

1975 S.C. Op. Atty. Gen. 181 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4105, 1975 WL 22401

Office of the Attorney General

State of South Carolina

Opinion No. 4105

September 4, 1975

*1 Section 72–126.1(h), S. C. Code (1962), as amended, provides for a ‘direct’ cause of action by the carrier against a third party tort-feasor which is in addition to any cause of action of the legal representatives of the deceased under the Wrongful Death Act.

TO: Mr. Emil W. Wald

QUESTION PRESENTED:

1. Does the carrier under Section 72–126.1(h) have a ‘direct action’ against the third party wrongdoer for monies paid out because of the death of the deceased?
2. Is the claim of the beneficiary under Lord Campbell's Act in any way diminished or reduced by amounts paid into the Second Injury Fund by the carrier under Section 72–126.1(h)?
3. Is the monetary responsibility of the third party tort-feasor under Section 72–126.1(h) increased whenever the Second Injury Fund is the primary beneficiary following the death of a deceased?
4. Should the causes of action as set forth in Section 72–126.1(h) by the carrier and the beneficiary under Lord Campbell's Act be brought separately or together?

STATUTES AND CITATIONS INVOLVED:

1. Section 72–126.1(b) of the Code of Laws of South Carolina. (1962, as amended)
2. Section 72–126.1(h) of the Code of Laws of South Carolina. (1962, as amended)
3. Section 72–165(c) of the Code of Laws of South Carolina. (1962, as amended)
4. Section 10–204 of the Code of Laws of South Carolina (1962, as amended)
5. Williams, et al. v. South Carolina State Highway Department, (1st Circuit, South Carolina, March 22, 1973).
6. U. S. Fidelity & Guaranty Co. v. Southern Farm Bureau Casualty Co., et al. (9th Circuit, South Carolina, August 7, 1975).

DISCUSSION OF ISSUES:

Section 72–126.1(b) provides for a lien in favor of the carrier paying workmen's compensation benefits to an injured employee, or in case of his death to his dependents, for any recovery from a third party up to the total amount of the workmen's compensation payment less certain expenses. The Legislature intended in providing for a lien in favor of the

carrier to prevent double recovery by the employee or his dependents. If the deceased employee leaves no dependent who qualifies for workmen's compensation benefits under the Act, and the carrier pays the death benefits to the South Carolina Second Injury Fund pursuant to Section 72–165(c), then the carrier has the right of action under Section 72–126.1(h) against the third party for the amounts paid to the Second Injury Fund and for reasonable funeral expenses and medical benefits actually paid. In Williams, et al. v. South Carolina State Highway Department, 1st Cir. S. C., filed March 22, 1973, the court stated as follows:

... The carrier would only make payment to the second injury fund in cases where there was no dependent of the deceased to draw workmen's compensation benefits. Even though there would be no compensation award, there could still be a wrongful death action, and in such cases, there would be no one for the carrier to be subrogated to. Obviously, subsection H was passed to provide for such cases to allow the carrier to recover. If the carrier were given a lien for all payments in all cases as contended by respondent, it would therefore not have been necessary to adopt Sub-section H.

*2 Therefore, while the carrier is in effect subrogated to the rights of the employee or, in death cases, his dependents, under Section 72–126.1(b), the carrier under Section 72–126.1(h) has a direct cause of action against the third party for amounts paid to the Second Injury Fund. U. S. Fidelity & Guaranty Co. v. Southern Farm Bureau Casualty Co., et al. (9th Cir., S. C. filed August 7, 1975).

Furthermore, the recovery by the employee or dependent by wrongful death action or otherwise is not diminished or reduced by the amounts paid by the carrier into the Second Injury Fund. Section 72–126.1(h) provides quite clearly that: The cause of action shall be in addition to any cause of action of the legal representative of the deceased.

These two causes of action may be brought against the third party, and to that extent, the monetary responsibility of the third party is increased. However, this is not double recovery against the third party, since the recipients of the workmen's compensation benefits and the wrongful death benefits are not the same. As the court in U. S. Fidelity & Guaranty Co. v. Southern Farm Bureau Casualty Co., Supra at 9, observed:

Without subsection (h), an anomalous situation would exist in that simply because a deceased employee did not have dependents eligible for workmen's compensation benefits, a carrier paying such benefits to the Second Injury Fund would be without recourse to recover any of its payments. Subsection (h) was enacted to prevent such an inequitable result by providing a method of subrogation in favor of the carrier. I am satisfied that subsection (h) does not create an additional wrongful death action to much as it places the ultimate loss on the third party tort-feasor instead of the innocent carrier responsible for workmen's compensation payments.

The statute is silent as to whether the subsection (h) 'direct action' should be brought separately to together with a wrongful death action by the legal representative. However, the two actions would raise similar issues involving the culpability of the third party tort-feasor. Therefore, it would appear that the cases could be consolidated for trial purposes.

CONCLUSION:

Section 72–126.1(h) provides for a 'direct' cause of action for the carrier against the third party tort-feasor to recover amounts paid by the carrier into the Second Injury Fund and also for other expense paid by the carrier to the legal representatives of the deceased. This action by the carrier against the third party is in addition to any recourse that the legal representatives of the deceased have under the Wrongful Death Act. The amount of recovery against the third party is increased when Section 72–126.1(h) is applicable since the recipients of the workmen's compensation benefits and the wrongful death benefits are not the same. The two causes of action may be maintained separately or together.

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