

1980 S.C. Op. Atty. Gen. 64 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-33, 1980 WL 81917

Office of the Attorney General

State of South Carolina

Opinion No. 80-33

March 19, 1980

**\*1 SUBJECT: Second Injury Fund Participation in Claimant v. Employer/Carrier Workmen's Compensation Hearings**

The Industrial Commission has jurisdiction to entertain claims of the Second Injury Fund at Claimant v. Employer/Carrier hearings. The degree of participation by the Second Injury Fund at these hearings, in absence of statutory directives, is controlled by the procedural mandates provided in Title 42 and the Industrial Commission's rule-making authority provided for in § 42-3-30.

If the Second Injury Fund is allowed to participate in Claimant v. Employer/Carrier hearings, it is bound by the decision as to questions of law and fact and therefore in order to protect the Second Injury Fund's rights and remedies under the Act, the Second Injury Fund must be provided an opportunity to apply for a review of the decision.

TO: Harold E. Trask, Jr.  
Chairman  
Industrial Commission

**QUESTION:**

- (1) Does the Second Injury Fund have the right to participate in hearings between the Claimant and Employer/Carrier in which the Carrier has notified the Second Injury Fund that a potential claim for reimbursement exists?
- (2) If the Second Injury Fund has the right to participate, what is the extent of said participation?
- (3) If the Second Injury Fund does participate, may they appeal the award of the single Commissioner?

**STATUTES AND CASES:**

Blue Cross and Blue Shield of South Carolina v. South Carolina Industrial Commission, Opinion No. 21125, filed January 6, 1980;

[Owens v. Herndon](#), 252 S.C. 166, 165 S.E.2d 696, 1969;

South Carolina Code of Laws (1976), §§ 42-7-310, 42-9-400, 42-9-410, 42-3-30, 42-17-50.

**DISCUSSION:**

In a recent decision, the South Carolina Supreme Court held that Blue Cross/Blue Shield was not entitled to participate in Workmen's Compensation litigation because the rights and liabilities under the Workmen's Compensation Act are purely statutory and no persons or 'parties' are allowed to participate in Workmen's Compensation litigation unless provided for

expressly or implicitly in the Workmen's Compensation Act. See Blud Cross and Blue Shield of South Carolina v. South Carolina Industrial Commission, Opinion No. 21125, filed January 6, 1980.

The Court's decision relied upon Owens v. Herndon, 252 S.C. 166, 165 S.E.2d 696 (1969) in which the Supreme Court pointed out that all rights and liabilities of the employer and employee under the Workmen's Compensation Act are to be determined by the terms of the statute. Jurisdiction not provided for in the Workmen's Compensation Act cannot be created by a commission decision or a judicial decision. From this, the Industrial Commission does not have jurisdiction to allow participation in Workmen's Compensation litigation by 'parties' who do not come within the provisions of the Workmen's Compensation Act.

As you are aware, § 42-7-310, § 42-9-400, and § 42-9-410 create and provide for the operation of the Second Injury Fund. Without question, the Second Injury Fund is within the scope of the Workmen's Compensation Act and therefore, unlike Blue Cross/Blue Shield, the Second Injury Fund is not a statutory stranger to the Act. Pursuant to the statutory provisions of the Workmen's Compensation Act, the Industrial Commission has jurisdiction to entertain claims presented by the Second Injury Fund.

\*2 Section 42-9-400(e) provides that the Second Injury Fund shall not be bound as to any questions of law or fact by reason of any compensation agreement, settlement, award, or adjudication to which the Second Injury Fund was not a party or was not given requisite notice thereof. This Section implies that in situations where the Second Injury Fund will be affected by a Workmen's Compensation claim, the Fund must be given an opportunity to participate in the Workmen's Compensation litigation, or in the alternative, not be bound by any decision reached in the Claimant v. Employer/Carrier hearings and thereby given an opportunity to litigate the factors affecting the Second Injury Fund at a subsequent hearing.

Section 42-9-400(e) would seem to give the Industrial Commission the opportunity to allow the Second Injury Fund to participate in Workmen's Compensation litigation where circumstances are such that the Second Injury Fund may be required to reimburse the employer according to the provisions of the Act. Section 42-7-310 provides that any questions or controversies arising under the Second Injury Fund provisions shall be determined by the Industrial Commission in the procedural matter set forth in Title 42. Based upon this, the degree of participation by the Second Injury Fund in Workmen's Compensation litigation, in absence of statutory directives, would be decided pursuant to the provisions of Title 42 and the Industrial Commission's rule-making authority set forth in § 42-3-30 Code of Laws of South Carolina (1976), as amended.

Taken conversely, § 42-9-400(e) provides that if the Second Injury Fund does participate in a Claimant v. Employer/Carrier hearing, the Second Injury Fund is bound by the decisions as to questions of law and questions of fact decided upon at said hearing. Therefore, the degree of participation by the Second Injury Fund in Claimant v. Employer/Carrier hearings must be such that the provisions of the Act relating to the rights of the Second Injury Fund are not abrogated. Equally true, if the Second Injury Fund participates and is so bound, it would stand to reason that the Second Injury Fund must be given the right to have the Commission decision reviewed as provided in § 42-17-50.

### CONCLUSION

The Industrial Commission has jurisdiction to entertain claims of the Second Injury Fund at Claimant v. Employer/Carrier hearings. The degree of participation by the Second Injury Fund at these hearings, in absence of statutory directives, is controlled by the procedural mandates provided in Title 42 and the Industrial Commission's rule-making authority provided for in § 42-3-30.

If the Second Injury Fund is allowed to participate in Claimant v. Employer/Carrier hearings, it is bound by the decision as to questions of law and fact and therefore in order to protect the Second Injury Fund's rights and remedies under the Act, the Second Injury Fund must be provided an opportunity to apply for a review of the decision.

\*3 Evans Taylor Barnette

State Attorney

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