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Maria W. Daugherty: Ms. Daugherty joined Evans & Dixon in 2016, and has practice for 11 years. Prior to joining the firm, she served the state of Missouri as an Assistant Attorney General defending the State's Second Injury Fund which provides workers' compensation benefits to injured workers with multiple injuries over the course of their working lives. Her practice with the firm is focused on the defense of employers against claims for workers' compensation benefits. Having extensive litigation training and trial experience, Ms. Daugherty is highly skilled when it comes to disputed cases, permanent total disability cases, and cases likely headed towards trial. She has independently completed over 150 depositions, has first chaired over 100 administrative hearings, has argued in front of the Labor and Industrial Relations Commission 10 times, and has argued 2 cases in front of the Missouri Eastern District Court of Appeals. Having previously served as the Head of the Case Law Update team for the firm, she now proudly serves as Chair of the Leadership Committee and a member of the Diversity and Inclusion Committee.

SECOND INJURY FUND: Changes That Are Now Affecting Employers/Insurers

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What Is The SIF?

- Second Injury Fund
- A fund responsible for the billing and collection of the SIF surcharge from insurance carriers writing WC premiums in Missouri, and from self-insurers or group trusts authorized to self-insure in Missouri.
- Defended by a Unit in the Attorney General's Office
- Sometimes another party to PTD and PPD claims (i.e. another party possibly responsible for PTD)
- Historically was created to encourage Employers to hire workers injured during war.

Why Did The Law Have To Change?

- SIF was unable to pay awards and settlements they were already held liable for
- As of April 2014, there were 2,985 held awards or settlements (i.e. money that was not paid to injured workers)
 - 477 Permanent total disability
 - 2,493 Permanent partial disability
 - 15 uninsured
- Total amount owed and unpaid for Awards and settlements in April 2014: \$51,191,910.82 (PTD, PPD, and Uninsured)

“Old Law” SIF (dates of injury PRIOR to 1/1/14)

- SIF could be liable for both PPD and PTD
- PPD:
 - Pre-existing PPD whether from compensable injury or otherwise
 - Pre-existing injury/disability constituted a hindrance or obstacle to employment
 - Equal to 12.5% BAW or 50 weeks or
 - Equal to 15% of a major extremity
 - Synergy: Made the combined disability substantially greater than that which would have resulted from the last injury, considered alone and of itself
 - Employer only liable for disability that resulted from the last injury/“primary” injury

“Old Law” SIF (dates of injury PRIOR to 1/1/14)

- PTD
 - Pre-existing PPD whether from compensable injury or otherwise, combined with last injury together result in PTD
 - Minimum PPD (12.5% BAW or 50 weeks; or 15% major extremity) did not apply
 - Employer shall only be liable for the disability resulting from the last injury considered alone and of itself

What Changes Were Made Effective 1/1/14?

- No SIF liability for PPD (can no longer be made a party when PTD is not alleged)
- No uninsured claims
- No wagemloss
- In practice: a lot of uncertainty with regard to what Employers will now be liable for

“New Law” SIF (dates of injury AFTER 1/1/14)

SIF liability exists when EE has medically documented preexisting disability equaling a minimum of 50 weeks of PPD according to medical standards which is:

- Direct result of active military duty, OR

- Direct result of compensable work injury as defined under 287.020,
OR

- Not a compensable injury but such preexisting disability **directly** AND **significantly aggravates** OR **accelerates** subsequent work injury, OR

- Pre-existing PPD of an extremity, loss of eyesight in one eye or loss of hearing in one ear where there is subsequent compensable work-related injury in the opposite extremity or body part.
 - Example: Prior injury to left knee, and our injury involves right knee; prior injury to left shoulder, and our injury involves right shoulder.

- **AND** for the first three categories (military, prior compensable, or aggravates OR accelerates): The EE has a compensable work injury that combines with any of the foregoing preexisting disabilities to result in PTD; OR
- For the last category: the EE has a subsequent compensable work injury to the opposite extremity, loss of eyesight, loss of hearing, such that it combines with the preexisting disability to result in PTD.

Preexisting: 50 weeks from

–active military duty **OR** compensable injury **OR**

–not compensable but preexisting disability directly and significantly aggravates or accelerates the subsequent work-related injury **OR**

–permanent partial disability of extremity, or loss of eyesight in one eye, or loss of hearing in one ear

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–(for the first three categories) subsequent compensable work injury that combines with any of the foregoing preexisting disabilities to result in permanent total disability; OR

–(for the last category) subsequent compensable work injury to the opposite extremity, loss of eyesight in the other eye or loss of hearing in the other ear such that it combines with the preexisting disability to result in permanent total disability

- 287.715.6: Allows the DWC to collect a **supplemental** SIF surcharge, not to exceed 3%, for calendar years 2014—2021. Expires on 12/31/21.
 - Effective 1/1/14 the surcharge and supplemental surcharge totaled 6%.
 - The first monies from this increased combined surcharged flowed into the SIF in April 2014.

Why Should Employers/Insurers Care?

- It might cost Employers and Insurers MORE \$\$\$\$\$\$
- *Cosby v. Treasurer*
 - Commission (under Larsen) alluded to the notion that liability for the benefits which were once paid by the SIF may shift to ER.
 - Supreme Court affirmed decision of Commission, but did not really comment on the shifting of benefits.
- But the Supreme Court DID say: Old law applied to claims for PTD before 1/1/14. New law (with its stricter standards) applied to cases where primary injury is after 1/1/14.
 - As such, harder to get PTD benefits after 1/1/14.
- Restriction of these benefits against the SIF has encouraged the claimants' attorneys to pursue PTD benefits against the Employer.
- The primary concern of Industry throughout the “downsizing” of the SIF has been exactly that, the shifting of PTD liability from the SIF to the employer where the ALJ or Commission would otherwise have to deny benefits beyond PPD in a primary injury case where the employee can no longer work.

Treasurer v. Parker, 622 S.W. 3d 178 (Mo. En banc 2021)

- April 2021
- Involved an appeal by the SIF of a PTD award
- Court held that any and all qualifying disabilities can combine with the primary injury to result in PTD (debunking the SIF argument that only ONE preexisting disability could combine)
- Held that that “disability” presumed the plural “disabilities”
- Arguably held that employee could “stack” the preexisting disabilities that qualify and combine with the primary injury to argue this resulted in PTD
- Still left plenty of ambiguity in the new law

Klecka v. Treasurer, Court of Appeals, Eastern District

- June 2021
- Court of Appeals held that where there is at least one qualifying disability, then all non-qualifying disabilities must be considered. All factors should be taken into account in determining if a Claimant is PTD. This is good news for Employers.
- But of course, there is bad news too.
- Court also held that as the legislature limits SIF exposure for PTD, the employers' exposure increases. If the SIF is not liable and the EE is PTD, then the employer at the time of the last injury MUST be held liable for the PTD benefits.
- In practice, this means if EE is found to be PTD, he can't lose!
- In August 2021, the Court denied transfer to the Supreme Court

How Are We Seeing These Concerns In Practice?

- PTD claims, which were historically easy SIF PTD cases, are not settling
 - Claimants' bar concerned about letting Employers out
- No one (Legislature, Commission, Courts) has defined “aggravate” or “accelerate” yet
- Still a lot of concerns as to what the New law means and how one can successfully obtain PTD award from the SIF
 - Expert opinions need updating with new language
 - Not sure which preexisting disabilities will “count”

Questions/Concerns:



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