

Opinion No. 52-5522

March 18, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. B. G. Dwyre State Highway Engineer Santa Fe, New Mexico

{*231} Recently you submitted to this office a request for an interpretation of, and an opinion concerning, two endorsements to a policy of insurance carried on the employees of your department in compliance with the Workmen's Compensation Law. You point out that the policy in question renews previous insurance carried on your employees and ask whether the State Highway Commission and the Department would have legal authority to accept a policy containing these amendatory endorsements, and whether members of the Commission or Department would render themselves personally liable by accepting the policy under the circumstances. The two endorsements read as follows:

"7. PARAGRAPH 'N' OF THE CONDITIONS OF THIS POLICY IS AMENDED TO READ AS FOLLOWS: The Policy holder agrees to be bound by all the provisions of the By-Laws of the Company in force at the time this Policy is issued, or which may be put in force during the continuance of this Policy, to which By-Laws reference is made and which are to be taken as incorporated herein. Provided that the provisions of any By-Laws shall not be contrary to nor conflict with the terms of this Policy. This Policy is issued as a non-assessable Policy under the provisions of Section 60-1111, N.M. Statutes, 1941 Annotated, as amended."

"8. ENDORSEMENT EXCLUDING LIABILITY UNDER SECTION 57-907, NEW MEXICO STATUTES OF 1941 -- It is agreed that the Policy does not afford insurance with respect to this Employer's liability to pay, under the terms of Section 57-907, New Mexico Statutes of 1941, the 50% increase in the compensation otherwise payable under the provisions of the Workmen's Compensation Act, in case of an injury to or death of a workman resulting from the negligence of this Employer in failing to supply reasonable safety devices in general use for the use or protection of workmen."

I note that endorsement No. 7 amends paragraph "N" of the conditions of the policy. Paragraph "N", before amendment, read as follows:

"The employer agrees to be bound by all the provisions of the By-Laws of the Company in force at the time this Policy is issued, or which may be put in force during the continuance of this Policy, to which By-Laws reference is had and which are to be taken as incorporated herein; with the exceptions, however, that the contingent liability of the employer to the Company during the continuance of this Policy shall in no event be greater than an amount equal to one time the premium written in this Policy, which contingent liability shall be in addition to such premium, provided that the provisions of

any By-Laws shall not be contrary to nor conflict with the terms of this Policy nor with the 'Workmen's Compensation Act of New Mexico.'"

Endorsement 7 changes paragraph "N" in no material respect and in my opinion it may be properly accepted by the Department and Commission without danger of personal liability. The fact that no by-law of the company may be contrary to, or conflict with, the terms of the policy affords ample and sufficient protection. I also note, however, that paragraph "N" {232} provided that no by-law could be contrary to the terms of the policy or to the Workmen's Compensation Act. It is clear that the policy now in question has been drawn up pursuant to, and includes by reference, the Workmen's Compensation Act of New Mexico. (Ch. 57, Title 9, N.M.S.A.). In this connection your attention is directed in particular to Paragraph One (a) of the policy and endorsement No. 1. Therefore, in my opinion, any by-law which is contrary to the terms of the Compensation Act would, of necessity, also conflict with the terms of the policy. It may be that your department feels that it would prefer the retention of the old language of Paragraph "N", referring specifically to the Compensation Act. Although I regard such reference to the Act as superfluous and unnecessary, I doubt if the company would object to its insertion upon request.

Endorsement No. 8 conforms to Section 7 of the Compensation Act (§ 57-907 N.M.S.A.). The pertinent portion of this section reads as follows:

"In case an injury to, or death of, a workman results from the failure of the employer to provide the safety devices required by law, or in any industry in which safety devices are not provided by statute, if an injury to, or death of, a workman results from the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the workman, then the compensation otherwise payable under this act shall be increased by fifty per centum (50%). Provided further, that any additional liability resulting from any such negligence on the part of the employer shall be recoverable from the employer only and not from the insurer, guarantor or sureties of said employer under this act except that this shall not be construed to prohibit employers from insuring against such additional liability."

Therefore, it is within the intentment of the Act itself that the employer, the Highway Commission in this case, shall alone be liable for the payment of any such additional compensation. It must be pointed out, however, that this section also provides that the employer may insure against this additional liability. I have learned that it is presently the intention of your department to procure this additional coverage by amending the policy now under consideration and paying an additional premium. This, in my opinion, is the only way in which the Highway Department and Commission may be fully protected in the event of the type of liability mentioned in Section 57-907.

I hope this opinion answers fully your questions on this subject.