

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**RAYMOND SKIRVIN**

**RESPONDENT,**

**v.  
TREASURER STATE OF MISSOURI,  
ET AL.**

**APPELLANT.**

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DOCKET NUMBER WD75541

DATE: January 22, 2013

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Appeal From:

Cole County Circuit Court  
The Honorable Patricia S. Joyce, Judge

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Appellate Judges:

Division Three: Alok Ahuja, Presiding Judge, Victor C. Howard, Judge and Cynthia L. Martin,  
Judge

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Attorneys:

Andrew H. Marty, St. Peters, MO, for respondent.

Ronald R. Holliger and John R. Phillips, Jefferson City, MO, for appellant.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
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**RAYMOND SKIRVIN,**

**RESPONDENT,**

**v.**

**TREASURER STATE OF MISSOURI,  
ET AL.,**

**APPELLANT.**

No. WD75541

Cole County

Before Division Three: Alok Ahuja, Presiding Judge, Victor C. Howard, Judge and Cynthia L. Martin, Judge

Missouri Treasurer Clint Zweifel and the Director of the Division of Workers' Compensation John J. Hickey appeal the trial court's grant of a writ of mandamus ordering them to pay a permanent total disability award in favor of Raymond Skirvin and against the Missouri Second Injury Fund. Appellants claim mandamus is unavailable to compel payment from a fund that is insolvent and unable to pay all recipients of permanent total disability awards.

**Majority Opinion holds:**

**REVERSE. CASE ORDERED TRANSFERRED TO MISSOURI SUPREME COURT  
PURSUANT TO RULE 83.02**

1. Execution may not run against the property of a political subdivision of the State. The only procedure available to permit a judgment creditor to collect a judgment from a political subdivision of the State is a writ of mandamus.

2. The right to mandamus is not absolute, but is a discretionary writ. To be appropriate, there must exist a clear, unconditional legal right in the relator and a corresponding present, imperative, unconditional duty of respondent.

3. Under section 287.220.1, Appellants are afforded no discretion, and thus have a ministerial duty to pay compensation and benefits awarded to a SIF claimant. The Appellants' duty to safeguard SIF funds described in section 287.710.5 does not convert this ministerial duty to a discretionary one, as the duty to safeguard controls what SIF funds can be used for and not whether SIF funds can be withheld from a claimant with an uncontested right to payment from SIF.

4. Though the Appellants' duty to pay SIF claims is ministerial, the right to mandamus remains nonetheless subject to the principle that mandamus cannot be issued to compel full payment of a claim from a fund with insufficient resources on hand to pay all claims, and with no power to replenish itself to insure the availability of sufficient funds to pay all

claims. In such a case, a fund is deemed "insolvent," and the first come/first served rule otherwise applicable to determine the priority of claims does not apply. At best, claimants in such circumstances may be entitled to compel ratable payment of their claims.

5. Here, SIF is conceded by Skirvin to be insolvent as it has insufficient resources on hand to pay all claims against it, and the deficiency between claims and available resources to pay claims is only projected to get worse. At the present, that deficiency exceeds \$21,000,000.00. Moreover, examination of the SIF funding statutes clearly reveal that in 2005, the General Assembly amended section 287.715.2 (the SIF funding statute) to cap the Surcharge the Director is authorized to assess to fund SIF at 3%. Neither the Director nor the Treasurer (the parties whose performance is sought to be compelled in this action) possess any statutory authority to increase the Surcharge beyond the statutory cap of 3%, or to otherwise replenish SIF to a level sufficient to pay all claims against it.

6. Skirvin's petition for writ of mandamus sought only an order compelling full payment of his claim. The trial court erred in granting this relief, as although the amounts on hand in SIF were sufficient to pay Skirvin's claims, they were not sufficient to pay all claims against SIF, and cannot be replenished within the existing bounds of the law to a level sufficient to pay all claims.

7. Skirvin did not seek ratable payment of his claim, and in any event, ratable payment of SIF claims would likely necessitate recurrent and complex calculations requiring ongoing court supervision, inconsistent with the remedy of mandamus.

8. We are required by controlling Missouri Supreme Court authority to reverse the trial court's grant of mandamus. We express reservations about the constitutionality of the General Assembly's cap on the Surcharge given the General Assembly's mandate that an injured employee's ability to recover for the pre-existing portion of second injuries is restricted exclusively to SIF. However, the constitutionality of SIF's funding mechanism is a matter beyond our authority to determine as such questions are relegated to the exclusive jurisdiction of the Missouri Supreme Court.

9. Because of the general interest and importance of the issues involved in this case, we order the case transferred to the Missouri Supreme Court pursuant to Rule 83.02.

**Concurring Opinion holds:**

Judge Ahuja concurs with separate opinion. In his view, the fact that the Second Injury Fund does not have sufficient funds on hand to satisfy all claimants in the same position as Mr. Skirvin prevents him from receiving full payment for his award, whether or not the Fund is "insolvent," and whether or not the Fund has the ability to raise additional revenues.

**Dissenting Opinion holds:**

The dissent would hold Skirvin has a present, clear, and unconditional right to be paid his award in full, because the funds are available and the State has the ability and obligation to replenish the funds for others. The dissent concurs in the majority's order to transfer.

Majority Opinion by Cynthia L. Martin, Judge  
Concurring Opinion by Alok Ahuja, Presiding Judge  
Dissenting Opinion by Victor C. Howard, Judge

January 22, 2013

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