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Second Injury Fund Update

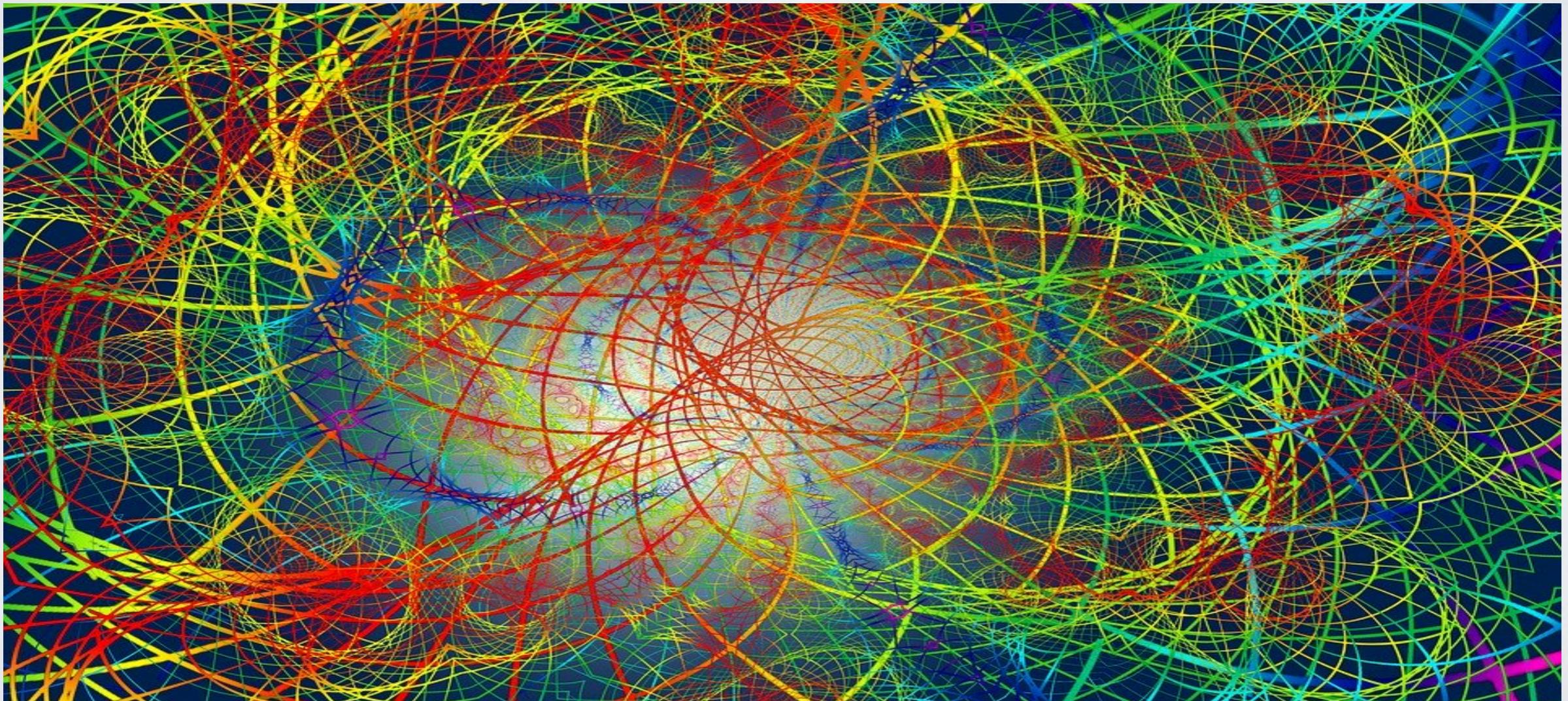
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Current State of the SIF





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What deciding body is it?





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Biggest news!



The Missouri Supreme Court recently handed down:

Treasurer v. Parker, No. SC 98704, 2021 WL 1554727, (Mo. banc April 20, 2021).



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Parker facts and findings

DOI: 6-12-14

Last injury: neck

Prior disabilities: right upper extremity (work related)

low back (not work related)

knees (not work related)

Parker's injury was on March 8, 2014. Pre-Cosby, ALJ applied old law following Gattenby and found PTD against the SIF.



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Parker facts and findings

Supreme Court issued Cosby on June 25, 2019.

LIRC decision in Parker was issued June 26, 2019.

LIRC affirmed the ALJ, likewise applying old law.

Fund appealed to the WDCOA claiming that under Cosby, the LIRC applied the wrong law, that new law applies, and under new law EE is not entitled to PTD.



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Parker at the WDCOA

(decision date 7-14-20)

WDCOA held that new law does apply.

WDCOA held that they did not need to remand the case to the LIRC to apply the new law (which they did in *Dubuc*) and instead applied new law to the facts.

WDCOA held that if there is one preexisting disability that qualifies under the new law, then all preexisting disabilities, even those that do not qualify, may be considered in the determination of Fund liability. They found EE PTD from a combo of all his preexisting disabilities and his last injury, and awarded PTD benefits from the Fund.



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What does the Supreme
Court say in Parker?





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Employees must meet two conditions to make a compensable PTD claim. First the employee must have **at least** one qualifying preexisting disability. (287.220.3(2)(a). To qualify under the first condition the preexisting disability must be medically documented, equal 50 weeks of disability, and meet one of the following criteria (i) result of active military (ii) result of compensable injury (iii) directly and significantly aggravates or accelerates the work injury (iv) disability of an extremity, eyesight in one eye, hearing in one ear when the work injury is to the opposite side



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Second Condition: The employee thereafter sustains a subsequent compensable work injury that when combined with the preexisting disability results in permanent total disability.



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Pre Parker-The Fund argued that in order to meet this second condition, the primary work injury could only be combined with ONE preexisting disability to result in PTD....but the Court had a different plan.....



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“To meet the second condition, the Fund argues only one preexisting disability can combine with the primary injury to result in PTD..... this Court disagrees. Although section 287.220.3(2)(b) refers to the preexisting disability in the singular form – “when combined with the pre existing disability”– section 1.030 instructs that the singular form should be interpreted to include the plural form. Therefore, section 287.220.3(2)(b) should be read to include “when combined with the preexisting disabilities.” Parker p.6 (Emphasis added)



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The Supreme Court held “the subsequent work-related injury must combine ‘with the preexisting disability, as set forth in (i), (ii), (iii), or (iv) of subparagraph a. of this paragraph.’” *Treasurer v. Parker*, No. SC 98704, 2021 WL 1554727, (Mo. banc April 20, 2021). The Court went on to state that the legislature excluded disabilities that are not the primary injury and that do not qualify under the first condition from being considered when determining if the claimant meets the second condition



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So again... which preexisting disabilities does the court look at when determining Fund liability under Parker?

“An employee satisfies the second condition by showing the primary injury results in PTD when combined with all preexisting disabilities that qualify under one of the four eligibility criteria listed in the first condition. They go on to say that “the existence of non-qualifying disabilities does not count against (or for) the claimant in evaluating whether he meets the second threshold condition.



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Other important issues
in the Parker decision:

1. MMI
2. 60 day notices



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MMI: The Court held that in determining PTD under the new law, the priors that are considered do not have to be at MMI before the primary injury occurs. The Court specifically held: “Section 287.220.3(2)(a) requires only that an employee has a medically documented preexisting disability equaling a minimum of fifty weeks of ppd before suffering the primary injury. That the employee’s disability was determined to reach MMI after he suffered his primary injury does not mean the employee suffered his preexisting disability after he suffered his primary injury. The statute does not require the employee know his injury equals a minimum of 50 weeks of ppd before suffering the primary injury...”



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60 day Notices: The Court found that materials are not admissible simply because they are attached to a notice. They went on to say, however, that the purpose of a notice is to help the other party evaluate the complete medical report. In Parker there was a report of Dr. Hess that was attached to the 60 day notice of Dr. Stuckmeyer's report. The Court found it admissible, not because it was attached to the notice, but because it was a part of Dr. Stuckmeyer's complete medical report –which in its entirety is admissible under 287.210.5



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In the meantime, pre-Parker, the Labor & Industrial Relations Commission issued several Awards in which it has held that to qualify for Fund benefits under the new law there must be “one” qualifying preexisting disability that combines with the last injury to result in permanent total disability. A few of those cases include:

Everett Ptomey, WD83918

Martha Satterfield, Injury Number 17-011298

Lexow, v. Treasurer, ED108853

Klecka v. Treasurer, ED108721

Charlie Hammons, WD83916

Jody Sneed, SD36803

Michael White, WD83995



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Ongoing issues:

1. If an employee has multiple priors and some meet the statutory criteria and others do not, then ONLY the ones that meet the criteria should be considered by the experts as a basis for the PTD opinion. In some cases there will still be some priors that do not meet the threshold and were considered as part of the PTD analysis and those cases still do not meet the criteria for Fund liability and SIF will not pay.
2. Can we stack multiple injuries to get to 50 weeks? Same or different body parts.....
3. Can we stack multiple body parts from one accident to get 50 weeks?
4. Interesting issue: if a claim is filed in another jurisdiction benefits are not payable from the SIF. (Applicable mostly in Kansas and Illinois) RSMo 287.220.12



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And... there are more cases





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Cases to watch





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- 1) Facts: Post 2014 claim was heard before the ALJ prior to Cosby-ALJ applied old law. Then Cosby came down after the ALJ ruled-but before window to appeal to the LIRC. SIF appealed asking LIRC to apply new law per Cosby. LIRC ruled that new law applies, SIF not liable for PTD.
- 2) CL argues if SIF isn't liable, then ER should be.... But CL settled with ER... so.....
- 3) Since CL "settled" with the employer-other than the issue of future medical only-and the hearing was only regarding future medical-can the "settlement" between CL and ER be set aside so CL can argue that ER is liable under the new law if SIF is not??



*Randall Clinkenbeard v. State of MO & SIF
SD36942 (currently at SDCOA)*



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Under new law, if one or some of the preexisting disabilities—do you still consider the other preexistings that do not meet the Fund criteria?

Lexow v. Treasurer, ED 108853 EE alleged twelve priors, but the Commission only made findings as to which exceed 50 weeks of PPD, and did not determine if those disabilities fall into any of the categories. The COA remanded the case back to the Commission to determine which of Claimant's preexisting disabilities qualify under the statute and whether they combine with his primary injury to render him PTD. The COA also made a ruling of law that Section 287.220.3(2)(a)a(ii)—the category that allows consideration of preexisting disabilities that are a “direct result of a compensable injury as defined in section 287.020—encompasses both accidental injuries defined in section 287.020 and injuries by occupational disease defined in section 287.067. The Fund has requested rehearing or transfer to the Missouri Supreme Court from the COA.



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Klecka v. Treasurer ED 108721

EE has one preexisting disability that qualifies under the new law and multiple others that do not qualify. The Commission found that his evidence shows that he is PTD only when considering all of his alleged priors, not just the one that qualifies, in combination with his primary injury. This case is fully briefed and argued before the COA, and we are waiting on a decision.



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Can you file one Claim for Compensation
for two different injuries?

Can one of those different injuries (on the
same day) be a preexisting and the other
one a last injury for Fund purposes? (Still
awaiting oral argument)



Anttila v. Treasurer, SD36826



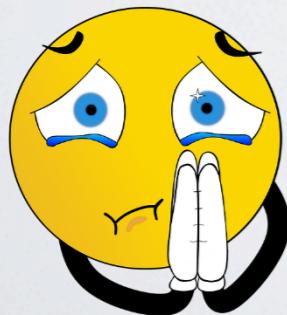
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In light of the new cases determining that new law applies, and how it applies, can you submit new evidence after you have tried your case before the ALJ?

Thus far the LIRC has denied such requests





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Thomas Dubuc WD82809

The COA reversed and remanded the case, finding that under *Cosby*, new law applies. The decision is very sweeping and the COA finds that *Cosby* overturned *Gattenby* and that *Cosby* applies not only to PPD cases but also to PTD cases.

The case was remanded to the LIRC who held that there no "medical documentation" of the pre-existing disability because there were no contemporaneous medical records. Also held that "generic testimony" of about "aggravate and accelerate" is not enough. They denied all benefits.

Case has been appealed again to the WDCOA.



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Does the Fund still have a “last accident” defense under the new law?

Roy Franklin v. Treasurer SD36898 Last week the SDCOA upheld a LA from the Commission.

Side note: SDCOA continues to defer to the commission’s credibility determinations.



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Bruce Krysl ED108958 Post 1-1-14 case for PPD benefits from the SIF. The ALJ awarded benefits. The compensable claim is an occupational disease occurring on January 1, 2013 but the claim was not filed until July 5, 2016. The ALJ looked to the old law based on the date of injury being prior to 1-1-14. The LIRC reversed and followed *Gattenby*, finding that if the compensable injury is an occupational disease and the claim is FILED after 1-1-14 the new law applies. It then held that under the new law there are no PPDs against the Fund so denied all benefits. EE appealed this court to the EDCOA who reversed and remanded basically finding that the stipulated date of the injury was before 1-1-14, therefore the old law applies. SIF filed an Application for Transfer with the Supreme Court in part of the grounds that this case conflicts with the WD in its *Gattenby* holding. Supreme Court denied the Application for Transfer. The ED entered a mandate for the LIRC to affirm the Award of the ALJ for PPD benefits against the SIF.

The SIF asked the ED to change its mandate to allow the LIRC to rule on the 2nd issue raised by the SIF in the initial appeal to the LIRC. The ED refused to do so. The LIRC issued a new Award reinstating the Award of the ALJ for PPD benefits from the SIF. SIF appealed the denial of the Commission because they failed to review the other point that was before them which was that CL is not entitled to benefits because the prior disability was not at MMI at the time of the last injury. SIF took it up to the EDCOA a 2nd time based on this. EDCOA agreed with SIF that we had been denied our right of review on this issue and remanded the case to the LIRC. The LIRC found that the prior was not at MMI and denied SIF benefits. The EE appealed to the EDCOA (This is essentially *Krysl III*.)



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Questions or Comments?

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