VOLUME NO. 46 OPINION NO. 1

ADMINISTRATIVE LAW AND PROCEDURE - Applicability of Montana Administrative Procedure Act to actions of Montana Self-Insurers Guaranty Fund board of directors;
LABOR AND INDUSTRY, DEPARTMENT OF - Relation to Montana Self-Insurers Guaranty Fund;
OPEN MEETINGS - Applicability of Open Meeting Law to Montana Self-Insurers Guaranty Fund board of directors;
RIGHT TO KNOW - Applicability of Montana Administrative Procedure Act to actions of Montana Self-Insurers Guaranty Fund board of directors;
STATE AGENCIES - Status of Montana Self-Insurers Guaranty Fund;
STATUTORY CONSTRUCTION - Montana Self-Insurers Guaranty Fund Act;
MONTANA CODE ANNOTATED - Title 2, chapter 4; chapter 3, part 2; sections 1-11-103(6), 2-3-102, -203(1), 5-4-402 to -404, 33-10-105, 39-71-504, -907, -2101, -2103, -2103(2), -2104 to -2106, -2109, -2601, -2602, -2602(1), -2611, -2611(1), -2615(2), -2615(3), -2618;
MONTANA CONSTITUTION - Article II, section 16;
MONTANA LAWS OF 1989 - Chapter 244;
MONTANA LAWS OF 1991 - Chapter 163;
MONTANA LAWS OF 1993 - Chapter 150.

HELD: 1. The Montana Self-Insurers Guaranty Fund does not ensure payment of all potential covered workers' compensation claims against employers bound by compensation plan No. 1 who are unable to pay the claims because of insolvency.

2. Proceedings of the board of directors of the Montana Self-Insurers Guaranty Fund are subject to the Montana Administrative Procedure Act (Mont. Code Ann. tit. 2, ch. 4), and the Open Meeting Law (Mont. Code Ann. tit. 2, ch. 3, pt. 2).

3. The legislature gave the Montana Self-Insurers Guaranty Fund the power to prevent the sole exercise, by the Department of Labor and Industry, of the powers enumerated in Mont. Code Ann. §§ 39-71-2101, -2103 to -2106, -2109, and -2611, as they are affected by 1993 Mont. Laws, ch. 150, and 1991 Mont. Laws, ch. 163.

4. In all cases except those involving workers' compensation liabilities accrued prior to July 1, 1989, the Department of Labor and Industry must obtain the concurrence of the

Montana Self-Insurers Guaranty Fund when it seeks to require an employer who self-insures to give security in addition to the security the employer has already provided.

February 23, 1995

Ms. Laurie A. Ekanger, Commissioner
Department of Labor and Industry
Lockey and Roberts
P.O. Box 201501
Helena, MT 59620-1501

Dear Ms. Ekanger:

The Department of Labor and Industry has requested my opinion on four questions concerning the Montana Self-Insurers Guaranty Fund Act [MSIGFA], Mont. Code Ann. tit. 39, ch. 71, pt. 26, and related sections of the Workers' Compensation Act, Mont. Code Ann. tit. 39, ch. 71, especially as they relate to the Department of Labor and Industry [Department]. I have phrased your questions as follows:

1. Does the MSIGFA establish a mechanism which ensures the payment of all covered workers' compensation claims made against employers bound by workers' compensation plan No. 1 who are unable to pay claims because of insolvency?

2. Are the proceedings of the Montana Self-Insurers Guaranty Fund board of directors subject to the Montana Administrative Procedure Act, Mont. Code Ann. tit. 2, ch. 4, or the Open Meeting Law, Mont. Code Ann. tit. 2, ch. 3, pt. 2)?

3. What powers are given to the Montana Self-Insurers Guaranty Fund by the phrase "with the concurrence of the Montana self-insurers guaranty fund" as used in 1993 Mont. Laws, ch. 150, and 1991 Mont. Laws, ch. 163?

4. Under what circumstances must the Department of Labor and Industry obtain the concurrence of the Montana Self-Insurers Guaranty Fund when it seeks to require an employer who self-insures to give security in addition to the security which the employer has already provided?

You state that these questions arise from your staff's experiences with the MSIGFA (1989 Mont. Laws, ch. 244) since its passage. The legislature passed the act in response to the problems associated with the bankruptcy of Great Western Sugar Co., a private self-insurer. See State ex rel. Div. of Workers' Compensation v. District Ct., 246 Mont. 225, 805 P.2d 1272 (1990). I will address your questions in the order in which they are presented above.

I.

The Montana Self-Insurers Guaranty Fund Act was enacted

> to provide a mechanism for the payment of covered workers' compensation claims of employers bound by compensation plan No. 1 who are unable to pay the claims because of insolvency, to establish a fund from which the claims may be paid, and to establish a board to assess the cost of the protection among those employers.

Mont. Code Ann. § 39-71-2602(1). To that end, Mont. Code Ann. § 39-71-2611(1) states: "The fund shall assume the workers' compensation obligations of a private self-insurer that come due after the private self-insurer has been determined to be an insolvent self-insurer."

However, these sections do not establish that the Montana Self-Insurers Guaranty Fund [Fund] will in fact pay *all* covered workers' compensation claims against a Fund member who has become insolvent; they only require that the Fund assume the workers' compensation "obligations" or liabilities of insolvent self-insurers. This is an important distinction.

"Liability is a broad term, of large and comprehensive significance. In a broad sense it means an obligation one is bound in law or justice to perform." State ex rel. Diederichs v. State Highway Comm'n, 89 Mont. 205, 211, 296 P. 1033, 1035 (1931), quoted with approval in State ex rel. Ward v. Anderson, 158 Mont. 279, 286, 491 P.2d 868, 872 (1971). The concept of liability must be distinguished from considerations of one's ability to discharge a liability. The law imposes many kinds of financial liabilities, without guaranteeing that any party will have the financial wherewithal to discharge the liability. You ask whether a mechanism has been created which will pay all potential covered workers' compensation claims. In my opinion, although the Fund is obligated by law to assume all workers' compensation liabilities for insolvent self-insurers, the law does not, and in all probability cannot, ensure that the Fund will have the resources to discharge all of the liabilities it assumes.

The Act contains provisions which may practically limit the Fund's ability to pay claims. For example, Mont. Code Ann. § 39-71-2615(2) limits the amount the Fund can assess against any self-insurer in any calendar year to 5 percent of the indemnity compensation paid by the self-insurer during the previous year. Mont. Code Ann. § 39-71-2615(3) provides similar protection to entities which cease to self-insure, limiting their liability to the Fund to three years of assessments after self-insurance status terminates. There is no legal requirement that the Fund be actuarially sound, i.e., that its assets be sufficient as a factual matter to satisfy all projected liabilities. Cf. Mont. Code Ann. § 39-71-2311 (provisions aimed at ensuring actuarial soundness of the State Compensation Insurance Fund).

The statutes obligating the Fund to assume the liabilities of insolvent self-insurers and those which limit the assessments against members of the Fund are not directly contradictory, and they must be reconciled if possible. Dale v. Trade Street, Inc., 258 Mont. 349, 357, 854 P.2d 828, 832 (1993). Such a reconciliation is possible; the result is that, in the case of the insolvency of a self-insurer, the Fund must assume the workers' compensation obligations of the employer. However, the assessments that the Fund may make on the other members of the Fund in order to pay the covered workers' compensation claims of the insolvent self-insurer are limited by the terms of Mont. Code Ann. § 39-71-2615. Taken together, the effect of these statutes is that the Fund must assume the workers' compensation obligations of an insolvent self-insurer, but the Fund's sources of revenue with which to pay claims may be limited.

In response to a request for information on your questions, the Fund has argued that the law contains mechanisms which, as a practical matter, make any shortfall in the Fund highly unlikely to occur. For example, the Fund obligates self-insurers to post security for payment of benefits, and the amount of security posted has historically far exceeded the claims experience of the self-insurers. Moreover, pursuant to its statutory rulemaking authority, the Fund has adopted bylaws which deal with the possibility of insufficient funds to pay covered claims by providing: "[A]ny remaining unpaid benefits shall be paid as soon thereafter as sufficient funds become available." Bylaws of the Montana Self-Insurers Guaranty Fund, art. V, B.1. Cf. Mont. Code Ann. §§ 33-10-116(3) and -227(5) (providing similar means of supplying shortfall in assets of Casualty and Property Insurance and Life and Health Insurance Guaranty Associations).

I take no issue with the sound management practices which the Fund has followed. I have no reason to disagree with the Fund's assertion that the combination of Fund assessments and security

posted by self-insurers provides a high level of protection for injured workers' benefits. However, the factual issue of whether the Fund is well positioned to satisfy obligations as they come due is separate from the legal issue you pose, which is whether the law ensures payment of all these obligations. The bylaw provisions cited above appear to assume the possibility that the Fund may not have the assets in hand to pay all of the obligations imposed by law in a timely manner. In my opinion, the law allows for the possibility, however remote, that the assets of the Fund may not be sufficient in a future case to cover its obligations.

The law is incapable of ensuring that any obligation will be satisfied. However, I note that in the case of the Fund, as with other insurance guarantee funds, the legislature has not gone as far as it might have. The Fund's situation should be contrasted, for example, with the requirements imposed by the legislature for associations, corporations, or organizations of self-insuring employers:

> Each individual employer in an association, corporation, or organization of employers given permission by the department to operate as self-insured under plan No. 1 of this chapter is jointly and severally liable for all obligations incurred by the association, corporation, or organization under this chapter. An association, corporation, or organization of employers given permission to operate as self-insured must maintain excess liability coverage in amounts and under such conditions as provided by rules of the department.

Mont. Code Ann. § 39-71-2103(2). By these provisions, the legislature explicitly made members of self-insuring employers' associations jointly and severally liable for all obligations incurred by those associations. In addition, an employers' association is required to maintain excess liability coverage. The legislature chose to do neither of these things in the case of the Fund. Finally, as I have previously noted, the legislature has not required that the Fund be operated on an actuarially sound basis.

I express no opinion here on whether courts might recognize some legal or equitable right of recovery in favor of an injured worker against any person or entity in the event that the Fund is not financially able to satisfy the workers' compensation obligations of an insolvent self-insurer. Cf. State ex rel. Div. of Workers' Compensation v. District Court, 246 Mont. 225, 805 P.2d 1272 (1990) (state agency subject to suit for negligence in authorizing employer to self-insure). I note, however, that while the legislature has immunized the Fund and its members from individual liability for the Fund's decisions and actions, Mont. Code Ann.

§ 39-71-2618, it has not acted to immunize the Department from claims such as the ones brought in State ex rel. Div. of Workers' Compensation. I likewise express no opinion on the advisability of making changes in the statutes to more closely approach the goal of providing absolute protection for the benefits of injured workers when a self-insurer becomes insolvent. I can only examine the structure and possible consequences of current statutes. I conclude that the Montana Self-Insurers Guaranty Fund does not provide a mechanism which legally ensures payment of all potential covered workers' compensation claims against employers bound by compensation plan No. 1 who are unable to pay the claims because of insolvency.

II.

Your second question asks whether certain proceedings of the Fund's board of directors are subject to the Montana Administrative Procedure Act [MAPA], Mont. Code Ann. tit. 2, ch. 4, or the Open Meeting Law, Mont. Code Ann. tit. 2, ch. 3, pt. 2.

In order to answer this question, we must first examine the laws that determine the types of meetings to which the two acts apply. Because the reasoning applicable to the acts differs somewhat, I will examine the acts separately. I also note that the statutes governing the MSIGF differ in potentially significant ways from those governing the Casualty and Property Insurance Guaranty Association, Mont. Code Ann. tit. 33, ch. 9, pt. 1, and the Life and Health Insurance Guaranty Association, *id.*, pt. 2. I have not been asked for an opinion as to whether the conclusions stated herein would apply to these other guaranty associations and, accordingly, I express no such opinion.

A.

MAPA applies to rulemaking and contested case proceedings conducted by state agencies. "Agency" is defined in MAPA, Mont. Code Ann. § 2-4-102(2), by reference to the definition of the term in Montana's statutes dealing with public notice and the opportunity to be heard, Mont. Code Ann. § 2-3-102, which provides:

> (1) "Agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except:
>
> (a) the legislature and any branch, committee, or officer thereof;

> (b) the judicial branches and any committee or officer thereof;
>
> (c) the governor, except that an agency is not exempt because the governor has been designated as a member thereof; or
>
> (d) the state military establishment and agencies concerned with civil defense and recovery from hostile attack.

The Fund board of directors is certainly a "board," fitting the first part of the definition. The Fund board is not specifically excepted from the definition in subsections (1)(a)-(d). Thus, under the definition, the exercise by the Fund of any of the three specific powers listed--rulemaking, determining contested cases, and entering contracts--would bring the Fund board under the definition of an "agency."

According to Mont. Code Ann. § 39-71-2610, the legislature has given the Fund board two of the three powers listed in the definitional statute: the power to make rules and the power to enter into contracts. My conclusion regarding rulemaking authority is buttressed by the fact that when the legislature passed the MSIGFA in 1989, it attached a statement of intent (1989 Mont. Laws, ch. 244). The inclusion in the MSIGFA of a statement of intent to authorize adoption of administrative rules strongly indicates the legislature's intention to treat the Fund board as a rulemaking entity subject to MAPA. See Mont. Code Ann. §§ 5-4-402 to -404. It is therefore my opinion that the Fund board of directors fits the definition of "agency" in Mont. Code Ann. § 2-3-102, and, by incorporation under Mont. Code Ann. § 2-4-102(2), in MAPA as well.

The question might arise, since private organizations may adopt rules (bylaws) and enter contracts in order to carry out their purposes and responsibilities, what makes the Fund a public organization? The answer is that the Fund is a public organization because it has a public purpose, Mont. Code Ann. § 39-71-2602, because its powers to compel membership and assess members derive from the police power of the state, and because it has been granted specific statutory authority to adopt public rules and enter public contracts. When the Fund board adopts rules or resolves matters which fall within the definition of "contested case" under MAPA, Mont. Code Ann. § 2-4-102(4), it must comply with MAPA.

B.

The second part of this issue deals with the Montana Open Meeting Law. It states in pertinent part:

> All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public.

Mont. Code Ann. § 2-3-203(1).

In examining the definition of "agency" in the Open Meeting Law, the Montana Supreme Court has again referred to the definition of "agency" found in Mont. Code Ann. § 2-3-102. SJL of Montana v. City of Billings, 263 Mont. 142, 147, 867 P.2d 1084, 1087 (1993); see also Common Cause of Mont. v. Statutory Committee, 263 Mont. 324, 868 P.2d 604 (1994). In these cases, the Court held, contrary to my conclusion here, that the meetings at issue did not involve "agencies" as defined in the statute. Because I find that the Fund Board is an "agency" as that term is defined in Mont. Code Ann. § 2-3-102, it is a public agency which must comply with the open meeting law.

This conclusion is consistent with the philosophy underlying the open meeting law. The laws guaranteeing the public's right to know are to be broadly construed. SJL of Montana, 263 Mont. at 146. In 44 Op. Att'y Gen. No. 40 (1992), Attorney General Racicot held that the open meeting law applies "generally to agencies that 'exist to aid in the conduct of the peoples' [sic] business.'" 44 Op. Att'y Gen. No. 40 at 2. The Fund exists to aid in the regulation of self-insurers, which is in turn an integral part of the workers' compensation system, a system which has from its earliest inception been recognized as serving an important public purpose. See Shea v. North Butte Mining Co., 55 Mont. 522, 528, 179 P. 499, 501 (1919). The Fund draws its authority to compel membership, and to assess its members and exercise its other regulatory powers, from the state's police power over employers. Application of the open meeting law to the Fund is, in my opinion, consistent with the law's purpose.

III.

Your third question concerns the phrase, "with the concurrence of the Montana self-insurers guaranty fund." That phrase, or an equivalent, is used throughout 1993 Mont. Laws, ch. 150, and 1991 Mont. Laws, ch. 163. You ask what powers were given to the Fund by the legislature through the use of that phrase.

In 1930 the Montana Supreme Court had occasion to discuss the concept of concurrence at length, and referred to standard definitions. Concurrence is defined as:

> "Concurrence in opinion; agreement." Century Dictionary. "A meeting of minds; agreement in opinion; consent." Webster's Dictionary. "Agreement in mind or opinion; consent; approbation; approval; to come together in opinion or action." Standard Dictionary.
>
> In the case of Northern Pacific Ry. v. Bennett, 83 Mont. 483, 272 P. 987, 992 [1928], this court quoted with approval the language of the Supreme Court of New York in the case of People ex rel. Schwab v. Grant, 126 N.Y. 473, 27 N.E. 964 [1891], as follows: "The requirement that a person must secure leave from some one [sic] to entitle him to exercise a right, carries with it, by irresistible implication, a discretion on the part of the other to refuse to grant it, if, in his judgment, it is improper or unwise to give the required consent."

Great Northern Util. Co. v. Public Serv. Comm'n, 88 Mont. 180, 212, 293 P. 294, 301 (1930).

As the Montana Supreme Court noted, the power to concur, by irresistible implication, also carries with it the power to withhold concurrence, such that withholding concurrence should have the effect of preventing the action. This "veto" power is the real power granted the Fund by the legislature in 1991 and 1993. The power of concurrence implies no power to initiate action.

I conclude that the legislature gave the Montana Self-Insurers Guaranty Fund, through its power of concurrence, the power to prevent the sole exercise by the Department of Labor and Industry of the powers enumerated in Mont. Code Ann. §§ 39-71-2101, -2103 to -2106, -2109, and -2611, as they are affected by 1993 Mont. Laws, chapter 150, and 1991 Mont. Laws, chapter 163.

IV.

Your final question also concerns the Fund's power of concurrence, as well as the power to require a private self-insurer to provide additional security. Specifically, you ask under what circumstances the Department must obtain the Fund's concurrence when the Department seeks to require an employer who self-insures to give security in addition to the security that the employer has already provided.

Your question arises because Mont. Code Ann. §§ 39-71-2105 and -2106, as amended in 1993, authorized the Department, with the concurrence of the Fund, to require any self-insurer to provide additional security or additional proof of solvency and financial ability to pay covered workers' compensation claims. In 1993, in

addition to adding by amendment the concurrence language to Mont. Code Ann. §§ 39-71-2105 and -2106, the legislature enacted the following:

> § 3. **Saving clause.** The department of labor and industry may require an employer, without concurrence of the Montana self-insurers guaranty fund, to give security in addition to the requirements described in 39-71-2105 and 39-71-2106 for workers' compensation liabilities that the employer accrued prior to July 1, 1989.

1993 Mont. Laws, ch. 150. Because the saving clause was not codified in the Montana Code Annotated, a question arises as to its effect. However, the question is answered clearly in the statutes. Mont. Code Ann. § 1-11-103(6) states unequivocally that in cases of inconsistency between enrolled bills and codified statutes, enrolled bills, such as 1993 Mont. Laws, ch. 150, control. As part of the enrolled bill, the "saving clause" is a law which must be given effect.

These three enactments may be read consistently once it is recognized that the saving clause is more in the nature of a proviso. See State ex rel. Huffman v. District Court, 119 Mont. 201, 461 P.2d 847 (1969); Great Western Sugar Co. v. Mitchell, 119 Mont. 328, 174 P.2d 817 (1946). In the words of the Mitchell case, describing the proviso at issue there, "it is clear that the legislature intended to limit or restrict what had gone before and to exclude from the scope of the statute that which it evidently thought might otherwise be within its terms." 154 Mont. at 332, 174 P.2d at 819. In this case, the legislature, through the saving clause, differentiated between workers' compensation liabilities accrued before July 1, 1989, and later workers' compensation liabilities. It is clear that the legislature intended to exclude the first group of liabilities from the requirement that the Department obtain the concurrence of the Fund before requiring additional security. With respect to workers' compensation liabilities accrued after July 1, 1989, the concurrence of the Fund is required before any demands by the Department that private self-insurers provide additional security or additional proof of solvency and ability to pay.

This is consistent with the Montana Supreme Court's holding that "workers' compensation benefits are determined by the statutes in effect as of the date of injury." Buckman v. Montana Deaconess Hosp., 224 Mont. 318, 321, 730 P.2d 380, 382 (1986), and cases cited therein. The saving clause appears designed to reflect the legislature's intent that the Fund not be at risk for workers' compensation claims which arose prior to its creation. Since the Department regulates self-insurers with respect to such pre-Fund

claims without the participation of the Fund, the legislature added the saving clause to make it clear that the Fund played no role in the Department's determination of the nature and amount of security required for pre-Fund claims.

I conclude that, in all cases *except* those involving workers' compensation liabilities accrued prior to July 1, 1989, the Department of Labor and Industry must obtain the concurrence of the Montana Self-Insurers Guaranty Fund when it seeks to require an employer who self-insures to give security in addition to the security which the employer has already provided.

THEREFORE, IT IS MY OPINION:

1. The Montana Self-Insurers Guaranty Fund does not ensure payment of all potential covered workers' compensation claims against employers bound by compensation plan No. 1 who are unable to pay the claims because of insolvency.

2. Proceedings of the board of directors of the Montana Self-Insurers Guaranty Fund are subject to the Montana Administrative Procedure Act (Mont. Code Ann. tit. 2, ch. 4), and the Open Meeting Law (Mont. Code Ann. tit. 2, ch. 3, pt. 2).

3. The legislature gave the Montana Self-Insurers Guaranty Fund the power to prevent the sole exercise, by the Department of Labor and Industry, of the powers enumerated in Mont. Code Ann. §§ 39-71-2101, -2103 to -2106, -2109, and -2611, as they are affected by 1993 Mont. Laws, ch. 150, and 1991 Mont. Laws, ch. 163.

4. In all cases except those involving workers' compensation liabilities accrued prior to July 1, 1989, the Department of Labor and Industry must obtain the concurrence of the Montana Self-Insurers Guaranty Fund when it seeks to require an employer who self-insures to give security in addition to the security the employer has already provided.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/rfs/kaa