MAINE STATE LEGISLATURE

The following document is provided by the

LAW AND LEGISLATIVE DIGITAL LIBRARY

at the Maine State Law and Legislative Reference Library

http://legislature.maine.gov/lawlib

Reproduced from scanned originals with text recognition applied

(searchable text may contain some errors and/or omissions)

Library
81-69

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

July 29, 1981

Theodore T. Briggs, Superintendent
Department of Business Regulation
Bureau of Insurance
Mailing Station 34
Hallowell Annex
Augusta, ME 04333

Dear Mr. Briggs:

You have requested an opinion concerning the extent of the liability imposed upon employers associated as a group self-insurer for payment of workers' compensation benefits to an employee of another employer member of the group in the event that the security deposited by the group self-insurer has been exhausted. This issue was raised in the context of the Insurance Bureau's promulgation of rules pursuant to 39 M.R.S.A. §23(4)(F) detailing standards of eligibility for approval of self-insurer status. 1/

The Bureau of Insurance has taken the position that under 39 M.R.S.A. §23 the employers in an approved self-insurance group are jointly and severally liable for the satisfaction of workers' compensation awards against any employer member of the group. Certain insurers contend that the group's liability for awards against a member employer is limited to the amount of the cash, securities or surety bond deposited by the group self-insurer as security pursuant to 39 M.R.S.A. §23(2-A) and (4). This issue is not specifically addressed in the legislative history of the relevant statutes, nor is it the subject of any reported judicial

---

1/ While your question is appropriate for consideration in an opinion, we should emphasize that only the courts can finally resolve this issue. Although this holds true for virtually all of our opinions, we point it out here because this opinion is unlike most of our formal advice in that it does not deal directly with the power and duties of a State agency but rather with the rights and liabilities which private parties have with respect to each other. Accordingly, in the event that such parties might rely on our legal interpreation, we deem it advisable to put them on notice of the limitations inherent in an opinion of this office.

interpretation. However, based upon articulated policy considerations in the workers' compensation law and in the case law, and the language of the statutes in question, we believe that the correct interpretation of §23 is that it subjects the members of the group to liability which is coterminous with that of each member employer.2/

The statutory language which defines the liability of a group self-insurer is found in 39 M.R.S.A. §23(4)(B) and (C), reading in pertinent part as follows:

> B. Any group of employers may adopt a plan for self-insurance, as a group, for the payment of compensation under this chapter to their employees. Under such plan the group shall assume the liability of all the employers within the group and pay all compensation for which the said employers are liable under this chapter. Where such plan is adopted the group shall furnish satisfactory proof to the superintendent of its financial ability to pay such compensation for the employers in the group, its revenues, their source and assurance of continuance. The superintendent shall require the deposit with the Workers' Compensation Commission of such securities as may be deemed necessary of the kind prescribed in paragraphs A to E or the filing of a bond of a surety company authorized to transact business in this State, in an amount to be determined to secure its liability to pay the compensation of each employer as above provided in accordance with paragraph E . . .
>
> C. An employer participating in group self-insurance shall not be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by the group self-insurer or by himself. As between the employee and the group self-

---

2/ References to liability for satisfaction of awards are made only for the sake of simplicity of language; there is no apparent basis for distinguishing the extent of liability for satisfaction of compensation agreements reached by the parties without formal proceedings before the Workers' Compensation Commission from the extent of liability for satisfying an order awarding compensation, assuming appropriate enforcement procedures are utilized.

> insurer, notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the group self-insurer; jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the group self-insurer and such group self-insurer shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the participating employer for the payment of compensation under this chapter. The insolvency or bankruptcy of a participating employer shall not relieve the group self-insurer from the payment of compensation for injuries or death sustained by an employee during the time the employer was a participant in such group self-insurance . . . .
>
> (Emphasis added).

The basic definition of the group's liability is that it "shall assume the liability of all the employers within the group and pay all compensation for which the said employers are liable under this chapter". The group is "bound by and subject to" awards against a participating employer even if that employer is insolvent or bankrupt. The required deposit of cash, securities or a bond is to "secure its [the group's] liability to pay the compensation of each employer," not to limit that liability. That the potential liability of the group exceeds the amount of the deposit is further evidenced by the requirement that the group furnish proof of financial ability to "pay such compensation for the employers in the group," in addition to the deposit of some type of security. Furthermore, the financial responsibility requirements outlined in §23(2-A) clearly contemplate a satisfactory showing that the group has the ability to pay compensation for the participating employers.

The Bureau's interpretation of §23 is also consistent with the public policy objectives of the Workers' Compensation Act as articulated by both the Legislature and the Maine Supreme Court. Section 92 of Title 39 mandates a liberal construction of the Act by the Workers' Compensation Commission with a view to carrying out its general purpose, and expressly abrogates the general rule that statutes in derogation of common law be strictly construed. The Law Court in Levesque v. Levesque, 363 A.2d 951 (Me., 1976) has noted this expression of legislative intent and has stated:

> Our Court has consistently recognized and adopted this principle of interpretation, often stating that the underlying object of the Act is to provide compensation to the injured workman for loss of earning capacity. 363 A.2d at 954.

For purposes of securing the payment of workers' compensation benefits, the group stands in the position of an insurer with respect to each employer member and its employees. If the group members' liability for claims against other member employers were limited to the amount of the security deposit, the Superintendent would be creating a limit of liability for self-insurers when he exercises his judgment in establishing the amount of the deposit under §23(4)(B). Nothing in the relevant legislative history supports the argument that the Legislature intended to delegate such a critical function to the Superintendent. A clear expression of legislative intent would appear to be necessary to accomplish such a result in light of the general purposes of the Workers' Compensation Act, particularly in view of the fact that employers who secure compensation by purchasing policies from insurance carriers do not have the benefit of any limitation of the liability so secured but must insure the payment of all compensation and other benefits.

Legislative concern for the financial responsibility of workers' compensation self-insurers is evident in the terms of §23(2) and (2-A), which require individual and group self-insurers to establish to the satisfaction of the Superintendent of Insurance their financial ability to pay compensation benefits. This condition must be met and security in an amount determined by the Superintendent must be provided before an individual employer or group may be approved as a self-insurer in lieu of obtaining an insurance policy from a carrier which would be subject to more pervasive regulatory controls and requirements.

Section 23, which defines the options available to employers for the securing of compensation benefits, was amended by Public Laws 1973, Chapter 559, §§2 and 3 (L.D. 1779) to permit the formation of group self-insurers in addition to the already existing alternatives of individual self-insurance and coverage through an insurance carrier. As originally proposed, L.D. 1779 added only what is now subsection 2-A of §23, which as noted above established certain requirements for proof of financial responsibility. However, the bill was subsequently amended (House Amendment "A" to L.D. 1779, Filing No. H-572) to add subsections 4 and 5 of §23 which include the language in §4 quoted above delineating the liability of the group for benefits owed by its employer members. In explaining the basis for this amendment, the sponsor of L.D. 1779 emphasized that it was intended to provide increased assurance of financial responsibility.

> MR. SMITH: Mr. Speaker and Ladies and Gentlemen of the House: The major concern that I had with this piece of legislation was that the groups that could be formed under the law if this bill passed, we were very concerned that these groups would be financially sound, so that if an employee were hurt, the payments could be made out of the group fund.
>
> The chairman of the Labor Committee, Mr. Brown and myself have been meeting with the Industrial Accident Commission and the Insurance Commissioner to make sure that there are enough teeth in this bill so that he can determine in advance if such a group, if it proposes, that it be allowed to provide workmen's compensation under the law so that those two officers of the state have enough authority to make sure that those groups are financially sound. That is what Amendment "A" was supposed to do. We looked it over and we didn't think that it was strong enough, that it didn't have enough in it. We called in these two officers and they suggested this new amendment and we have accepted it because they say it gives them enough authority to make sure that these groups are financially sound.
>
> Legislative Record, pp. 4289-4290 (June 14, 1973).

The argument that the group's liability should be limited to the amount of the security deposit is inconsistent with this expression of legislative intent. Concern over the financial ability of workers' compensation group self-insurers was heightened when former 39 M.R.S.A. §23(4)(A), which had limited such groups to employers with related activity in a given industry, was repealed by Public Laws 1979, Chapter 577, Sec. 3 (L.D. 526). Public Laws 1979, Chapter 658 (L.D. 1863) was subsequently enacted to require workers' compensation group self-insurers to participate in the Maine Insurance Guaranty Association, a mechanism designed to pay covered claims and avoid loss to claimants due to the insolvency of an insurer. Again, issues regarding the financial

responsibility of group self-insurers were of major importance in the passage of this legislation. (See Legislative Record, pp. 419-420, March 13, 1980 and p. 482, March 17, 1980). These issues center on the uncertainty of a group's ability to meet the type of long-term payments which are not uncommon in the area of workers' compensation. The leading workers' compensation treatise, 4 LARSON, THE LAW OF WORKMEN'S COMPENSATION §92.10 (1978) emphasizes that group self-insurance programs have been most seriously criticized:

> . . . on the ground that the current solvency of a moderate-sized business is no guarantee that it can be depended upon to pay long-term compensation obligations or survive disastrous accidents and business depressions.

The Maine Supreme Court has not addressed the issue of the extent of a group self-insurer's liability for each employer member's obligations, and due to the variations in other jurisdictions' statutes this specific question does not appear to have been decided in the context of a comparable statute. However, there are cases which address related issues wherein the courts conclude that liability for workers' compensation benefits is jointly imposed upon the employer and another entity. Although not directly on point, these cases reflect a liberal construction of workers' compensation statutes in furtherance of the overriding public policy goal of securing certain and speedy payment of benefits.

Under statutes which are comparable to 39 M.R.S.A. §2(1) in defining "employer" to include the insurer for most purposes under workers' compensation acts, the employer and insurer have been held to be jointly and severally liable to the employee for the payment of benefits. The Supreme Court of Tennessee so held in General Accident Fire & Life Assurance Corp. v. Kirkland, 356 SW2d 283, 210 Tenn. 39 (1962), affirming an award against the employer's insurer despite the fact that the statute of limitations barred the employee's right to bring suit against his employer. The same result was reached in Morrisseau v. Legac, 181 A.2d 53, 123 Vt. 70 (1962) which held that both employer and insurer are primarily liable to the employee. The Court also reversed that part of the Commissioner's order which established a series of priorities for satisfaction of the award among the contractor, subcontractor and their insurance carriers, noting that the statute did not provide such authority. The opinion emphasizes the unfairness of exposing the claimant to possible litigation, expense and undue delay in enforcement of the award by requiring that he proceed against the defendants in the order listed:

> The judgment order in favor of the award should have been against all of the defendants unconditionally. It is not the intent of the compensation law that a claimant be made a football in any contest between parties defendant who have been held liable, in the determination of their respective rights or liabilities as between themselves. 181 A.2d at 59.

Relieving the employee of the burden of litigating complex issues of primary-secondary liability between defendants is in furtherance of the general policy goals of the workers' compensation system. Thus under statutes which impose liability on general contractors for workers' compensation benefits to employees of subcontractors which have not secured their payment, joint and several liability has been found. The court in Tayloe Paper Company v. W. F. Jameson Construction Company, 364 SW2d 882, 211 Tenn. 232 (1963) held that contractor and subcontractor are jointly and severally liable to the employee, although this is for the benefit of the injured workman and does not determine as between them which is primarily liable for purposes of deciding rights to indemnity or contribution. See also Belford Trucking Company v. Pinson, 360 So.2d 1140 (Fla. Dist. Ct. of App., 1978) to the same effect.

These cases illustrate the general rule of construction in the workers' compensation area that language be construed so as to effect the speedy and efficient payment of compensation to the injured workman for loss of earning capacity. Had the Legislature intended to restrict the group self-insurer's liability, it could easily have so provided. The language of the statute, existing legislative history concerning group self-insurers, the general purposes of the Workers' Compensation Act and the case law all support the conclusion that 39 M.R.S.A. §23 subjects the group self-insurer to liability to the same extent as each employer member. We do not address the complex questions of allocation of that liability among members of the group or their rights to indemnification and/or contribution with respect to each other, as such issues can be determined only by the courts in the context of an actual controversy.

Please contact this office if further assistance is required.

Very truly yours,

LINDA M. PISTNER
Assistant Attorney General

LMP/glm