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March 5, 1980

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ATTORNEY GENERAL OPINION NO. 80-62

The Honorable Thomas E. Slattery
State Representative, Fiftieth District
3431 N.W. 42nd
Topeka, Kansas 66618

Re: Labor and Industries--Workmen's Compensation--
Self-Insurance; Trust Indenture Pooling Arrange-
ment

Synopsis: The presence of a trust arrangement for the payment of workmen's compensation claims does not in itself entitle a participating employer to self-insured status. However, in the discretion of the director of worker's compensation, the beneficial interest of such employer in the trust fund may be considered by the director in determining the assets of the employer on application for self-insured status.

* * *

Dear Representative Slattery:

You request our opinion concerning K.S.A. 1979 Supp. 44-532, which provides for self-insuring by an employer under the workmen's compensation laws of Kansas, and K.A.R. 51-14-3 and 51-14-4 which set forth certain procedures to be followed by an employee seeking self-insured status under the act. You set forth two specific issues:

"(1) Is there any language in the applicable Kansas statutes and the Rules and Regulations that would prohibit an employer from being a self insured by virtue of the fact that the security for approval of his application to be a self insured is a trust indenture, wherein other employers are pooling their resources to protect the payments of compensation.

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"(2) Can the Workman's compensation director reject an application from an employer to become self insured on the sole basis that the employer's security arrangement is through a trust indenture involving the pooling of funds from other employers."

You note that these issues are important because the Associated General Contractors of Kansas, Inc., has created a trust program wherein participating members can pool their workmen's compensation risks with the idea that a participating member would make application for self-insurer status under K.S.A. 1979 Supp. 44-532. As you point out, after submission of this plan to the Workmen's Compensation Division of the Kansas Department of Human Resources, the director of that division issued a letter which indicated his opinion that such a matter of self-insuring is not within the purview of the above specified statute and regulations. We note, however, that you do not request our opinion regarding the validity of the specific plan submitted by the Associated General Contractors of Kansas, Inc. Therefore, our response will be directed solely to those issues quoted above.

The statute relevant to self-insurance under the Kansas Workmen's Compensation Act is K.S.A. 1979 Supp. 44-532, which provides in pertinent part:

"(b) Every employer shall secure the payment of compensation to his employees by insuring in one of the following ways: (1) By insuring and keeping insured the payment of such compensation with an insurance carrier authorized to transact the business of workmen's compensation insurance in the state of Kansas; or (2) by showing to the director that said employer carries his own risk and is what is known as a self-insurer and by furnishing proof to the director of his or its financial ability to pay such compensation for himself or it."

Kansas Administrative Regulations 51-14-3 and 51-14-4 were promulgated by the Director of Workers' Compensation pursuant to his authority under K.S.A. 1979 Supp. 44-573. K.A.R. 51-14-3 specifies that employers and insurance carriers must provide information on a periodic basis regarding the disposition of all claims and awards as requested by the director. K.A.R. 51-14-4 specifies what is required should an employer operating under the act wish to become qualified as a self-insurer.

To guarantee the security of those covered by the Workmen's Compensation Act, employers must, pursuant to K.S.A. 1979 Supp. 44-532(b), either (1) insure "with an insurance carrier authorized to transact the business of workmen's compensation insurance in the state of Kansas," or (2) qualify as a self-insurer. Both requirements are designed to guarantee that the purpose of the act will be satisfied. If the employer insures with an authorized insurance carrier (i.e., one regulated by the Kansas Insurance Department), the workers' compensation director is provided assurance that the employer's contribution will be available when needed, because pursuant to K.S.A. 1979 Supp. 44-532 and K.S.A. 44-559, the insurance company is subrogated to the rights and duties of the insured employer. If the employer qualifies as a self-insurer, the regulations promulgated by the workers' compensation director at K.A.R. 51-14-4 seek to insure that the employer is financially capable of paying his part of a compensation award. Should the exigency arise that either the insurance company or self-insured employer defaults on this responsibility, the commissioner of insurance, in his capacity as administrator of the workman's compensation fund, has statutory authority to compel payment. K.S.A. 1979 Supp. 44-532a(b).

However, in the case of the third party trustee contemplated by your inquiry, it is not clear whether the workers' compensation director would have a similar remedy against the trust. Specifically, in the event that the trust refuses or is financially unable to honor the commitment to the employer-beneficiary or the employee, the Kansas act does not give the director specific authority to compel payment by the third party trust. We note that such insolvency in similar pooling arrangements is not an unheard of contingency as shown by the facts in Florida Industrial Com'n v. Yell for Pennell, Inc., 253 So.2d 918 (1971), where a plumbing and mechanical contractor self-insurance fund was unable to meet its obligations.

The legal limitations of the director of workers' compensation in reaching the assets of third parties was decided in King v. El Dorado Motor Co., 181 Kan. 477 (1957). In that case, an insurance agent, not qualified to transact insurance business in Kansas, agreed to personally carry an automobile dealer's compensation insurance. One of the dealer's workmen was injured and instituted proceedings for compensation under the Workmen's Compensation Act. The dealer filed with the Commissioner an application to make the agent an additional respondent. The application was granted and after hearing all evidence, the Commissioner (now director) rendered his decision that both the dealer and the agent were liable to the workman. The agent appealed to the district court which held that the Workmen's Compensation Commissioner did not have jurisdiction

over the unlicensed insurance broker. The Kansas Supreme Court, on appeal, relying on what is now K.S.A. 1979 Supp. 44-522 and K.S.A. 44-559, affirmed. The Court stated:

"[W]hen these two sections are considered together we think it is clear the Legislature not only meant to make certain the type of insurance required to protect a workman under the Act but intended to limit jurisdiction of the Commissioner in a compensation proceeding to insurance companies executing policies of compensation insurance in form as contemplated by its terms.

"[W]e are constrained to the view, that from the standpoint of public policy, the Act must be construed as just indicated. To hold otherwise and place our stamp of approval, even by implication, on side arrangements or agreements between an employer and third parties, who are in no way qualified to transact the business of workmen's compensation insurance, would permit employers to violate the express provisions of 44-532, supra, and in many cases, due to financial irresponsibility of the third parties, work a hardship on workmen covered by the Act instead of protecting them."
Id. at 482.

This reasoning was later noted with approval in State v. Collins, 209 Kan. 534 (1972).

Our research has uncovered nothing in either Kansas statutory or case law concerning workmen's compensation which would indicate an interpretation of "self-insured" as meaning anything other than an employer who individually carries his own risk. And it would be our opinion that the restrictions of the Kansas Workmen's Compensation Act as to the "reach" of the director regarding third parties would be applied to the trustee of the trust you describe.

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It is interesting to note the applicable law of other jurisdictions as to this issue. It is apparent from the information regarding the AGC plan which you supplied to us, that the plan is modeled primarily on a Florida plan. But it is important to point out that the Florida workmen's compensation statutes are significantly different from those of Kansas, with regard to self-insurers. Florida, in its workmen's compensation act, as does Kansas, allows an employer to secure payment of such compensation by qualifying as a self-insurer [Fla. Stat. §440.38(b)]. Unlike Kansas, however, Florida also allows two or more employers to enter into agreements to pool their liabilities for the purpose of qualifying as a group self-insurers fund. Each member of such group, if the group is approved, qualifies as a self-insurer as defined by that state's workmen's compensation act. However, it is important to note that Florida has a specific statute allowing such a plan [Fla. Stat. §440.57]. The statute not only approves such a plan, however, it also specifies that the Florida Workmen's Compensation Division shall adopt rules carefully regulating the monetary reserves and other financial aspects of such group self-insurers funds. The Florida Workmen's Compensation Division therefore has statutory power over such plans that the Kansas division does not have, should such plan be implemented in Kansas. Furthermore, our research indicates no state which allows such pooling plans without specific legislation so authorizing them.

Thus, to answer your first question, although no language in the applicable Kansas statutes or rules and regulations specifically prohibits a trust indenture serving as security for approval of an employer's application to be a self-insured under the Kansas Workmen's Compensation Act, nothing in the Kansas law authorizes the director to consider third party payment guarantees as "self-insurance" and absent some grant of this authority coupled with authority to compel such third party payment, we are of the opinion that the pooling trust you describe does not, in itself, qualify employers for "self-insured" status.

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As to your second question with respect to the workers' compensation director's power to reject an application from an employer to become self-insured, K.S.A. 1979 Supp. 44-573 states in pertinent part:

"The director may adopt and promulgate such rules and regulations as he shall deem necessary for the purposes of administering and enforcing the provisions of the workmen's compensation act."

Pursuant to that authority the director promulgated K.A.R. 51-14-4. That regulation, at subsection (h), specifies that after the director evaluates all information requested from a prospective self-insurer, he shall then make a decision whether to issue a new permit or to renew an existing permit. If, in the director's judgment there is a question whether a prospective self-insurer can meet the full financial obligation imposed by the act, the permit can be denied and a hearing to protest such a denial is provided by the regulation. Of course, the denial is reviewable by the courts, but that fact does not affect the director's initial authority to issue such a denial.

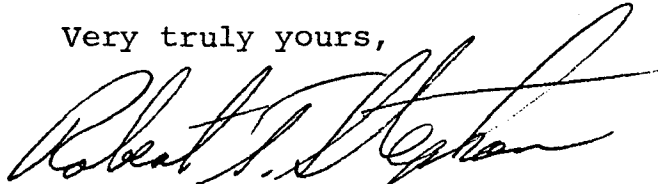
We are compelled to note that a question not asked in your request needs to be aired, namely, may the fact that an employer is a beneficiary of a workmen's compensation fund be considered as an "asset" of the employer in determination of self-insured status, pursuant to K.A.R. 51-14-4. As indicated by this regulation, the director may require "any employer who desires to operate as a self-insurer to submit a financial statement showing assets in a substantial amount over and above any indebtedness or exemptions allowed by law."

The act and regulations do not specify which assets are to be considered in calculating the financial abilities of an individual employer. Conceivably, the director may determine in his discretion that the beneficial interest in the trust you describe is an asset for purposes of evaluating an individual employer's ability to meet his workmen's compensation obligations. Thus, any employer's ability to achieve "self-insured" status may be enhanced by such trust arrangement, although in itself, the trust arrangement will not guarantee self-insured status.

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In summary, the presence of a trust arrangement for the payment of workmen's compensation claims does not in itself entitle a participating employer to self-insured status. However, in the discretion of the director of workers' compensation, the beneficial interest of such employer in the trust fund may be considered by the director in determining the assets of the employer on application for self-insured status.

Very truly yours,



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