The State of South Carolina

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Edgar W. Dickson, General Counsel
South Carolina Workers' Compensation
Uninsured Employers' Fund
Winthrop Building, Suite 119
220 Executive Center Drive
Columbia, South Carolina 29210

Dear Mr. Dickson:

Your letter of September 21, 1990, to Robert D. Cook, Executive Assistant for Opinions, has been referred to me for a response. You pose the following question:

Should claims against qualified self-insurers who become bankrupt be paid by the Uninsured Employers' Fund?

In order to answer your question, it is necessary to interpret the applicable statutes.

Statutory construction is, ultimately, the province of the courts. Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942). In interpreting a statute, the primary purpose is to ascertain the intent of the legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987); Multi-Cinema, Ltd., v. South Carolina Tax Comm'n, 292 S.C. 411, 357 S.E.2d 6 (1987). When interpreting a statute, the legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in the light of the intended purpose of the statutes. Gambrell v. Traveler's Insurance Companies, 280 S.C. 69, 310 S.E.2d 814 (1983).

Where a statute is clear and unambiguous, there is no room for construction and the terms of the statute must be given their literal meaning. Duke Power Company v. South Carolina Tax Comm'n, 292 S.C. 64, 354 S.E.2d 902 (1987). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Multi-Cinema, Ltd., v. South Carolina Tax Comm'n, supra. In determining the meaning of a statute, it is the duty of the court

to give force and effect to all parts of the statute. State ex rel. McLeod v. Nessler, 273 S.C. 371, 256 S.E.2d 419 (1979). In construing a statute, words must be given their plain and ordinary meaning, without resort to subtle or forced construction for the purpose of limiting or expanding its operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). The legislature is presumed to have fully understood the import of words used in a statute and intended to use them in their ordinary and common meaning, unless that meaning is vague and indefinite, or in their well defined legal sense, if any. Powers v. Fidelity & Deposit Company of Maryland, 180 S.C. 501, 186 S.E. 523 (1936).

Act No. 286 of 1982 was passed by the General Assembly in order to amend the Code of Laws of South Carolina, 1976, by adding Section 42-7-200. The pertinent part of Section (a) of Section 42-7-200 reads as follows:

> "(a) There is established within the office of the State Workers' Compensation Fund the State Workers' Compensation Insolvency Fund to insure payment of awards of workers' compensation benefits which are unpaid because of the insolvency of employers who fail to acquire necessary coverage for employees. The fund shall be administered by the director of the state fund.
>
> When any award is made by the Industrial Commission for workers' compensation benefits and such claim or any part thereof is not paid because of the insolvency of an employer who has not secured coverage, payments shall be made from the insolvency fund upon certified approval of the Industrial Commission. The director of the state fund shall establish procedures for the implementation of this section."

Section 1(b) of that Act required that funds be earmarked from the collections of the tax on insurance carriers and self-insured persons provided for in Sections 42-5-140 and 42-5-190 in an amount sufficient to establish and annually maintain the insolvency fund at a level of not less than $200,000.00.

This statute was amended in 1987 to replace the words "Industrial Commission" with "State Workers" Compensation Commission" in two places and to replace a reference to Section 42-5-140 with a reference to Section 38-7-50. The statute was amended again in 1989 to replace "State Workers Compensation Fund" with "Second

Injury Fund" and to replace "State Fund" with "Second Injury Fund."

Neither the 1987 nor the 1989 amendments changed the purpose of the statute which was to "insure payment of awards of workers' compensation benefits which are unpaid because of the insolvency of employers who fail to acquire necessary coverage for employees." Neither amendment altered the language of the second paragraph of (a) which states that when an award cannot be paid because of the "insolvency of an employer who has not secured coverage, payment shall be made from the Insolvency Fund ...". Likewise, neither amendment altered the requirement of Section 1(b) which requires funds to be earmarked from the collections of tax on self-insured persons in order to maintain the Fund.

Under the 1989 version of the statute, it is clear that a self-insured employer who has failed to deposit adequate security and has become insolvent has failed "to acquire necessary coverage for employees" and "has not secured coverage" as required by the statute. Based on a reading of this statute, claims against self-insurers who become bankrupt should be paid by the Fund. Were this not the legislative intent, Section 1(b) of that Act would not require that funds be earmarked from the collections of the tax on self-insured persons in order to establish and maintain the Insolvency Fund.

However, Section 42-7-200 was amended again on June 12, 1990, by Act No. 589. The provision of the first paragraph of (a) that states that the purpose of the Fund is "to insure payment of awards of workers' compensation benefits which are unpaid because of the insolvency of employers who fail to acquire necessary coverage for employees" was changed to read "to insure payment of workers' compensation benefits to injured employees whose employers have failed to acquire necessary coverage for employees." The 1989 statute provides that the Fund be administered by the Director of the Second Injury Fund. The 1990 amendment adds that the Director shall establish procedures to implement this section. The 1990 amendment also changes the wording of the second paragraph of (a). That amendment reads as follows:

> "When an employee makes a claim for benefits pursuant to Title 42 and the State Workers' Compensation Commission determines that the employer is subject to Title 42 and is operating without insurance or as an unqualified self-insurer, the Commission shall notify the Fund of the claim. The Fund shall pay or defend the claim as it considers necessary in accordance with the provisions of Title 42."

Based on my previous analysis, if an employer has failed to deposit adequate security and has become insolvent, that employer has "failed to acquire necessary coverage for employees" however, it is unclear as to whether or not that employer is an "an unqualified self-insurer." Section 42-5-20 requires a self-insurer to deposit "an acceptable security, indemnity or bond to secure the payment of the compensation liabilities as they are incurred." If a self-insurer's security is not sufficient to pay all of its claims, it seems reasonable that one could conclude that the security was not acceptable. To conclude otherwise would result in injured employees being unjustly denied workers' compensation benefits. However Act No. 589 of 1990 provides that the State Workers' Compensation Commission determine whether the employer is subject to Title 42 and is operating as an unqualified self-insurer. Therefore, the decision as to whether or not a self-insurer has deposited an acceptable security, indemnity or bond lies with the State Workers' Compensation Commission.

Construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons. Dunton v. South Carolina Board of Examiners in Optometry, 291 S.C. 221, 353 S.E.2d 132, (1987).

If the State Workers' Compensation Commission should determine that a bankrupt self-insurer has not deposited an acceptable security, indemnity or bond, that self-insurer would be considered unqualified and claims should be paid by the Fund. This is consistent with Section (C) of 1990 Act No. 589 which requires that funds be earmarked from collections of the tax on self-insured persons in order to establish and maintain the Insolvency Fund.

Sincerely yours,

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REVIEWED AND APPROVED BY:

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