

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 46

STATE DEBTS - Whether unfunded liability in industrial insurance expendable trust fund constitutes "state debt" within scope of article VIII, section 8, Montana Constitution;

WORKERS' COMPENSATION - Whether unfunded liability in industrial insurance expendable trust fund constitutes "state debt" within scope of article VIII, section 8, Montana Constitution;

MONTANA CODE ANNOTATED - Title 39, chapter 71; sections 39-71-726, 39-71-740, 39-71-2101, 39-71-2201, 39-71-2301, 39-71-2304, 39-71-2321, 39-71-2501 to 39-71-2504, 39-71-2909;

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MONTANA CONSTITUTION - Article VIII, section 8;
MONTANA LAWS OF 1915 - Chapter 96;
MONTANA LAWS OF 1987 - Chapters 464, 664.

HELD: Unfunded liability in the industrial insurance expendable trust fund is not a "state debt" within the scope of article VIII, section 8 of the Montana Constitution.

17 December 1987

The Honorable Robert L. Marks
Montana House of Representatives
302 Lump Gulch
Clancy MT 59634

Dear Representative Marks:

You have requested my opinion concerning the following questions:

1. Does unfunded liability in the Industrial Insurance Expendable Trust Fund constitute a "state debt" within the scope of article VIII, section 8 of the Montana Constitution?
2. Does the State of Montana have responsibility to provide workers' compensation benefits to individuals insured by the State Compensation Insurance Fund, irrespective of whether the Industrial Insurance Expendable Trust Fund is solvent?

I answer the first question negatively and determine that no response is appropriate at this time with respect to the second question.

The Montana Workers' Compensation Act, §§ 39-71-101 to 2914, MCA, permits employers to elect one of three methods for providing payments of benefits to injured employees: self-insurance, insurance purchased through a private carrier, and insurance purchased through the State Compensation Insurance Fund (State Fund). See §§ 39-71-2101, 39-71-2201, 39-71-2301, MCA. The State Fund is engaged in the business of insurance but is also a governmental entity whose operation is wholly circumscribed by statute. Birkenbuel v. Montana State Compensation Insurance Fund, 41 St. Rptr. 1647, 1652, 687 P.2d 700, 704 (1984). Most importantly for present

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purposes, the State Fund is required to establish premium levels which will make its insurance program "neither more nor less than self-supporting." § 39-71-2304(2), MCA. The program, therefore, is intended in theory to operate on the basis of contributions by those employers opting for State Fund coverage and income earned from such contributions.

All employer contributions are deposited into the Industrial Insurance Expendable Trust Fund (trust fund). § 39-71-2321, MCA. To be actuarially sound, the trust fund's corpus must be sufficient to pay the future costs of all liability incurred as of a particular time; when the corpus is not adequate to pay those future costs, a funding deficiency or "unfunded liability" arises. See Office of Legislative Auditor, Report to the Legislature: Department of Labor and Industry 17-18 (Mar. 1987). Determination of whether unfunded liability exists is necessarily premised on various actuarial assumptions and accordingly represents an estimate of a fund's future adequacy to satisfy potential claims against it. The existence of an unfunded liability, however, does not mean currently accruing benefit-payment obligations cannot be met.

During the 1987 legislative session the Legislative Auditor submitted an analysis which indicated that, as of June 30, 1986, the trust fund had accumulated an \$81 million funding deficiency. He also stated that, without significant modifications to benefit or contribution levels, the trust fund would experience a continued growth in the amount of unfunded liability and would be unable to meet currently accruing benefit obligations by July 1990. Addressing this imbalance in the fund, the Legislature enacted a four-year workers' compensation payroll tax (1987 Mont. Laws, ch. 664 (codified in §§ 39-71-2501 to 2504 (temporary), MCA)) and made other modifications in the Act generally designed to reduce benefit expenditures (1987 Mont. Laws, ch. 464). The State Fund remains both authorized and required under section 39-71-2304, MCA, to set premium rates at a level which will maintain the trust fund's ability to pay the future costs of all presently incurred liability.

Your first question asks whether the unfunded liability in the trust fund constitutes a "state debt" within the meaning of article VIII, section 8 of the Montana Constitution. In relevant part that provision reads: "No state debt shall be created unless authorized by a two-thirds vote of the members of each house of the legislature or a majority of the electors voting

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thereon." I conclude for two reasons that no "state debt" has been created.

My earlier review underscores the critical fact that, to the extent unfunded liability may exist, it has arisen not by conscious act of the Legislature but from a combination of circumstances which resulted in a mismatch between liability incurred and trust fund deposits. There is, in this respect, no reasoned contention that the Act itself created a "state debt" within the meaning of article VIII, section 8 of the Constitution. As codified from 1915 to the present, the statute has contemplated that the State Fund or its predecessor entities would assure through appropriate contribution levels that the fund would be adequate, at any particular time, to satisfy the future costs of all presently incurred liability. See 1915 Mont. Laws, ch. 96, § 40. Whatever the precise scope of the constitutional provision, it plainly does not extend to the unanticipated consequences of otherwise validly adopted legislation. Cf. Rochlin v. State, 112 Ariz. 171, 540 P.2d 643 (1975) (unfunded liability in state pension fund was not "debt" within scope of Arizona constitutional provisions).

Second, while unfunded liability must be avoided to ensure the continued, statutorily mandated self-sufficiency of the State Fund, no claim has been made that the trust fund's corpus will be inadequate to satisfy those benefit-payment obligations which will accrue during this biennium. See, e.g., Graham v. Board of Examiners, 116 Mont. 584, 593, 155 P.2d 956, 957 (1945) ("[i]t has repeatedly been held by this court that there is no debt or liability created [under article XIII, section 2 of the 1889 Constitution] when there is cash on hand or revenue provided by the legislature for the biennium to meet the appropriation"); State ex rel. Rankin v. State Board of Examiners, 59 Mont. 557, 568, 197 P.2d 988, 992 (1921) (same). Although a claimant's entitlement to a specific amount of benefits or to reimbursement of medical expenses is determined at the time of his injury and is contractual in nature (Buckman v. Montana Deaconess Hospital, 43 St. Rptr. 2216, 2221-22, 730 P.2d 380, 384-85 (1986)), the actual obligation to tender a portion of the benefits or expenses most typically arises on a biweekly basis. § 39-71-740, MCA; see, e.g., Polich v. Whalen's O.K. Tire Warehouse, 38 St. Rptr. 1572, 1574, 634 P.2d 1162, 1165 (1981); Laukaitas v. Sisters of Charity of Leavenworth, 135 Mont. 469, 474, 342 P.2d 752, 754-55 (1959); cf. Brurud v. Judge Moving & Storage Co., 172 Mont. 249, 255, 563 P.2d 558, 561 (1977) (distinguishing award of lump sum advance

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from lump sum settlement). The State Fund's obligation to make such payments, moreover, is contingent upon, inter alia, the claimant's survival (§ 39-71-726, MCA) and the absence of an intervening order which modifies or eliminates such duty (§ 39-71-2909, MCA). The unfunded liability at issue here thus reflects the potential of future financial deficiency and not a present inability to pay currently accrued obligations or those which will arise prior to fiscal year 1990. Consequently, even if the term "state debt" in article VIII, section 8 of the Constitution did encompass the State Fund's inability to satisfy its legally-due obligations, no such debt has yet occurred or will likely occur this biennium, and it is speculative to assume that it will arise in later bienniums.

Your other question hypothesizes an inability of the State Fund to pay currently accruing obligations in future bienniums. It is my practice to decline to respond to questions which present wholly abstract issues. If the trust fund does become, or is assured of becoming, insolvent and if a bona fide dispute exists as to the State's responsibility upon such insolvency, an opinion request would be appropriate.

THEREFORE, IT IS MY OPINION:

Unfunded liability in the industrial insurance expendable trust fund is not a "state debt" within the scope of article VIII, section 8 of the Montana Constitution.

Very truly yours,

MIKE GREELY
Attorney General