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BELOW THE RED LINE

WORKERS' COMPENSATION UPDATE
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A NEWSLETTER FOR EMPLOYERS & CLAIMS PROFESSIONALS

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A WORD FROM THE PRACTICE CHAIR

As you read this, I am hopeful you are back at your desk, after your holiday break, with a refreshed battery, rested and ready to attack 2022. From all of us at Heyl Royster, I want to wish you nothing but the best in 2022. We look forward to building on our relationships with you and your Team and making sure your workers' compensation needs are not only met but exceeded in the coming year.

We will be reaching the two-year point since the pandemic and the historic shutdown of many things in just a few months. We have come a long way since that time, learned a great deal about ourselves and COVID. Everyone is well aware of the current Omicron surge, and I can report to you it has directly impacted the Commission here in Illinois. Chairman Brennan recently announced that oral arguments before the Commission would no longer be in person. Due to the increase in COVID numbers in Illinois, the Commission has, once again, instructed attorneys that any oral arguments are to be done virtually until further notice. There is no change to our workers' compensation docket calls and pre-trial hearings, as they all remain virtual. Likewise, our trials/arbitration hearings are still in-person, and at present, that has not changed.

This month's article has been written by Heyl Royster, associate out of our St. Louis, Missouri office, Jenna Scott. Jenna has been working with Jessica Bell (Peoria/Springfield) and Amber Cameron (Edwardsville/St. Louis), and I cannot think of two better mentors. Her article tackles the subject matter of the Second Injury Fund in both Illinois and Missouri. The purpose of this fund is to encourage employers to hire individuals who have been previously injured. This fund's purpose, in part, is to make an employee more employable and to ensure the employer who hires this previously injured individual is not impacted too harshly if a second injury befalls the employee (thus the name: Second Injury Fund). This is one of those subjects that does not come up often. Still, when it does, it is always good to have reference material and insight to rely upon so you know what you are dealing with, and you do not feel as though you are in the dark no matter if you are handling an Illinois or a Missouri matter.

This is the time of year you might be thinking about long-range plans for yourself and your Team as it relates to seminars, lunch-and-learns, and continuing education on the subject matter of workers' compensation. We also understand you and your Team may not have the luxury of being back in the office to host guests for such an event or go out and travel to a seminar. If this does not apply to you, then great. In either case, whether you are still operating virtually or if you are allowing in-person visitors, I want to let you all know we are ready when you are for a visit. We want to be there to make sure you and your Team can get what is needed as far as ongoing education and learning opportunities. So, don't hesitate to contact me, and let's set something up for 2022. We can come to you either in person or virtually; just let us know how to help.

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FEATURE ARTICLE

THE SECOND INJURY FUND: WHAT YOU NEED TO KNOW

by Jenna Scott

Both Illinois and Missouri have statutes that set forth the requirements for the Second Injury Fund ("SIF"). The purpose of the SIF is to help an injured worker when a work-related injury, coupled with a prior disability, creates an increased combined disability. Throughout this article, we will take a look at the Illinois and Missouri statutes, as well as recent case law, relating to the Second Injury Fund.

Missouri

In Missouri, V.A.M.S. 287.120 is the statute that sets the standard for the Second Injury Fund and has been amended several times over the past few decades to either increase or reduce the benefits payable to a claimant through the SIF. For cases in which the most recent compensable work injury occurred on or after January 1, 2014, there are two benefit categories available through the SIF: rehabilitation benefits and permanent total disability ("PTD") benefits. For cases in which the most recent compensable work injury occurred before January 1, 2014, there are five benefits potentially available from the SIF: permanent partial disability ("PPD"), PTD, death benefits, rehabilitation benefits, indemnity, and medical expenses. Throughout this article, we will focus on benefits available for cases in which the most recent compensable work injury occurred on or after January 1, 2014.

For an employee to qualify for PTD benefits against the SIF, the employee must have a medically documented pre-existing disability equating to at least 50 weeks of PPD *and* the employee must show s/he subsequently sustained a work-related injury. For reference, 50 weeks of PPD equates to 12.5% body as a whole or 22% of the shoulder. To qualify as a pre-existing disability, the disability must be one of the following: 1) the direct result of active US military duty, 2) the direct result of a compensable injury as defined under V.A.M.S. 287.120, 3) a pre-existing disability which directly and significantly aggravates or accelerates the subsequent work-related injury, *or* 4) a pre-existing permanent partial disability of an extremity opposite of the primary injury, loss of eyesight in one eye, loss of hearing in one ear, when there is a subsequent compensable work-related injury of the opposite extremity, eye or ear.

In 2019, the Missouri Supreme Court discussed the SIF in its decision, *Cosby v. Treasurer of the State of Mo.,* 579 S.W.3d 202 (2019). In *Cosby*, the Court confirmed the end to the SIF liability for permanent partial disability benefits when the subsequent injury occurred after January 1, 2014. For PTD claims, the Court reinforced the four categories set forth in the 2014 legislation regarding pre-existing disabilities. *Cosby*, however, left unanswered questions as to what qualifies as a pre-existing disability in the statutory language as well as how employers will be affected in cases in which the employee is permanently and totally disabled not from the last injury alone, but from a combination of the pre-existing disability and the last accident when the pre-existing disabilities do not individually meet the thresholds or categories listed in the statute.

The Missouri Supreme Court sought to clarify some of these questions and provide additional guidance relating to SIF by issuing an opinion in April 2021, *Parker v. Treasurer of State of Mo.,* 2020 WL 3966851. The employee in *Parker* had prior injuries with disability to his low back and knee. He sustained a work-related injury to his right elbow and shoulder in March 2014 and subsequently sustained a second work-related injury to his neck in June 2014. The employee argued at trial that he was permanently and totally disabled because of the combination of both 2014 work injuries and pre-existing disability.

The Supreme Court addressed three issues in the *Parker* decision. First, the Court held a prior disability which has not reached Maximum Medical Improvement (MMI) at the time of the primary injury can still meet the first condition of a qualifying pre-existing disability under V.A.M.S. 287.220. A pre-existing condition that has not reached MMI can still be considered in determining whether the SIF is liable for PTD benefits, if the pre-existing condition meets the 50-week threshold and meets one of the four criteria under V.A.M.S. 287.220.3(2)(a). Second, the Court held Section 287.220.3(2)(b) can be held in its plural form. Therefore, *all* pre-existing disabilities which meet the minimum 50-week threshold, as well as one of the four eligibility criteria under V.A.M.S. 287.220.3(2)(a), can be considered in conjunction with the primary injury to determine whether the SIF is liable for PTD benefits. Third, the Court clarified that the second condition specifies that the pre-existing disabilities considered in conjunction with the primary injury must meet the eligibility criteria to be considered in a PTD claim against the Fund. Thus, a pre-existing disability that does not meet the 50-week threshold or does not meet one of the four eligibility criteria under V.A.M.S. 287.220.3(2)(a), is not to be considered when determining SIF liability for PTD.

The *Parker* decision provides a solid defense allowing employers and insurers to shift the liability for the PTD portion of a claim combining qualifying pre-existing condition(s) and the last accident from the employer to the SIF. The Employer and Insurer can stand behind *Parker* in asserting that all qualifying pre-existing disabilities should be considered against the Fund when defending alleged PTD cases on the basis that the total disability resulted from the last accident in combination with the pre-existing disabilities. The downside of the *Parker* decision is it effectively eliminates the argument by employers that combined disabilities with a sum of 50+ weeks PPD should be considered when determining SIF liability for PTD benefits. For example, a prior leg injury resulting in 30 weeks PPD and a prior low back injury resulting in 40 weeks PPD together are more than 50 weeks of disability, but neither can be considered when analyzing SIF liability as they do not individually meet the 50-week threshold.

Illinois

In Illinois, 820 ILCS 305 is the statute governing the Workers' Compensation Act. Section 7 of the Act discusses the SIF. While the Act discusses the SIF, it is not regularly used in Illinois practice as it is in Missouri. The Illinois' SIF is more narrowly constructed than most other states. Under the Act, if an employee with a prior injury resulting in complete loss of

use of the man or complete loss of use of a body part suffers the complete loss of another body part so that he/she is permanently and totally disabled, the employer is liable *only* for the injury due to the second accident. The SIF pays the amount necessary to provide the injured employee with a PTD benefit.

There is not any recent case law in Illinois pertaining to the SIF, likely because of the scarce use. The most relevant case is from 1979. The Court found that the employee lost all sight in her left eye prior to the accident, but her pre-employment physical examination showed that she had identical uncorrected and corrected visual acuity in both eyes. This evidence precluded the SIF from providing compensation, although there was evidence clearly supporting the finding that the work accident deprived the employee of the total use of one eye. The Court further explained that recovery under the SIF requires a finding that prior to the most recent work accident, the employee had suffered the complete loss of or loss of use of one member. That loss may have resulted in a prior award, or it may have occurred outside the Act, but it must have been capable of supporting an award if the other elements of compensability were present. The Court held the benefits under the SIF was not proper in this situation based on the circumstances of the injury.

The reasoning behind the purpose and creation of the Second Injury Fund in both Missouri and Illinois are similar. However, traditionally Missouri has allowed injured workers to claim benefits under the Fund in more circumstances than allowed in Illinois. However, with the recent statutory changes and Missouri Supreme Court opinions of *Cosby* and *Parker*, it seems Missouri is making it harder for parties to shift liability for employees who are permanently and totally disabled in part due to pre-existing disability to the Fund.

ABOUT THE AUTHOR

Jenna Scott

Jenna joined the firm's St. Louis office as an associate following graduation from law school in 2018. She received her J.D. from St. Louis University School of Law and her Bachelor of Science in Accounting from Bradley University.

Jenna focuses her practice on defending clients in workers' compensation and civil litigation, including in the areas of personal injury claims (premises, auto, and other casualty), product liability, professional liability, and trucking.

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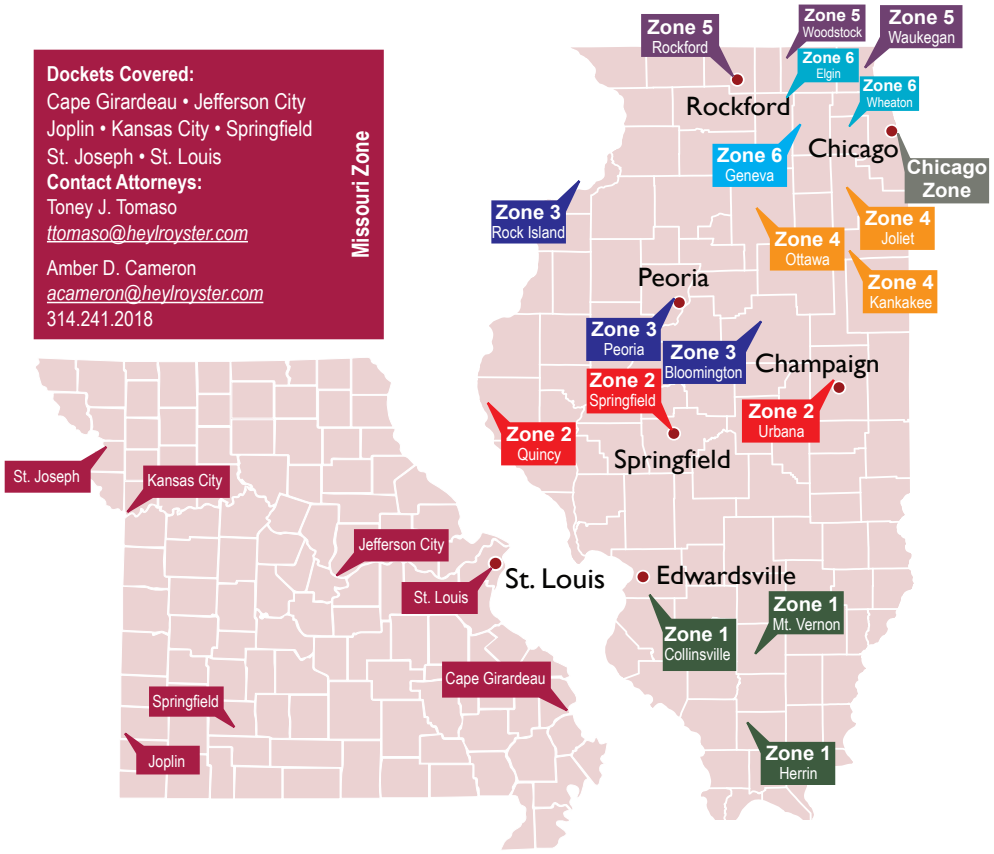

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