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VOLUME NO. 45

OPINION NO. 6

INSURANCE - Requirement of State Fund to provide employers' liability insurance;
WORKERS' COMPENSATION - Requirement of State Fund to provide employers' liability insurance;
MONTANA CODE ANNOTATED - Sections 39-71-101 to 39-71-2914, 39-71-105, 39-71-105(4), 39-71-407(1), 39-71-2101, 39-71-2201, 39-71-2301, 39-71-2311, 39-71-2313, 39-71-2316, 39-71-2316(1), 39-72-305(1);
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 35 (1992), 43 Op. Att'y Gen. No. 63 (1990).

HELD: The Montana Workers' Compensation Act does not require the State Compensation Mutual Insurance Fund to provide its policyholders with employers' liability insurance coverage.

May 12, 1993

Mr. Patrick J. Sweeney
President
State Compensation Mutual Insurance Fund
P.O. Box 4759
Helena, MT 59604-4759

Dear Mr. Sweeney:

You have requested my opinion on the following question:

Is the State Compensation Mutual Insurance Fund required to provide employers' liability insurance in conjunction with providing workers' compensation and occupational disease liability insurance coverage to its policyholders?

I conclude that MCA § 39-71-2316(1) of the Workers' Compensation Act authorizes, but does not require, the State Compensation Mutual Insurance Fund [State Fund] to provide employers' liability insurance in conjunction with providing workers' compensation and occupational disease liability insurance coverage to its policyholders.

The Montana Workers' Compensation Act, MCA §§ 39-71-101 to -2914, permits employers to elect one of three methods for providing payments of benefits to injured employees: self-insurance, insurance purchased through a private carrier, or insurance purchased through the State Fund. See MCA §§ 39-71-2101, -2201, and -2311.

MCA § 39-71-2316(1) distinguishes between two types of employer coverage available through the State Fund: workers' compensation and occupational disease liability insurance, and employers' liability insurance. Workers' compensation and occupational disease liability insurance provides "wage supplement and medical benefits to a worker suffering from a work-related injury or disease." MCA § 39-71-105. This coverage protects the employee who receives an injury arising out of and in the course of employment. MCA §§ 39-71-407(1) and 39-72-305(1). In contrast, employers' liability insurance typically covers an employer's liability for bodily injury to an employee in those situations in which workers' compensation and occupational disease liability insurance does not apply. See 7B Appleman, Insurance Law and Practice § 4571 (1979). This coverage is generally included as part of the coverage for an employer when purchased through a private carrier.

The answer to your question hinges on the statutory construction of MCA § 39-71-2316, the only statute referring to employers' liability insurance, which provides:

For the purposes of carrying out its functions, the state fund may: (1) insure any employer for workers' compensation and occupational disease liability as the coverage is required by the laws of this state and, in connection with the coverage, provide employers' liability insurance.

The goal in construing and applying a statute is to discern and effect legislative intent, through primary reliance on the plain meaning of the words used in the statute. MCA § 1-2-102; State ex rel. Roberts v. Public Service Comm'n, 242 Mont. 242, 246, 790 P.2d 489, 492 (1990); Thiel v. Taurus Drilling Ltd., 218 Mont. 201, 205, 710 P.2d 33, 35 (1985). Further, the Workers' Compensation Act is to be construed according to its terms and not liberally in favor of any party. MCA § 39-71-105(4).

Here, MCA § 39-71-2316(1) provides that "the State Fund may ... provide employers' liability insurance" in connection with workers' compensation and occupational disease liability coverage." (Emphasis added.) The use of the word "may" in this section is not by itself determinative of the employers' liability insurance question, since "may" can be interpreted as either mandatory or permissive. State ex rel. Griffin v. Greene, 104 Mont. 460, 469,

67 P.2d 995, 999 (1937); 44 Op. Att'y Gen. No. 35 (1992); 43 Op. Att'y Gen. No. 63 (1990). Accordingly, the ambiguity created by use of the word "may" in MCA § 39-71-2316(1) is resolved by reviewing other provisions under Title 39, chapter 71, part 23, and determining from those provisions whether the Legislature intended to require the State Fund to provide employers' liability insurance. 44 Op. Att'y Gen. No. 35; 43 Op. Att'y Gen. No. 63.

MCA §§ 39-71-2311 and -2313 indicate that MCA § 39-71-2316(1) does not create an affirmative duty on the part of the State Fund to provide employers' liability insurance. MCA § 39-71-2311 sets forth the intent and purpose of the State Fund. It provides in pertinent part:

It is the intent and purpose of the state fund to allow employers the option to insure their liability for workers' compensation and occupational disease coverage with a mutual insurance fund. The state fund is required to insure any employer in this state requesting coverage, and it may not refuse coverage for an employer unless an assigned risk plan established under 39-71-431 is in effect.

This statute specifically requires the State Fund "to insure any employer in this state requesting coverage, and it may not refuse coverage for an employer unless an assigned risk plan established under 39-71-431 is in effect." The statute prohibits the State Fund from refusing "coverage" absent an assigned risk plan. This statutory provision does not distinguish between workers' compensation and occupational disease coverage, and employers' liability insurance coverage. However, the first sentence of MCA § 39-71-2311 provides, "It is the intent and purpose of the State Fund to allow employers the option to insure their *liability for workers' compensation and occupational disease coverage* with a mutual insurance fund" (emphasis added). Thus, when taken in context, the statutory requirement of the State Fund "to insure any employer in this state requesting coverage" should be construed to require the State Fund to provide employers the option of procuring workers' compensation and occupational disease coverage, and not other types of coverage such as employers' liability insurance.

Additionally, MCA § 39-71-2313 declares that the State Fund was created "for the purpose of allowing an option for employers to insure their liability for workers' compensation and occupational disease coverage" under Montana's Workers' Compensation Act. MCA § 39-71-2313. The legislative intent of the State Fund is further indicated in the Statement of Intent attached to SB 428, the 1989 bill in which MCA § 39-71-2316 originated, which states: "The new State Fund would be bound to insure all employers who apply to it for workers' compensation coverage." Nothing in the language of the Workers' Compensation Act or its legislative

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history indicates a legislative intent to impose upon the State Fund an obligation to provide employers' liability insurance coverage.

I conclude, therefore, that MCA § 39-71-2316(1) authorizes the State Fund in its discretion to provide employers' liability insurance in connection with workers' compensation coverage and occupational disease coverage which it is required to provide employers under MCA § 39-71-2311. The word "may" under MCA § 39-71-2316(1) should be construed as discretionary: it is within the State Fund's discretion to provide employers' liability insurance.

THEREFORE, IT IS MY OPINION:

The Montana Workers' Compensation Act does not require the State Compensation Mutual Insurance Fund to provide its policyholders with employers' liability insurance coverage.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/msw/dlh