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April 29, 1985

Herman B. Lightsey, Jr., Director
Coverage and Compliance Division
South Carolina Industrial Commission
Middleburg Office Park
1800 St. Julian Place
Columbia, South Carolina 29204

Dear Mr. Lightsey:

You have asked this Office whether the doctrine of res judicata precludes an employee [claimant] from relitigating a finding by an Industrial Commissioner in a compliance prosecution that an employer is not subject to the Worker's Compensation Act [Act]. We conclude that a claimant would not ordinarily be bound by the ruling of a Commissioner in a compliance proceeding where he was not a party thereto. We note as well in this regard that the doctrine of collateral estoppel would not preclude litigation of this issue by the claimant.

As I understand the facts presented to this Office,[1/] a claimant will notify the Commission, through either formal pleading or otherwise, of a worker's compensation claim. A routine administrative review by the staff of the Commission on occasion will identify that the employer has not filed proof of financial responsibility and thus may not be in compliance with the registration provisions of the act. See, § 42-5-30. If the administrative check determines that the employer is not registered, this finding will be conveyed to the Coverage and Compliance Division of the

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1/ In the issuance of its opinion, this Office neither has the authority nor the manpower to investigate and determine facts; thus, we accept the facts as represented.

REQUEST LETTER

Industrial Commission and the matter will be further investigated by that Division. During the investigation, the employer and the employee will be contacted and ordinarily will have substantial input into the investigation.

At the conclusion of the investigation, if the Coverage and Compliance Division determines that the employer is not in compliance with the financial responsibility provisions of the Act, the Division, in the name of the Industrial Commission, will seek a rule to show cause before a Commissioner in order to prosecute the employer for this failure pursuant to §§ 42-5-10 through 42-5-40, particularly § 42-5-40. As provided in these provisions respectively, the Coverage and Compliance Division will ordinarily request the Commissioner to require the employer to provide proof of his financial ability to cover any claims under the Act and also seek civil penalties for his delects.

Importantly, this civil prosecution for noncompliance is brought in the name of the Industrial Commission and the only parties identified in the pleadings are the Commission and the employer, not the claimant. At the hearing the Coverage and Compliance Division's position is presented by the state's attorney and moreover, the claimant does not have any control over the proceedings and is not permitted to call witnesses or to question the witnesses called by the Division or by the employer; however, ordinarily the claimant participates as a witness in the proceedings. In practice, both the employer and the Industrial Commission may appeal to the full Commission; however, appeals by the claimant from this proceeding are not recognized.2/

We note at the outset that the doctrines of res judicata and collateral estoppel are generally applicable to rulings of the Industrial Commission. See, Liberty Mutual Insurance Co. v. Employers Insurance of Wausau, et al., ___ S.C. ___, 325 S.E.2d 566 (S.C. App. 1985); LARSON'S Workers Compensation Law, § 79.72(a) (1983). Nonetheless, it is our

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2/ Apparently Professor Custy recognizes that an appeal from the proceeding provided for in § 42-5-40 is available only to the employer, and thus there is no appellate remedy for the employee. CUSTY: The Law of Workman's Compensation § 17.4 (1977).

opinion that neither doctrine bars the claimant from litigation of the issue decided adverse to his interest in the compliance hearing.

Res judicata has been described in the following manner:

> A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action.

Beall v. Doe, ___ S.C. ___, 315 S.E.2d 186, 189, n. 1 (S.C.App. 1984). Of course, here, there is no similarity of parties, nor is there privity between them as is necessary for the application of that doctrine. Moreover, and equally important, the claimant's claim for worker's compensation benefits is not the same claim presented in the compliance prosecution.

As to the doctrine of collateral estoppel, we conclude that it similarly does not bar claimant's litigation of the issue of whether the employer is subject to the Act in the instant case. Since the claimant was not a party to the compliance prosecution, he has not "had a full and fair opportunity to litigate the relevant issue in the prior action." State v. Graham, 277 S.C. 389, 287 S.E.2d 495 (1982). As such, he is not bound by the prior ruling.

In addition, we believe our conclusion herein is further supported by Article I, § 22, Constitution of South Carolina, 1985 as amended. This provision provides in pertinent part that:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and opportunity to be heard; ... and he shall have in all instances a right to judicial review.

Again, since the claimant's role is merely that of a witness in the compliance prosecution he possesses neither the right to call witnesses or present evidence nor question witnesses

presented by the employer, and further he has no right of appeal of the compliance decision. Accordingly, we read this provision as most likely prohibiting the Commission from giving a binding effect to the compliance ruling such that it precludes the claimant from prosecuting his worker's compensation claim. We note as well that the language of the Fourth Circuit's decision in Bean v. Piedmont Interstate Fair Assoc., 222 F.2d 227 (4th Cir. 1955) where the Court recognized that § 42-5-40 provides an action for a penalty and exhaustion of that procedure was not a requisite to the litigation of a claim.3/

Thus, for the reasons noted herein, we conclude that under the facts represented a claimant should not be barred by the doctrines of res judicata and collateral estoppel from litigating the issue of whether the employer is subject to the Act even if this issue has been decided in favor of the employer in a compliance proceeding brought by the Coverage and Compliance Division of the Industrial Commission pursuant to § 42-5-40.

Very truly yours,

Edwin E. Evans
Senior Assistant Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions

3/ Interestingly, in the claimant's action against the employer on his claim, the parties to that proceeding are the employer and the employee [claimant]. See, Blue Cross/Blue Shield v. S.C. Industrial Comm., 274 S.C. 204, 262 S.E.2d 33 (1980). Thus, the Coverage and Compliance Division of the Industrial Commission is not a party to the claimant's action upon his claim, just as the employee is not a party to the compliance proceedings brought by the Coverage and Compliance Division of the Industrial Commission.