

BELOW THE RED LINE

WORKERS' COMPENSATION UPDATE
"WE'VE GOT YOU COVERED!"

September 2023

A WORD FROM THE PRACTICE CHAIR

I am putting this month's introduction together while sitting across from my daughter in the cafeteria of her sorority house. We are wrapping up a successful Dad's Weekend that included perfect weather, a win in overtime for the football team, and my daughter not having to pay for anything this weekend. She is studying for midterms, and I am happy that I have no exams to take this week. Remember those? It's definitely something I do not miss about school. Out of solidarity with my daughter, I decided to get some work done so she doesn't feel guilty about studying while I am here. I don't want to leave because as soon as I do, and my daughter is in the rearview mirror, I know I only have one more of these special weekends to experience. For a brief while, you get invited into your child's world, and you pretend you are "cough" number of years younger and reliving your college days. The only difference is that, as the Dad, you pay for everything, and after a night of revelry, you don't bounce back as easily.

I hope you are enjoying this time of year: rolling out of summer and into autumn with all the brilliant colors the season offers. Not to mention the pumpkin spice that feeds our soul in the fall. Spend some time in the great outdoors and enjoy the changing seasons.

One of our newest associates who recently joined our Rockford office, Jacquelin Pulak, prepared this month's article. She delves into the intersection of workers' compensation settlement contracts and Social Security benefits. It is great to have a little history and context, which Jacquelin provides, regarding how Social Security works and its application to injured workers. Jackie discusses how we can use this knowledge to push settlements forward in a manner that does not negatively impact the employee. This can be helpful for you as you deal with pro se Petitioners. If you have any questions or concerns on this topic or any other, please feel free to contact me or any of the other Heyl Royster workers' compensation attorneys.

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BY JACQUELIN PULAK

The Social Security Administration has recently reported that in 2021, over 7 million injured workers were beneficiaries of Social Security Disability Insurance ("SSDI"). Because so many SSDI beneficiaries are injured workers, workers' compensation attorneys must understand the impact on a petitioner's SSDI benefits when litigating and evaluating a workers' compensation claim.

Petitioners may be eligible to receive both SSDI and workers' compensation simultaneously. When a petitioner receives SSDI payments and workers' compensation, it may trigger Section 424a of the Social Security Act 42 U.S.C.A. § 424a. Section 424a limits the total benefits received not to exceed 80 percent of the petitioner's average current earnings ("ACE") before they became disabled. When a petitioner's SSDI and workers' compensation payments exceed 80 percent of the petitioner's ACE rate, the excess amount will be deducted, or offset, from the petitioner's SSDI benefits.

CALCULATING THE TRIGGERING THRESHOLD FOR AN OFFSET

Attorneys defending workers' compensation claims should determine whether the petitioner is a beneficiary of SSDI. Besides calculating a potential SSDI offset, the information is relevant in determining whether Medicare may have an interest in the claim. If the petitioner receives SSDI benefits, an initial calculation should be performed to see what payment threshold would trigger an offset. To run this calculation, we need to know (1) the petitioner's monthly workers' compensation benefit, (2) their monthly social security disability benefit, and (3) their average current earnings or ACE rate.

The Social Security Administration calculates the SSDI beneficiary's ACE rate using the highest of the three computation methods: the "High-1", the "High-5," or the Average Monthly Wage (AMW). Social Security provides a useful chart to calculate the ACE. See POMS DI 52150.010, Average Current Earnings (ACE), effective 11/09/2009. "High-1 ACE" is the default calculation and is determined by selecting the highest yearly earnings from the past five years and dividing a worker's gross earnings for the 12 months by 12, regardless of how many weeks worked in that period. So, if using the High-1 ACE, it is the highest income out of the five years immediately before the year of disability plus the year of disability itself, for a total of six. The "High-5 ACE" is similar but significantly less used. The "High-5 ACE" formula takes the worker's highest earnings during a five-year consecutive period after 1950 divided by 60 months, regardless of the work attendance during the period. This method is used for claimants who earned a high wage over an extended period of time and then dropped out of the workforce and re-entered (e.g., a parent staying home to raise a family). The final method, Average Monthly Wage (AMW), would require a very unusual earnings record to come into play. To calculate AMW, find the covered earnings upon which the unindexed disability insurance benefit primary insurance amount

is based. SSDI benefits received by any member of the petitioner's household will count towards the SSDI received for purposes of calculating the offset.

Certain carefully documented expenses are considered excludable when determining the amount of a petitioner's workers' compensation benefit to calculate their exposure to an offset. Legal expenses paid or incurred by the petitioner in the workers' compensation claim are excludable in lump sum settlements. Additionally, medical expenses the petitioner paid, incurred, or could incur are among excludable expenses. Medical expenses paid out of compensation due to the worker, verified medical expenses in addition to the amount shown in the award, and future medical costs, when they reflect a reasonable estimate of future expenses, can also be excluded from the workers' compensation award for the offset calculation.

Here's a hypothetical to illustrate this calculation. The petitioner has monthly workers' compensation benefit payments equal to \$1,500. The petitioner is also receiving \$2,500 per month in SSDI benefits. Because this petitioner's predetermined ACE rate is \$4,000 per month, that would leave the offset-triggering threshold at 80 percent, or \$3,200. In this scenario, the petitioner's SSDI would be reduced by \$800 every month due to the offset to prevent the petitioner from receiving more than 80 percent of their ACE rate. The petitioner is losing a total of \$9,600 per year, or even more over the course of the full payment life, from their SSDI benefits due to the workers' compensation award payments.

PETITIONER'S INCENTIVE TO SETTLE

With the threat of the offset reducing the amount of money a petitioner would otherwise be entitled to, settlement of a workers' compensation claim can

be a mutually beneficial tool for both petitioners and employers. When it is determined that the offset is likely to reduce a petitioner's SSDI benefits, employers and those defending workers' compensation claims should use this to their advantage to encourage settlement. Petitioners have an incentive to settle because they cannot eliminate or reduce their exposure to the offset without agreement by the employer. Additionally, a failure to take action to reduce the offset could result in negative tax consequences for the petitioner. The IRS taxes the petitioner at the full value of the monthly SSDI benefit before the offset. Therefore, if the threshold triggering the offset is met, and the petitioner's workers' compensation payment reduces the amount of SSDI benefits the petitioner receives, the petitioner is still taxed on the full amount of that SSDI payment before the offset is applied. Alternatively, those defending workers' compensation actions benefit from the petitioners using this incentive to include



carefully yet favorably crafted settlement language.

If a case is tried, the offset will be determined using the disability rate expressed in the award. A recent trend in settlement language is often referred to as "spread language," or language that excludes certain expenses and spreads the lump sum settlement over the petitioner's life expectancy or work-life expectancy. This language would subtract the expenses mentioned above, such as attorney's fees,

past medical expenses, and medical expenses the petitioner will incur from the lump sum settlement first, as they are excludable when calculating the offset. Next, the language will spread the remaining lump sum over the remaining time until the petitioner retires or over the petitioner's life expectancy. It is best practice to spread the settlement over the work-life expectancy unless spreading the settlement over the life expectancy is necessary to avoid an offset.

Returning to our previous hypothetical, the petitioner at the time of the lump sum start date is 42 years old, and their settlement was 40 percent person as a whole for a total lump sum settlement of \$139,592.00. Even though the settlement is a lump amount, "spread language" details the monthly allotment of the sum over the life expectancy period. With a work-life expectancy of 300 months, spreading the petitioner's lump sum settlement over their work-life expectancy would bring the monthly workers' compensation payment to \$465.31. With the same ACE rate of \$4,000 and the offset threshold at \$3,200, the petitioner can receive their \$2,500 monthly SSDI benefits and their \$465.31 monthly workers' compensation payment for a total of \$2,965.31 received per month. This use of spread language in the settlement has prevented the petitioners from triggering the offset, protecting their SSDI benefits.

Here is an example of the use of "spread language" to reduce or eliminate the social security offset:

TERMS OF THE SETTLEMENT:

Respondent agrees to pay, and Petitioner agrees to accept the sum of \$____ as a full, final, and complete settlement of all claims, past, present, or future, the loss of time, medical, surgical, or hospital expenses arising or to arise out of the accident described herein. Respondent to pay and Petitioner to accept the


sum of \$____, which, after attorney's fees \$____ and expenses \$____, leaves a net recovery due to the Petitioner of \$____. Based upon the anticipated life expectancy of the Petitioner of ____ years according to the National Vital Statistics Report, United States Life Tables, 2000, Table 8, this settlement represents a yearly payment to Petitioner of \$____.

For other sample settlement language and an even more detailed analysis of Social Security offsets and the use of spread language, please see the chapter on this topic from the Illinois Practice Series: Illinois Workers' Compensation Law (authored by Bruce Bonds and Kevin Luther). 27 Ill. Prac., Illinois Workers' Compensation Law § 30:1 (updated August 2023). For more information on prorating a lump sum settlement, the Social Security Administration's Program Operations Manual System outlines all necessary information and steps to ensure accuracy. See POMS DI 52150.060, Prorating a Workers' Compensation/Public Disability Benefit (WC/PDB) Lump Sum Settlement, effective 8/1/2023.

CONCLUSION

Spread language is a tool for those defending workers' compensation claims to encourage settlement with favorable language, but also necessary to protect the SSDI benefits of the petitioner and prevent avoidable and unfavorable tax consequences. It is critical to note that exposure to the SSDI offset occurs more frequently and dramatically for low-income petitioners than higher-income petitioners with a higher ACE rate. Because the disability that makes a petitioner eligible for SSDI benefits does not have to be related to the injury they are seeking redress from in their workers' compensation claim, there is a recent trend where counsel for a petitioner may

request spread language in settlements of smaller lump sum settlements and even for petitioners who have no immediate SSDI issues as best practice for protecting any future SSDI benefits their clients may have. Defense of workers' compensation claims must understand the use and context of spread language for the several purposes it serves.

Feel free to contact any of our workers' compensation attorneys if you have any questions on this topic or other workers' compensation issues. 



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**Heyl Royster Is Ready To
Defend You**

ABOUT THE AUTHOR

Jacquelin Pulak
Associate in Rockford

- Graduate of Northern Illinois University, *magna cum laude*
- Inaugural ISBA Rural Practice Fellow

An accomplished associate joining the Rockford office, where she once clerked, Jackie Pulak will focus her practice on Workers' Compensation. Jackie takes immense pride in her attention to detail and clear, consistent communication style to create a personalized approach for each client and a willingness to advocate for their positions aggressively.

While at her alma mater, Northern Illinois University College of Law, Jackie was selected to participate in the Summer Fellow program for the Inaugural ISBA Rural Practice Initiative Fellowship Program and the Brewster Parker Award Recipient in recognition of her outstanding legal skills. She was also awarded the prestigious 2022 DeWilde Award for the Study of Evidence at NIU and served as Vice President of the College of Law's Women's Law Caucus.

When not in the office, Jackie enjoys baking delicious treats for her loved ones and spending quality time with her nephew.

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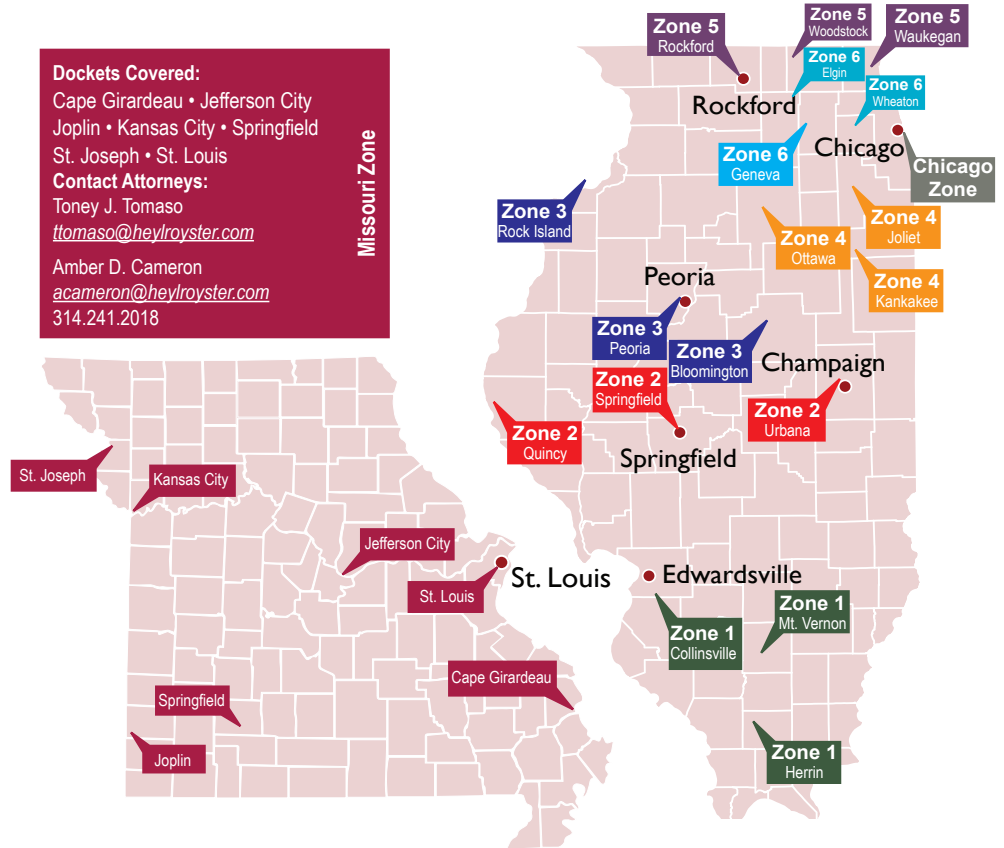
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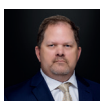
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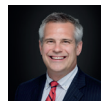
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