., § 30.
- **Exempted SPIF from “certification”** process for collection of delinquent awards. See, 85 O.S., § 42.
- Reduced rate of interest on SPIF awards from 18% to the rate applicable to civil cases. See, 85 O.S., § 42; 12 O.S., § 727.
- **172(e) “Elapse Clause” Effective:** If a claimant JP the last injury for a lump sum settlement, then same is divided by the claimant’s rate to determine the number of weeks which must elapse before SPIF payments are to be commenced. See, 85 O.S., § 172(E).
- Sum of all PPD awards, including those against the SPIF, **shall not exceed 100% PPD** per individual or 520 weeks compensation for PPD. See, 85 O.S., § 22(7).

#### **November 1, 1999**

- Name of Special Indemnity Fund changed to the “Multiple Injury Trust Fund (MITF).”
- Forty percent **(40%) threshold eliminated**.
- Tax reduced to 4% each for an aggregate of 8%. See, 85 O.S., § 173.
- **“Material Increases / PPD” abolished for last injury on or after November 1, 1999.** Amendment provides MITF’s liability for combined disabilities is limited to PTD for claims filed on or after November 1, 1999. See, 85 O.S., § 172. The Court later found application of a “filing” date deadline deprived claimant of a vested right, and found the statute could only be applied according to injury date; *Autry v. MITF*, 2001 OK 79, 38 P. 3d 213; and *Loftis v. MITF*, OK CIV APP 30, 67 P.3d 924.
- For purposes of additional MITF benefits, **reopening is limited to the last employer injury claim**. See 85 O.S., § 172. Statute overturned *McGough v. SPIF*, 1997 OK 51, 939 P.2d 1136, which allowed claimant to proceed against MITF on the reopening of any award, including “priors”.
- **§ 172(E) “Elapse Clause” repealed**.
- Procedures are established for unclaimed awards against MITF. See, 85 O.S., § 172.

#### **May 26, 2000**

- State Insurance Fund is authorized to loan MITF money to pay delinquent “material increase” orders dated back to 1995. See, 85 O.S., §§ 138, 173.3.
- If the **last injury is before June 1, 2000, MITF is liable for combined disabilities resulting in PTD**. [Under the 1999 changes, MITF has no liability for combined disabilities (“material increase”) resulting in PPD for claims filed on or after November 1, 1999.] See, 85 O.S., § 172.
- **Form 3E’s: If the last injury is on or after June 1, 2000, the last employer (not MITF) is liable for combined disabilities resulting in PTD**, in addition to liability for disability caused by the last injury alone, thus **restoring the pre-1943 Full Responsibility Rule**. (Effectively, MITF’s liability for combined disabilities -- whether “partial” or “total” -- is extinguished if

the last injury occurred on or after June 1, 2000.) The last employer is not liable for “material increases” that do not result in PTD. See 85, O.S., § 172.

- PTD awards for combined disabilities -- whether against MITF or last employer -- can be commuted to a **lump sum upon agreement** of the parties. See, 85 O.S., § 172.
- **New Funding of MITF by Assessment on Insureds:** The tax rate and taxation scheme to fund obligations of MITF changed beginning July 1, 2000. There is now a 2% assessment against gross direct premiums of worker’s compensation insurers (including the State Insurance Fund) instead of the aggregate 8% MITF tax against insurers and employees. (Employees pay no tax.) The 4% tax against self-insured employers is continued. See, 85 O.S., § 173.

#### **October 23, 2001**

- 100% cap changed to exclude awards from MITF. The exclusion only affects PPD awards against employers. The amendment is moot for MITF awards as “material increases” were eliminated in 1999.

#### **\*January 1, 2002**

- **Rate of disability** for body as a whole was changed back to five hundred (500) weeks. Weeks and percentages per body part vary. Weeks and benefits revised again in **January 1, 2003**. **SEE CHARTS** at [http://www.owcc.state.ok.us/charts\\_rules.htm](http://www.owcc.state.ok.us/charts_rules.htm).

#### **November 1, 2005**

- **Vocational Rehabilitation (Section 16):** Amendment changes “he” to “employee”, further clarifying that vocational rehabilitation issues are between “employee” and “employer”, not between claimant and MITF.
- **IME’s:** Amendments to § 17, including those attempting to eliminate “dueling doctors” appear to apply only to on the job injuries, not MITF cases. Section 17(3) may be the exception, where the **party requesting the deposition of the IME, pays the related costs**. The **time to object to an IME is extended from five (5) days to ten (10) days**. Objections (to competency) may not be made at trial; rather the objecting party must take the IME doctor’s deposition or have the doctor appear in person at trial. Costs of the IME are borne by the party objecting to the “treating” physician’s report, making application to MITF unclear.
- **Statutes of Limitations:** While MITF has no SOL of its own, case law has held that the same SOL for employers applies to MITF, and that the defense may be raised by MITF even if not raised by employer in the underlying case. See *SPIF v. Reynolds*, 1986 OK 64, 725 P.2d 1265. Amendment makes **SOL for “reopens” against employer three (3) years from date of last order**.
- **Crumby findings of previous disability are no longer considered adjudications** for purposes of § 171; “pre-existing” is changed to “previous adjudications”, returning the statute to its pre-1993 language. See also, *Ball v. Multiple Injury Trust Fund*, 2015 OK 64, 360 P.3d 499.

- **MITF liability for PTD (only) is reinstated for dates of last injury on or after November 1, 2005.** Benefits extend from a minimum of five (5) years to a minimum of fifteen (15) years.
- MITF awards no longer abate in their entirety upon death of the claimant. Section 172(H) awards **benefits to surviving spouse for five (5) years or until remarriage.** Benefits cannot extend beyond the period of benefits awarded to claimant. To be eligible, claimant's death must be caused by his/her injuries.
- Authority of MITF to settle existing PTD awards for discounted lump sums is repealed.

#### **November 1, 2010**

- **Standard of Review:** The amendment authorizing review of an order or award to determine whether it was against the clear weight of the evidence applies to claims for injuries that occur after the effective date of the amendment (11.1.10). *Cattlemen's Steakhouse, Inc. v. Waldenville*, 2013 OK 95, 318 P. 3d 1105.

#### **August 26, 2011**

- **Crumby findings must be to same body part to be combinable as previous adjudications.**
- **Statutes of Limitations and Failure to Prosecute defined separately for MITF.** Claims must be filed (Form 3F) within two (2) years of the date of the last order for PPD from the latest claim against the employer. Claimant has three (3) years from the filing of the Form 3F to request a hearing.

#### **August 23, 2013 (SB 1062)**

- MITF parent agency, Compsource Oklahoma, becomes Compsource Mutual, and MITF becomes an independent state agency.

#### **February 1, 2014 (Title 85A)**

- Workers' Compensation Court becomes the Court of Existing Claims.
- The Workers' Compensation Commission is created.
- Director of MITF and the newly created Commission are charged with the administration and protection of MITF.
- MITF statutory language remains the same, with the exception of added attorney fee language.

#### **July 1, 2015 (HB 2238)**

- Distribution of MITF revenue to Department of Labor and Department of Career and Technology, eliminated for a net total gain to MITF of \$2.16 million annually. Attorney General's Fraud Unit receives \$389,000.00 from MITF.
- Additional 1% premium assessment provided to fund the Court of Existing Claims and the Workers' Compensation Commission.