

Opinion No. 52-5598

October 3, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Honorable Don R. Casados Commissioner New Mexico Public Service
Commission Santa Fe, New Mexico

{*310} Recently you requested an opinion of this office seeking advice as to whether the Public Service Commission is required to carry Workmen's Compensation insurance by virtue of the fact that the commission regulates electric, gas and water utilities.

In your letter you stated that from July, 1941 to July, 1947, the commission had a force of eight employees and from July, 1947, including commissioners, has had fourteen employees. You stated that prior to taking over administration of the Liquified Petroleum Gas Act in 1947 the commission did not feel it necessary to carry Workmen's Compensation insurance for the reason that employment in administrative {*311} functions regarding the regulation of electric, gas and water utilities was not considered unduly hazardous.

Your attention is directed to 57-902 N.M.S.A. which provides that the state, and other political subdivisions therein named, as well as every private person, firm or corporation, employing as many as four workmen in extra hazardous occupations, shall be liable to pay compensation for injuries or death resulting to such workmen, arising out of and in the course of their employment.

Attorney General's Opinion No. 4218, issued January 28, 1943, stands for the proposition that the state and other political subdivisions which employ one or more workmen in such occupations are subject to the provisions of the act. The requirement of four employees applies only to private persons, firms and corporations.

Section 57-910, N.M.S.A. defines such extra hazardous occupations. This section enumerates, inter alia, gas works, natural gas plants, water works, electric light or power plants or lines, and all employment where-in a process requiring the use of any injurious explosive or inflammable material is carried on.

To the extent that employees of the Public Service Commission are engaged in such activities, it seems to follow that the Public Service Commission would be liable to pay compensation to such employees for injuries or deaths arising out of and in the course of their employment. This view is supported by Attorney General's Opinion No. 5004, issued April 7, 1947, dealing with the question whether the Workmen's Compensation Act covers the inspector of mines and his assistant in connection with the duties of inspecting the various mines of this state.

It is to be noted in this connection, however, that the only employees of the Public Service Commission who might come under the provisions of the Workmen's Compensation Act are those who are working at such extra hazardous occupations. The fact that members of the commission, or employees of the commission, do a great deal of traveling does not make the commissioners or these employees subject to the act. See Attorney General's Opinion No. 4796, issued September 28, 1945, to the State Corporation Commission, in which it was held that the Workmen's Compensation Act had no application to employees of the State Corporation Commission even though its employees occasionally had to handle voluminous files and electrically operated machines and that some of the employees, on occasion, travel over the highways in motor vehicles while engaged in the performance of their duties.

This opinion is not to be construed as a pronouncement that employees of the Public Service Commission, whose work requires them to be engaged in occupations that would be classified as extra hazardous, are automatically under the Workmen's Compensation Act. That is a matter for judicial pronouncement but the courts would make their determinations upon the specific facts involved in any particular case.

It appears, therefore, that while some questions may exist as to whether the Public Service Commission is subject to the Workmen's Compensation Act as to some of its employees, the possibility exists that the Public Service Commission could be held subject to the Act. So long as that possibility exists, the Public Service Commission should take appropriate steps to cover its possible liability through insurance. The matter of budget approval for such expenditure for insurance is something to be determined by the Board of Finance.

The only question that arises in connection with the procurement of insurance to cover possible liability is that raised by § 57-903 N.M.S.A. and § 57-904 N.M.S.A. Section 57-903 N.M.S.A. requires every employer subject to the Act to {*312} file appropriate security with the Clerk of the District Court to cover its liability. While the state is expressly exempted from filing such security, the possibility arises that by filing evidence of such insurance, the Act of filing might be considered an election by the Public Service Commission to be bound by the Act, even though not automatically subject to the Act as to the several phases of the work performed by its employees, as contemplated in § 57-904 NMSA.

It is the opinion of this office that while § 57-904 gives employers not subject to the Act the privilege of becoming bound by it, the act of acceptance requires a written statement that the employer accepts the act. That is the holding of the Supreme Court of New Mexico as enunciated in *Eaves vs. Contract Trucking Company*, 55 NM 463. See also the annotation at 103 ALR 1523 et seq., which contains authority for the proposition that the mere filing of evidence of insurance under the Workmen's Compensation Act does not amount to an acceptance of the Act by the employer in question but is merely protection against results that might follow if the employer was determined judicially to be under the Act.

However, in view of the fact that Attorney General's Opinion No. 5194, issued February 4, 1949, contains language indicating that the mere fact that an employer insures his liability to pay compensation may amount to an election, it seems advisable that in any policy of insurance which might be taken out by the commission, the same should contain a proviso to the effect that the procurement of insurance does not amount to an election to be bound by the Workmen's Compensation Act under § 57-904.

In this connection it seems worth-while to note that there is reason to contend that a sub-division of the state, not automatically bound by the Act, has no power to agree to be bound by the Act. While there would seem to be authority for state departments to come under the act voluntarily, (See Attorney General's Opinion No. 219, issued July 25, 1931, and Attorney General's Opinion No. 5194, supra) the fact remains that the state may not be sued without its consent. An election to come under the act would leave the state, through such department, open to suit under the Act and only the Legislature can give consent for the state to be sued. Therefore it seems to follow that if a state department attempted to come under the Act voluntarily, such acceptance would be a nullity in default of legislative authorization, expressed or implied, sanctioning actions against the state under the Workmen's Compensation Act. It is to be noted further in this connection that if the Public Service Commission elects to insure its possible liability under the Act, the insurance carrier should be required to insert a provision in the policy to the effect that it will not defend against any action brought on the policy upon the ground that such an action is a suit against the state and that it will defend the action in its own name and in that of the state.

Otherwise the possibility exists that the employee intended to be covered by such policy might find himself without remedy. See Parr v. N.M. State Highway Department, 54 N.M. 126; N.M. State Highway Dept. v. Bible, 38 NM 372.

Of necessity this opinion has had to concern itself with sundry questions implied in your inquiry. To summarize briefly, therefore, it is my opinion that the Public Service Commission may be subject to the Workmen's Compensation Act as to its employees whose work compels them to engage in extra hazardous occupations. As to its other employees, it is not subject to the Act. As to its employees engaged in work possibly subject to the Act, it should cover its possible liability with insurance as indicated herein. As to its other employees it may not elect to come under the Act.

This office is mindful of the fact that modern office routine often requires {*313} employees to work with machinery that is dangerous and that the necessity of travel in occupations exposes employees to highway hazards, and that there are other hazards which employees of the state face which would seemingly require that the state protect its employees through Workmen's Compensation insurance coverage to be on a par with modern business and industries which recognize that employees are entitled to be protected against such hazards they face because of their work.

However, the matter is something for the Legislature and the remedy for any hardship rests with that body.

I trust this fully answers your inquiry.