3653 Library

The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

January 23, 1990

The Honorable J. Verne Smith
Senator, District No. 5
313 Gressette Building
Columbia, South Carolina 29202

Dear Senator Smith:

In a recent letter to this Office you indicated that House Bill 3702 has been referred to the Senate Labor, Commerce and Industry Committee for review. The legislation provides that:

> The South Carolina Workers' Compensation Law does not apply to licensed real estate salesmen engaged in the sale, lease, or rental of real estate for a licensed real estate broker on a straight commission basis.

You have questioned the constitutional validity of the bill, specifically, whether the bill creates an invalid classification for purposes of exemption under the workers' compensation laws. You indicated that a possible constitutional infirmity lies in the fact that there may be other similarly situated persons beside realtors who would not benefit from a similar exemption under the legislation.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Upon enactment, the legislation will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts are generally resolved in favor of constitutionality.

While this Office may comment upon potential constitutional problems, it solely within the province of the courts of this State to declare an act unconstitutional.

In examining an equal protection challenge to a workers' compensation law, the Wyoming Supreme Court in Hays v. Wyoming Workers' Compensation Division, 768 P.2d 11 (Wyo. 1989) stated:

> (a) strict scrutiny standard is employed when a fundamental interest is affected or if the classification is inherently suspect ... Under this standard, the classification is subject to close scrutiny to determine if it is necessary to achieve a compelling state interest, and the state is required to establish that there is no less onerous alternative by which it may achieve its objective. .... When an ordinary interest is involved, however, a rational basis standard is applied, pursuant to which a court must determine whether the classification made by the statute is reasonably related to a legitimate state interest. .... If, in the court's perception, the legislature had some arguable basis for choosing the ends and the means, the law will be sustained.

768 P.2d at 15. Such is consistent with the statement in Michigan Manufacturers Association v. Director of Workers' Disability Compensation Bureau, 352 N.W.2d 712 at 716 (Mich. App. 1984) that

> (i)n evaluating constitutional challenges to socio-economic legislation on the basis of equal protection, ... courts apply the traditional 'rational relation' test ... In applying the standard the challenged statute is presumed to be constitutional and the burden is placed on the challenging party to show that the law has no reasonable basis.

Referencing the standard set forth in Hays, the Wyoming court concluded that

> (t)he right to worker's compensation benefits is not a fundamental right, but instead it is an ordinary interest. ... There must only be some difference that furnishes the rational basis for

> different legislation as to different classes. ... The differences in classifications, however, cannot be arbitrary and without just relation to the matter being legislated.

768 P.2d at 15 - 16. In Hays, the court determined that the finding that members of partnerships were not "employees" within the meaning of the Wyoming Workers' Compensation Act even though officers of corporations were classified as "employees", did not deprive the members of partnerships of equal protection. The Court found a rational basis existing as to the different treatment available under the legislation to partners as opposed to corporate officers.

In Baskin v. State ex rel. Worker's Compensation Division, 722 P.2d 151 (Wyo. 1986) the Wyoming Supreme Court again referencing the rational relationship standard concluded that an exception from the Wyoming Workers' Compensation Act for "ranching or agriculture" found in statutory provisions dealing with teaming and truck driving were based on a legitimate state objective of not imposing additional expenses and requirements on Wyoming agricultural operations. The Court concluded that the exception withstood an equal protection challenge. See also: Sellmer v. Ruen, 769 P.2d 577 (Idaho 1989) (agricultural exemption in Idaho Workman's Compensation Act not violative of equal protection)

Other courts have similarly upheld exceptions in workers' compensation statutes from equal protection challenges. In English v. Industrial Claim Appeals Office, 764 P.2d 386 (Col. 1988), the Colorado Court of Appeals upheld an exception in that State's laws which did not impose statutory employer status on private homeowners who contract out work which is to be done on their private homes. Homeowners could come under the legislation only if a contractor who was hired by the owner in turn hires or uses employees to carry out the job. The Court stated:

> (t)he purpose of this legislation is to make the statutory employer ultimately responsible for workmen's compensation benefits for injuries to employees of uninsured contractors and subcontractors .... The statute as framed is rationally related to this objective, and we cannot say that the fact that singular workers are not also protected makes the statute infirm. The omission of singular workers from the statute is indicative that the General Assembly believed

> that the case of one worker who fails to protect himself is not as potentially catastrophic to the interests of societal welfare as the case of multiple workers whose employers have been irresponsible.

764 P.2d at 388.

In Rudolph v. Miami Dolphins, Ltd., 447 So.2d 284 (Fla. 1983), the Florida District Court of Appeals concluded that an exemption to the Florida Worker's Compensation Act for professional athletes was not violative of equal protection as to those athletes. The Court noted that professional football players are well paid for engaging in a occupation which typically involves a high risk of frequent and repetitive serious injury. The Court stated that these players

> ... make a conscious decision to use their skills in an occupation involving a high risk of frequent, repetitive, and serious injury. We cannot say that the legislature's exclusion of this voluntary, though highly dangerous, activity from the worker's compensation act fails to bear some reasonable relationship to a legitimate state purpose and is so completely arbitrary and lacking in equality of application to all persons similarly situated as to violate ... constitutional provisions.

447 So.2d at 291 - 292.

In Parsons v. Workers' Compensation Appeals Board, 179 Cal. Rptr. 88 (1981), the California Appeals Court considered a challenge on equal protection grounds to a classification in that state's workmen's compensation laws which allowed benefits for county prisoners only if an injury occurred while the prisoners were engaged in suppression of forest, brush or grass fires. The Court concluded that the fact that there was typically a greater risk of injury or death in fighting or preventing fires than in working on public ways or providing clerical or other menial work in prisons provided a rational basis for the classification.

However, my research has also disclosed one case in which a court concluded that the exclusion from coverage under workmen's compensation laws for certain individuals was unreasonable and arbitrary and therefore unconstitutional. In DeMonaco v. Renton, 113 A.2d 782 (N. J. 1955), the New Jersey Supreme Court reviewed a

clause in the New Jersey Workmen's Compensation Act which excluded persons from coverage under that Act who were engaged in selling newspapers or magazines. The Court stated

> (i)f the legislature wishes to exclude a certain class from the coverage of the act it may, of course, do so, but only where the classification bears a reasonable and just relationship to the general object of the legislation or to some substantial consideration of public policy or convenience or the service of the general welfare. For instance, the Legislature may exclude certain occupations on the basis of the degree of risk involved or on the existence of other laws governing liability, ... or on the fact that merely casual employment is involved, ... Here, however, we perceive no reason, nor has any been suggested to us, why employees who may either primarily or incidentally be engaged in the sale of newspapers or magazines to the general public should be excluded from the coverage of the act. The product which they are handling, newspapers and magazines, affords no logical reason for the separate classification.

113 A.2d 787. Cf, Adams v. Petal Municipal Separate School Systems, 487 So.2d 1329 (Miss. 1986) (the Mississippi Supreme Court distinguished DeMonaco as "factually distinguishable" finding a "good and logical reason" for the legislative exemption of state employees, and particularly the Petal Separate School District, from mandatory workmen's compensation coverage in that financial resources were not available for such coverage.); Parker v. Cappell, 500 So.2d 771 at 776 (La. 1987) (the Louisiana Supreme Court determined that "... the legislature's decisions on economic and social welfare and the preservation of the state's fiscal resources are decisions within the discretion of the legislative branch." In Parker the Court upheld legislation which excluded sheriff's deputies from workers' compensation coverage.)

As to the situation you addressed dealing with the exclusion for licensed real estate salesmen, at least one court has concluded that a statute which excludes real estate employees from worker's compensation benefits is not unconstitutional on the ground that it denies these employees equal protection. In Sessions v. Stan Weber and Associates, Inc., 491 So.2d 54 (La. 1986), the Louisiana Court

of Appeals upheld such exclusion. The Court stated:

> (t)he exclusion of real estate brokers or salesmen is an economic or social decision by the legislature, and we are of the opinion that it does not exceed the bounds of reasonableness. .... Simply, the legislature has placed real estate brokers and salesmen in the same class as independent contractors ... This court recognizes that most, if not all, real estate agents work on a commission basis, that due to the nature of the business they work with little or no supervision, that they must remain somewhat independent of their brokers to serve their clients, and that they must also work alone and at odd hours to serve their buyers and sellers. All of these known factors could have been considered by the legislature in its decision to exclude real estate brokers and salesmen from coverage of the Worker's Compensation Law. We do not find the decision of the legislature to exceed the bounds of reasonableness and conclude that the exclusion is constitutional.

491 So.2d 55 - 56. See also: J. W. Tripp and Assoc. v. Industrial Commission for the State of Colorado, 739 P.2d 245 (Colo. 1987) (no equal protection violation in construction that certain "placement consultants" were not independent contractors so as to be exempt from unemployment compensation provisions while real estate and insurance agents were exempt)

Consistent with the above authority, it appears that the legislation excluding licensed real estate salesmen from the State Workers' Compensation Law would probably withstand a constitutional equal protection challenge in that a rational basis would exist for excluding such individuals.

We also understand that there is pending an amendment in the Senate to H.3702 which would provide that the State Workers' Compensation Law is inapplicable to licensed real estate agents "... over whom the broker has no control." Such an amendment would be consistent with the Louisiana decision cited above which specifically exempted real estate salesmen in the category of independent contractors from coverage and would bolster or make even clearer the constitutionality of the pending legislation. Such would be consistent with prior decisions of the State Supreme Court recognizing

exemptions from the State Workers' Compensation Law for independent contractors. See: McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947); Carter's Dependents v. Palmetto State Life Insurance Co., 209 S.C. 67, 38 S.E.2d 905 (1946); South Carolina Industrial Commission v. Progressive Life Insurance Co., 242 S.C. 547, 131 S.E.2d 694 (1963).

If there are any questions, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

CHR/an

REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions