

IN THE SUPREME COURT OF MISSOURI

STATE EX REL RAYMOND SKIRVIN,)

Respondent,)

vs.)

Case No. SC93092

CLINT ZWEIFEL,)

MISSOURI STATE TREASURER,)

et al.,)

Appellants.)

**Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia Joyce, Judge**

APPELLANTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the Circuit Court of Cole County, Missouri. The trial court erroneously entered a writ of mandamus against Appellants-Respondents dictating that they pay money from the Missouri Second Injury Fund "SIF" to Respondent-Relator based on an Labor and Industrial Relations Commission award against the SIF. However, the SIF is insolvent and has been unable to pay new awards accruing against it since approximately June 2011.

After opinion by the Missouri Court of Appeals Western District this case was transferred to the Supreme Court of Missouri pursuant to Rule 83.02.

POINTS RELIED ON

I. The trial court erred in granting the writ of mandamus because the court erroneously applied the law in that it failed to take into account the public interest in granting mandamus and that it is not in the public interest where hundreds of citizens have mature claims against an insolvent fund to grant priority to the claimants in the order that they win the race to the courthouse.

State ex rel. Sturdivant Bank v. Little River Drainage District,

68 S.W.2d 671 (Mo. banc 1934)

State ex rel. Drainage District No. 8 of Pemiscot County v. Duncan,

68 S.W.2d 279 (Mo. banc 1934)

State ex rel. Bliss v. Grand River Drainage District,

49 S.W.2d 121 (Mo. banc 1932)

II. The trial court erred in granting mandamus against the SIF because the court erroneously applied the law in that mandamus is not properly awarded where a state fund is insolvent and the Director of the Division of Workers' Compensation is exercising quasi judicial discretion in determining the order and priority of SIF payments and not acting arbitrarily or abusing his discretion.

State ex rel. Schulz v. Fogerty,

195 S.W.2d 908 (Mo.App. 1946)

III. The trial court erred in refusing to join all other claimants with awards against the SIF in this lawsuit because they are necessary parties in that the SIF is insolvent and there are multiple claims to the same limited SIF monies and complete relief cannot be awarded without joining all SIF claimants who also have an interest in whether SIF can continue paying them while also paying Relator.

State ex rel. Clinton Area Vocational School v. Dandurand,

766 S.W.2d 169 (Mo. App. W.D. 1989)

State ex rel. Mayberry v. City of Rolla,

970 S.W.3d 901 (Mo.App. S.D. 1998)

STATEMENT OF FACTS

Raymond Skirvin (“Relator”) originally filed his Petition in Mandamus in the Circuit Court for Marion County, Missouri, seeking to collect on a May 6, 2011 permanent total disability (“PTD”) award by the Labor and Industrial Relations Commission against the Second Injury Fund (“SIF”). L.F. 7-8. The underlying award called for Relator to receive \$99.37 per week commencing on July 26, 2006 and continuing for sixty (60) weeks, and then weekly payments of \$464.45 for life from the SIF. L.F. 15.

Subsequently, the case was transferred from Marion County Circuit Court to Cole County Circuit Court. L.F. 2. Missouri Treasurer Clint Zweifel (“Zweifel”) answered the petition and filed his motion to join necessary parties, arguing that all permanent total disability awardees have an interest in this case, and/or that relief cannot be fully afforded in their absence. L.F. 32-35.

On June 21, 2012, there was a hearing on Zweifel’s motion to join necessary parties and Relator’s Petition in Mandamus. L.F. 4. At the hearing, Zweifel called Cindy Streumph¹, Second Injury Fund program manager for the Missouri Division of Workers’ Compensation. Tr. 6. In that role, Ms. Streumph oversees the receipt and handling of awards that are made by administrative law

¹ The transcript refers to a “Cynthia Streumph.” However, the witness’s name is Cindy Streumph.

judges or the Industrial Relations Commission against the SIF. Tr. 6-7. She also is responsible for overseeing the funds that are received from insurers based on the premium tax that funds the SIF. Tr. 7. Finally, Ms. Streumph is responsible for processing disbursements from the SIF. *Id.*

Ms. Streumph testified as to the fiscal health of the SIF. Tr. 5-6. At the time of the hearing, there were 1079 current recipients of bi-weekly permanent total disability payments from the SIF. Tr. 8. The average monthly total of those recurring payments from the SIF was \$2,028,342.82. *Id.* In addition, at that time, SIF paid approximately \$500,000.00 per month in permanent partial disability awards. Tr. 11. SIF also paid attorneys from the Attorney General's Office approximately \$240,000.00 per month to defend against claims. Tr. 24. The total revenues for SIF were \$43,284,364.00 for FY 2011. *Id.* The total expenditures for SIF in FY2011 were \$39,609,685.50. Tr. 12. With the unpaid awards the total liabilities incurred by SIF in FY 2011 were 61 million. Tr. 12

SIF receives income on a quarterly basis. Tr. 12. The payments are due by the end of the month following the end of each calendar quarter. *Id.* The payments come from a 3% tax ("surcharge") on premiums paid to insurance carriers and self-insured employers. Tr. 16.

In March of 2011, SIF could not meet its obligations to new awardees because the General Assembly had capped the surcharge at 3% in 2005, the reserves had been exhausted and insufficient revenues were being collected to

make all current obligations. Tr. 8, 16. *Id.* As a consequence, payments on new permanent total awards were withheld beginning that month. ² Tr. 8.

At some later point, SIF had accumulated sufficient excess funds to pay the awards that were initially withheld in March, April and May of 2011. Tr. 9. But payments on any new awards since then have been withheld. *Id.* The liability for those unpaid new awards was \$21,313,855.80 (without interest) at the time of hearing in this matter. *Id.* This liability has only increased based on bi-weekly payments owed, interest, and new unpaid claims. Tr. 17. The balance in the SIF at the time of hearing in this matter was \$6,500,000.00. Tr. 12. It was projected to be only \$3,900,000.00 on July 15, 2012. Tr. 13. At the time of hearing, SIF was in deficit at least \$15,000,000.00. Tr. 15.

Relator was owed approximately \$124,000.00 in back due lump sum payments and interest at the time of the hearing. Tr. 18. There was more money in the SIF than was owed to Relator at the time of hearing. Tr. 26.

Relator added John J. Hickey, Director of the Division of Workers' Compensation as a party on June 25, 2012. L.F. 4. Also on June 25, 2012, the Court granted Relator's Petition in Mandamus and ordered that consistent with the underlying award, he be paid immediately in full. L.F. 40. Zweifel and

² Although not in the record, immediately after the judgment in this case payments of permanent partial disability awards were ceased.

Hickey moved to reconsider or for new trial and that motion was denied on August 6, 2012. L.F. 44. They timely filed their notice of appeal. L.F. 45.

INTRODUCTION

There is no question but that the Second Injury Fund (hereinafter SIF”) is unable to pay all of its obligations as they come due. Nor is there any question that Relator and hundreds of past, present and future recipients of workers’ compensation awards have moral and legal rights to their disability benefits. But the essential question here is first, whether Relator or any other claimant has a superior moral or legal claim of priority. The second essential question is whether mandamus is an appropriate remedy for determining the legal priority of payment.

STANDARD OF REVIEW

Mandamus does not issue as a matter of right. Therefore, its grant or refusal is reviewed for an abuse of discretion. *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo.App. 1998). “The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberation. *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). Nor does discretion permit an erroneous interpretation of law to serve as the basis of a ruling. *Bohrn v. Klick*, 276 S.W.3d 863, 865 (Mo.App 2009).

I. The trial court erred in granting the writ of mandamus because the court erroneously applied the law in that it failed to take into account the public interest in granting mandamus and that it is not in the public interest where hundreds of citizens have mature claims against an insolvent fund to grant priority to the claimants in the order that they win the race to the courthouse.

“A writ of mandamus is appropriate only where it compels ministerial actions; it may not be utilized to compel the performance of a discretionary duty.” *State ex rel. Childress v. Anderson*, 865 S.W.2d 384, 386 (Mo. App. S.D. 1993) (citing *State ex rel. Schaefer v. Cleveland*, 847 S.W.2d 867, 870 n. 8, 9 (Mo. App. 1992)). A writ of mandamus is not a writ of right, and the court has discretion in issuing it. *Id.* (citing *Anderson v. Smith*, 377 S.W.2d 554, 559 n. 9 (Mo. App. 1964)). “[H]owever, the court should **look to the public interest** which may be concerned, and act in view of all the existing facts and with due regard to the consequences.” *Id.* (emphasis added).

Put simply, the issuing of a writ of mandamus must be in the public interest. Respondents do not contest that Relator is owed money from the SIF. The question is how and when that money will be paid.³ And although generally

³ That there is a role for consideration of interests beyond Relator’s mere claim is demonstrated by the requirement that a claim against the state cannot be

considered insolvent, this brief considers whether the SIF is legally insolvent as that term is used in several of this court's decisions involving a mandamus action against a fund that could not pay all of its obligations.

**THE SECOND INJURY FUND IS INSOLVENT UNDER EITHER THE
BALANCE SHEET OR EQUITY TESTS**

The two standards for judging insolvency are generally the balance sheet or equity tests. Balance Sheet insolvency exists when the debtor's liabilities exceed its assets. So-called equity insolvency is created when the debtor cannot meet its obligations as they come due. Black's Law Dictionary at 799 (7th Ed.) Both definitions are used in Section 428.014 dealing with fraudulent conveyances and liens.

Testimony at trial established that SIF revenues for the 2011 calendar year were 43.2 million. (Tr. 11) At the time of trial, current past due liabilities for permanent total disability claims (PTD) were approximately 21 million dollars. (Tr. 9). Additionally, the SIF pays approximately 2 million per month in bi-weekly ongoing benefits for totally disabled claimants. (TR. 8). Finally, the SIF

enforced by garnishment, *Otte v. State Treasurer*, 141 S.W.3d 74, 76 (Mo. App. E.D. 2004), but only by mandamus. If mandamus is to be considered in this context as directed purely at a ministerial act there would be no logical reason for exempting a public claim from garnishment.

incurs approximately \$500,000 per month for partial disability awards, (Tr. 11) and an additional amount of approximately \$240,000 per month for legal expenses. At the time of trial the total payouts and liabilities for fiscal year 2012 were approximately \$61 million vs. 43.2 million in revenues. The balance in the SIF as of the date of trial was \$6.5 million.

THIS COURT'S PRIOR TREATMENT OF INSOLVENCY IN MANDAMUS

ACTIONS

These facts satisfy the insolvency test discussed in *State ex rel. Sturdivant Bank v. Little River Drainage District*, 68 S.W.2d 671 (Mo. banc 1934) and *State ex rel. Drainage District No. 8 of Pemiscot County v. Duncan*, 68 S.W.2d 679 (Mo. banc 1934). These two cases are very helpful to the analysis here because, like the SIF, they involve variable revenue streams (via the district's taxing power) and payment of current obligations on bond payments competing with other matured and future bond payments. Their similarity and application in this case requires some discussion of the SIF's funding mechanism.

Revenue comes solely from a surcharge on premium payments for workers' compensation coverage paid by employers. Section 287.715, RSMo. 2000. Prior to 2005, the Director of the Division of Workers' Compensation was charged with setting the surcharge at an amount necessary to generate approximately 110% of the amount anticipated to be necessary in the following calendar to pay benefits less any carryover from the prior year. *Id.* In 2005 the Missouri General

Assembly capped that surcharge at 3%. Section 287.815, RSMo. 2005. The State Treasurer is designated as the Custodian of the Fund, Section 287.220, RSMo. 2000, and is charged to “sacredly safeguard and preserve all funds collected . . . for the purposes herein declared.” Section 287.710(5), RSMo. 2000. Payments are received quarterly which means the balance in the SIF at any point in the quarter must be sufficient to cover the anticipated bi-weekly payments and legal expenses of the fund until the next quarter’s receipts have come in.

In *Sturdivant* a drainage district had issued bonds to pay for improvements with the bonds to be solely paid out of special taxes levied against benefits assessments that by statute could not be raised. *Id* at 673. The district defaulted in payment to a bond holder when the special taxes were insufficient to pay all the bonds. Apparently other bond holders agreed to pro rata payments but Sturdivant Bank insisted on payment in full and filed a mandamus. The court first needed to decide whether the drainage district was in legal effect insolvent. In doing so the court first addressed whether the drainage district had an “inexhaustible power to tax” concluding that the bonds in question were not the general obligation of the district and that the district had no authority to levy a general tax for their payment. 68 S.W.2d at 672. Similarly here, SIF benefits are paid solely by that fund which collects monies based on a surcharge, which by law cannot exceed 3%. The court in *Sturdivant* held that “[i]f the tax returns within these limits are insufficient to pay all bonds and interest in full, the

district is in legal effect insolvent.” *Id.* In those circumstances the court observed in dicta that pro rata payments the court deferred the question whether mandamus would be available to reach that result but that in any event that relief had not been sought mandamus would be denied. *Id.* at 770.

The SIF clearly satisfies this standard. There is no statutory provision for priority of one claim over another, SIF benefits are not general revenue obligations and Respondents have exhausted their taxing power by reaching the surcharge cap. One distinction should be acknowledged. In *Sturdivant* the future liabilities of the district (the unmatured bonds and interest) were fixed and determinable. For SIF some comparable liabilities (future benefits) are fixed and determinable by actuarial calculation (the ongoing bi-weekly PTD payments) but the liabilities for claims not yet reduced to compensation awards is far more indefinite. Nevertheless, even if this would prevent application of the *Sturdivant* insolvency test to SIF, the Relator here is not entitled to the mandamus relief he sought and received.

**MANDAMUS IS NOT AN APPROPRIATE REMEDY BECAUSE RELATOR
IS NOT ENTITLED TO FULL PAYMENT**

The question is whether use of mandamus is a proper remedy where either the SIF is insolvent or unable to pay all of its currently due obligations. In

Sturdivant the court held mandamus was improper. 68 S.W. 2nd at 676.⁴ That conclusion cited *State ex rel. Bliss v. Grand River Drainage District*, 49 S.W.2d 121, 124 (Mo. banc 1932) for the proposition that apportionments cannot be made in a mandamus proceeding and that a relator gets the relief he asked for or none at all. In *Pemiscot County* the action was a writ of prohibition concerning the right of the court to hear a mandamus action concerning a drainage district unable to pay all of its matured bondholders. The court permitted the trial court to proceed consistent with its opinion which necessarily would require the trial court to order pro rata payments (or at least not payment in full). In *Pemiscot County* (unlike *Sturdivant*) insolvency was not conceded. Nevertheless, the court looked at all of the matured obligations to determine whether mandamus was appropriate. Concluding that they exceeded the available funds (like SIF, the district had substantial mature unpaid bond liabilities), the court held that the Relator was not entitled to payment in full. Under either *Sturdivant* or *Pemiscot County*, the court should hold that Relator is not entitled to full payment.

Neither *Sturdivant* nor *Pemiscot County* per se requires pro rata payments in the event of insolvency. In *Sturdivant* the court discussed various equitable maxims and their application to the drainage district's insolvency. The court

⁴ That conclusion was likely effected because the drainage district had offered pro rata payments but Relator refused.

rejected the maxim that equity aids the vigilant, 68 S.W.2d at 675-76. That is the principle that Relator seeks to apply here. The first to get a mandamus judgment is first in priority. That principle should not be applied here, as it was not in *Sturdivant*, because there is nothing in the SIF statute that indicates a preference for payment of one past due obligation over another. Another maxim discussed was that when equities are equal the first in order of time must prevail. In essence this has been the principle followed by the SIF during this crisis.⁵ In *Sturdivant* the court applied the maxim that equality is equity thus an approval of pro rata payments.

But neither *Sturdivant* nor *Pemiscot County* involves some of the complications presented by SIF pro rata payments. First, even setting aside the unknown future liabilities, it is not at all obvious how to pro rate SIF payments. Biweekly payments are designed to help permanently injured Missourians live when they are unable to work, and the lump sum payment provides compensation for past harm. Should the biweekly payments be paid in full but the lump sum prorated? Should the lump sums be paid in full but the biweeklies prorated? Should both be prorated? Further complicating this analysis is that there is a group of SIF recipients who have received their payments and another group who have not; the former group has had their social security disability payments reduced in a way that the latter group has not. Does the same pro rate

⁵ Apart from administrative costs as discussed below.

split apply to both groups? Second, in addition to the uncertainty surrounding what pro rating even means in the context of SIF, the salaries for the Attorney General's lawyers and staff defending the thousands of cases currently pending are paid out of the fund.

Other questions were left unanswered or did not apply in *Sturdivant* and *Pemiscot County*. Pro rating bond payments was a less complicated exercise than it is with SIF because all of the current and future liabilities were known. In contrast, even an actuarial study of thousands of currently pending SIF cases does not adequately delineate the future liabilities because additional meritorious claims may already have accrued but not yet been filed. How would a court handle bonds that matured in the future (new awards against the SIF are made every day)? Would the reality of new awards every week require constant readjustment of the ratable payments? How often would the adjustments be made? Could all of these future adjustments be accomplished or even considered in this Relator's mandamus action or would a new mandamus action be required? Would the effect of this procedure be to somehow convert a mandamus action into some type of undefined receivership? Would that require more equitable powers than can or should be exercised under a mandamus theory? Does due process or other legal considerations require that competing unpaid claimants be joined in a mandamus action intended to determine their pro rata share? Is it reasonable for the court below to administer a

mandamus/receivership with 1300 parties and additions to the class nearly every day? These uncertainties surrounding what pro rating means in the context of the SIF suggest that following the same equitable principle followed in *Sturdivant* and *Pemiscot* Relator seeks too uncertain a remedy to be handled as part of a mandamus action.

Here, the public interest is in the viability of the SIF, or in the orderly disposition of SIF assets, not simply whether Relator gets his particular award **as quickly as possible**. At a minimum, the public interest is in considering whether new awardees, or a particular awardee such as Relator, can effectively jump in line and obtain their money ahead of those individuals who have been receiving SIF payments for years.⁶ By virtue of this and other court rulings, these writ cases have already become the quintessential “race to the courthouse.”

In issuing the writ of mandamus, the trial court ignored the public interest in the viability of the SIF, or the orderly disposition of SIF money.⁷ This case

⁶ Among other things, because of the way Social Security disability payments offset SIF payments, those already receiving SIF payments have had their Social Security payments reduced, while those who have not received SIF payments have not.

⁷ Similarly, it is also clear that the financial health of the SIF is a political question for the General Assembly. After all, the General Assembly caused the

should be reversed with directions to dismiss the Relator's action because the issuance of a writ of mandamus was an abuse of discretion.

II. The trial court erred in granting mandamus against the SIF because the court erroneously applied the law in that mandamus is not properly awarded where a state fund is insolvent and the Director of the Division of Workers' Compensation is exercising quasi judicial discretion in determining the order and priority of SIF payments and not acting arbitrarily or abusing his discretion.

As discussed earlier, mandamus only properly is used to compel a purely ministerial act. The payment of funds from the State Treasury or a sub-fund in that Treasury is never a purely ministerial act and mandamus cannot be utilized to force payment of a claim against the state or a fund such as SIF established by the state.

The Missouri statutes set forth clear requirements for presentation and payment of claims against the state. Section 33.120, RSMo. 2000 ⁸ requires that "[P]ersons having claims against the state shall exhibit the same, with the

shortage of funds by capping the surcharge at 3% (Tr. 16), and they should be relied on to solve the problem, one way or another. As such, in the interim, the Court should not be injecting its view of who should be paid when. *See Bennett v. Malinckrodt, Inc.*, 698 S.W.2d 854, 863-64 (Mo. App. E.D. 1985).

⁸ All statutory references are to RSMo. 2000 unless otherwise noted.

evidence in support thereof, to the commissioner of administration, **for the commissioner's approval**" The commissioner is even given the power to call witnesses and issue subpoenas concerning such a claim. Section 33.140. As part of that approval process the commissioner must determine that the expenditure is within the purpose of an appropriation and that there is a sufficient unencumbered balance to pay the claim. Section 33.030, RSMo. If the claim is approved then the commissioner signs a warrant which is then presented to the state Treasurer. Section 33.060. The Treasurer is forbidden to make payment from the Treasury in the absence of a proper warrant. Section 33.170. Since the early 2000's these obligations, under Memorandum of Understanding, have been performed by the various departments and agencies on the commissioner's behalf. The Director of the Division of Workers' Compensation performs those duties of the commissioner for SIF claims.

Prior to 1945, these same functions were performed by the State Auditor. In *Gehner v. Thompson*, 293 S.W. 391 (Mo. Div. 1 1927) the St. Louis City Collector made a mandamus claim to the State Auditor for money he believed owed him by the state. This court said that mandamus will not issue in a doubtful case and will not be used to control the exercise of discretion of any officer as to judicial or quasi judicial power, unless he clearly abuses his discretion. *Id.* at 396. Discussing statutes very similar to those cited above in Chapter 33, this court held the statutes "constitute the auditor a quasi judicial

officer for the adjustment of accounts presented to him to be admitted [admitted?]. . . This . . . [is] conclusive reason for denying relief by mandamus.” *State ex rel Keck v. Seibert*, 32 S.W. 670 (Mo. 1895). The law concerning ministerial acts certainly cannot not require the Director of the Division of Workers’ Compensation to sign warrants for payment of more money than is available at a particular time in the SIF. Moreover, the State Treasurer is prohibited by law from honoring those warrants as much as he would be forbidden to issue drafts on the state general fund that would overdraw it. Assuming, which Respondents submits we must, that the Director and Treasurer have some discretion to prevent the SIF from going completely belly-up, the proper question is whether they have abused that discretion arbitrarily, capriciously or in bad faith. *State ex rel Schulz v. Fogerty*, 195 S.W.2d 908, 911 (Mo.App. 1946). There is no evidence or even an allegation that Respondents are exercising their discretion in an improper way. Relator’s claim is simply that because he got to the courthouse first that he should be paid first and immediately in full.

Under these circumstances, Respondents should be permitted to continue to manage the fund as they have to attempt to obtain the fairest and most equal treatment available and the writ of mandamus be dismissed.

III. The trial court erred in refusing to join all other claimants with awards against the SIF in this lawsuit because they are necessary parties in that the SIF is insolvent and there are multiple claims to the same limited SIF monies and complete relief cannot be awarded without joining all SIF claimants who also have an interest in whether SIF can continue paying them while also paying Relator.

Even if this court determines that the remedy of mandamus may be used in the circumstances of the SIF, it should reverse the trial court and remand for further proceedings. The trial court erred in applying the law and abused its discretion when it granted Relator's writ of mandamus and effectively denied Zweifel's motion to join all of the current recipients and unpaid awardees of permanent total disability benefits. These potential parties all have claims against the monies in the SIF and an interest in what priority is applied to limited funds to make payments. They were, therefore, necessary parties in this case.

Mo. S. Ct. R. 52.04(a):

[a] person shall be joined in the action if: **(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of**

the action in the person's interest may (i) as a practical matter impair or impede the person's ability to protect that interest....

If the person has not been joined the court shall order that the person be made a party... (emphasis added).

At the time Zweifel filed his motion, there were 1032 payees receiving regular recurring permanent total disability payments for life from the SIF. L.F. 32. In addition, at that time, there were 148 additional permanent total disability awardees in the same situation as Relator, except that most had not brought writs of mandamus. *Id.*

There is no disagreement that SIF is unable to pay all the monies owed to the new awardees while continuing to pay those individuals currently receiving benefits. *Id.* The 148 awardees were owed approximately \$10,604,000.00 in just back due lump sums. L.F. 33. With interest, additional withheld awards, and bi-weekly payments, at the time of the hearing in this matter, SIF owed awardees \$21,313,855.80. Tr. 8. The SIF is also the sole source of salary payments for assistant attorney generals who represent the Fund. Tr. 24. Those payments average \$240,000.00 per month. *Id.* Additionally, about \$500,000.00 per month is being paid in permanent partial disability benefits. Tr. 11.

At the time of hearing, premium tax collections were just beginning for the second quarter ending June 30, 2012. Tr. 13. No substantial additional receipts

were anticipated until the last two weeks of July 2012. *Id.* As of July 15, 2012, the balance in the SIF was estimated to be \$3,900,000.00. *Id.* The SIF balance at the time of hearing was \$6,500,000.00. Tr. 12.

One of the primary purposes of Rule 52 is to avoid piecemeal litigation. *State ex rel. Clinton Area Vocational School v. Dandurand*, 766 S.W.2d 169, 171 (Mo. App. W.D. 1989). Rule 52.04(a) (1) clearly states that a person **shall** be joined if in his absence full relief cannot be accorded to those already parties. Here hundreds of parties will be forced to litigate their right and priority to SIF monies in separate actions with the only distinction between them being who gets his/her judgment in mandamus first. It is reversible error for a cause to proceed to final judgment without a necessary party who feasibly could have been joined. *State ex rel. Mayberry v. City of Rolla*, 970 S.W.3d 901, 909 (Mo. App. S.D. 1998).

With a balance at the time of hearing of \$6,500,000.00, the Second Injury Fund did not and does not have sufficient monies to pay the unpaid back awards totaling \$21,313,855.80 and new bi-weekly continuing obligations, let alone the recurring monthly payments of \$1,718,000.00 to existing award recipients, permanent partial awards and the administrative costs of running the Second Injury Fund program. Even if SIF were to pay only the existing lump sum awards of \$21,313,855.80, it would be unable to pay any bi-weekly amounts, permanent partial awards and the administrative costs of the fund. At the time

of the hearing, SIF was in deficit in the amount of at least \$15,000,000.00. Tr. 15.

Relator claims he is owed \$99.37 per week for 60 weeks commencing 7/26/06, then \$464.45 per week for life, pursuant to an award of the Labor and Industrial Relations Commission on May 6, 2011. Respondents do not contest the amount claimed. However, the other SIF awardees, including those currently receiving payments, are necessary parties to this action because Respondents cannot pay Relator without affecting whether they can pay other claims—Relator’s money is effectively encumbered by those awardees receiving payments. Complete relief cannot be afforded absent these other parties.

In addition, the very reason for Mo. S. Ct. R. 52.04(a) is to ensure that individuals whose interests would be impacted in a particular lawsuit are allowed the opportunity to be heard. For all other permanent total disability awardees, whether Relator can jump the line and get paid first impacts their interests—when there is insufficient money in a fund to go around, everyone entitled to receive money is a necessary party. It is simple arithmetic—if Relator’s award is paid, another award cannot be paid. If nothing else, those individuals are necessary parties for purposes of determining priority between claims.

The trial court erred in failing to join all other claimants to the limited funds.

CONCLUSION

The Treasurer and Director of the Department of Workers' Compensation request this court to dismiss Relator's claim, or alternatively, to remand the case to the trial court with directions to join all other claimants to the SIF for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this brief complies with the limitations set forth in Rule 84.06(b) and contains 5,828 words as calculated pursuant to the requirements of Rule 84.06(b)(2).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on March 4, 2013, to:

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