HENRY MCMASTER
ATTORNEY GENERAL

August 19, 2009

William E. Gunn, Interim Director
South Carolina Second Injury Fund
100 Executive Center Drive, Suite 101
Columbia, South Carolina 29210

Dear Mr. Gunn:

We understand you desire an opinion of this Office on behalf of the South Carolina Second Injury Fund (the "Second Injury Fund") concerning the Second Injury Fund's ability "to assess carriers for 2008 calendar year normalized premiums without regard to date of injury even though the 2007 Workers' Compensation Reform Act bars reimbursement for dates of injury on and after July 1, 2008; or whether it is required to limit carrier assessments to normalized premiums for claims with date of injury prior to July 1, 2008."

Law/Analysis

Section 42-7-310 of the South Carolina Code (Supp. 2008), establishing the Second Injury Fund, contains a provision explaining how the Second Injury Fund will be continually funded. One method is found under section 42-7-310(d)(2) states, in pertinent part:

> equitable assessments upon each carrier which, as used in this section, includes all insurance carriers, self-insurers, and the State Accident Fund. Each carrier shall make payments to the fund in an amount equal to that proportion of one hundred thirty-five percent of the total disbursement made from the fund during the preceding fiscal year less the amount of net assets in the fund as of June thirtieth of the preceding fiscal year which the normalized premium of each carrier bore to the normalized premium of all carriers during the preceding calendar year. Each insurance carrier, self-insurer, and the State Accident Fund shall make payment based upon workers' compensation normalized premiums during the preceding calendar

> year. The charge to each insurance carrier is a charge based upon normalized premiums.

(emphasis added). Thus, this provision requires that carriers submit an assessment to the fund. This provision also provides the following definition of "normalized premium."

> (3) "Normalized premium" is defined as gross paid losses before salvage and subrogation times a factor representing normalized expenses. Normalized expenses include taxes, licenses, fees, general expenses, profit, contingencies, and other expenses as reported on the Insurance Expense Exhibit of the NAIC Annual Statement blank. This normalized expense factor shall be computed annually by the Workers' Compensation Commission by August first of each year and must be based upon aggregate expense information obtained from the Department of Insurance derived from insurers' most recently filed annual statements.

As you mentioned in your letter, in 2007, the Legislature passed the Workers' Compensation Reform Act (the "Act"). As part of the Act, the Legislature decided to terminate the Second Injury Fund's programs as of July 1, 2013. To affect this termination, the Legislature passed section 42-7-320 of the South Carolina Code (Supp. 2008). Subsection (B) of this provision states: "(B) After December 31, 2011, the Second Injury Fund shall not accept a claim for reimbursement from any employer, self-insurer, or insurance carrier. The fund shall not consider a claim for reimbursement for an injury that occurs on or after July 1, 2008." S.C. Code Ann. § 42-7-320(B). Thus, as you stated in your letter, you are concerned as to the legality of continuing to assess carriers after July 1, 2008, when carriers are barred from receiving reimbursement for injuries that occur on or after this date.

First, we look to the statutory construction of sections 42-7-310 and 42-7-320 to determine whether the Legislature intended to repeal the assessment provision given its decision to terminate the Second Injury Fund's programs. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Blackburn v. Daufuskie Island Fire Dist., 382 S.C. 626, 629, 677 S.E.2d 606, 607 (2009). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478(1998).

The best evidence of the Legislature's intent is the wording of the statute itself. State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). Neither section 42-7-310 nor 42-7-320 indicate that the Second Injury Fund's ability to impose assessments on carriers is to cease after

July 1, 2008. Moreover, "[t]he law does not favor the implied repeal of statute." Hodges v. Rainey, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000).

> Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. Id. "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would . . . expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." Justice v. Pantry, 330 S.C. 37, 43-44, 496 S.E.2d 871, 874 (Ct. App. 1998) (quoting State v. Hood, 181 S.C. 488, 491, 188 S.E. 134, 136 (1936)).

Id. at 88-89, 533 S.E.2d at 583.

In addition to finding no indication that the Legislature expressly repealed section 42-7-310(d)(2), we find section 42-7-320 contemplates the continuation of the Second Injury Fund's ability to levy assessments during the Second Injury Fund's termination. In section 42-7-320(A), the Legislature provides:

> Except as otherwise provided in this section, on and after July 1, 2013, the programs and appropriations of the Second Injury Fund are terminated. The State Budget and Control Board must provide for the efficient and expeditious closure of the fund with the orderly winding down of the affairs of the fund so that the remaining liabilities of the fund are paid utilizing assessments, accelerated assessments, annuities, loss portfolio transfers, or such other mechanisms as are reasonably determined necessary to fund any remaining liabilities of the fund.

(emphasis added). In addition, section 42-7-320(B)(3) states:

> (3) Insurance carriers, self-insurers, and the State Accident Fund remain liable for Second Injury Fund assessments, as determined by the State Budget and Control Board, in order to pay accepted claims. The fund shall continue reimbursing employers and insurance carriers for claims accepted by the fund on or before December 31, 2011.

(emphasis added).

These provisions contemplate that the Legislature intended for assessments on carriers to continue. In addition, in speaking with a representative of the Second Injury Fund, we understand that if the Second Injury Fund does not levy an assessment on carriers after July 1, 2008, it will not have the funding needed to pay claims due and payable on injuries occurring prior to July 1, 2008. Thus, we do not believe that the Legislature intended to repeal the requirement that carriers pay assessments to the Second Injury Fund and to the contrary, acknowledged that the Second Injury Fund would need funds through continuing assessments to pay claims while the Second Injury Fund is in the process of terminating.

We find further support of our understanding of the Legislature's intent in the fact that the Legislature amended section 42-7-310(d)(2), the provision authorizing assessments, when it enacted the Act in 2007. Prior to the amendment, section 42-7-310(d)(2) provided that "[e]ach carrier shall make payments to the fund in an amount equal to one hundred seventy-five percent." S.C. Code Ann. § 42-7-310(d)(2) (Supp. 2006). Pursuant to the Act, the Legislature changed this section to read: "each carrier shall make payments to the fund in an amount equal to one hundred thirty-five percent." S.C. Code Ann. § 42-7-310 (Supp. 2008). Certainly, the Legislature had the opportunity to add a provision to section 42-7-310(d)(2) when it amended it indicating at what point assessments could no longer be levied or that assessments could not be levied on claims in which the injury occurred after July 1, 2008. But, for whatever reason, the Legislature chose not to include such an amendment. Thus, we infer from the Legislature's decision not to add language restricting assessments that the Legislature intended that carriers continue to be assessed as they have in past years.

While we find no provision in the law that prevents the Second Injury Fund from assessing carriers after July 1, 2008, we recognize that some may argue that an inequity may arise if the Second Injury Fund continues to assess carriers while discontinuing to pay claims. In speaking with representatives from the Second Injury Fund, we understand that a considerable lag time exists between when a claim occurs, is submitted, and when the claim is actually paid. In addition, some claims involve the payment of lifetime benefits to the claimant. These claims, which arose prior to July 1, 2008, must continue to be paid possibly long after the termination of the Second Injury Fund in 2013. However, if carriers continue to be concerned about the continuation of assessments, we suggest that legislative clarification be sought to resolve any possible inequities.

Conclusion

Section 42-7-310 of the South Carolina Code clearly requires carriers to pay annual assessments to the Second Injury Fund. Section 42-7-320 of the South Carolina Code, passed as part of the Workers' Compensation Reform Act, calls for the termination of the Second Injury Fund's programs as of July 1, 2013. Although this provision, as you mentioned in your letter, also states

that the Second Injury Fund will not reimburse any claim in which the injury from which the claim arises occurs after July 1, 2008, we did not find any language in section 42-7-310 or 42-7-320 indicating that assessments are not longer due after July 1, 2008. To the contrary, we gather that the Legislature intended for assessments on carriers to continue during the winding up phase of the Second Injury Fund. Thus, we believe that the Second Injury Fund has the authority to continue to assess carriers after July 1, 2008.

Very truly yours,

Henry McMaster
Attorney General

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REVIEWED AND APPROVED BY:

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