

## **Opinion No. 57-19**

February 8, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

**TO:** Mr. William Byron Darden, Special Assistant Attorney General, P. O. Box 347, Las Cruces, New Mexico

### **QUESTIONS**

#### QUESTIONS

Whether the board of regents of New Mexico A & M A College would subject themselves to personal liability if the college did not carry workmens compensation insurance.

#### CONCLUSION

It can not be said with certainty that such personal liability would obtain if the insurance was not carried, but it is the better policy and wiser course of conduct to carry such insurance.

### **OPINION**

#### ANALYSIS

There is no question but what the college is under the provisions of the workmens compensation law. Section 59-10-12 N.M.S.A., 1953 Compilation at sub-section (h) thereof. See also opinion of the Attorney General No. 299, dated October 30, 1931, holding that the college in question is under the provisions of the act. In such opinion it was clearly pointed out that it is not mandatory to carry the insurance, but that it is the better policy to do so since the institution might not have funds out of which to pay workmens compensation claims.

Of interest in determining this question in the case of Hathaway v. New Mexico State Police, 57 N.M. 747, 263 Pac. 2nd 690, in which it was held that the workmens compensation act of New Mexico carries no expressed consent by the state to be sued, and such consent cannot rest upon implication, and any judgment against the State of New Mexico in a workmens compensation case is void. This is so even though the particular state agency in question was given corporate status with power to sue and be sued. Day v. Penitentiary of New Mexico 58 N.M. 391, 271 Pac. 2nd 831. Thus, under our workmens compensation law the state (meaning the state and its various arms and agencies) are immune from suit. But as was pointed out in the Hathaway case, supra,

the fact that the state is immune does not relieve the insurance carrier with whom the state agency has contracted from the liability of responding to the judgment.

However, that may be, the fact that the state is immune from suit does not mean that the state agencies such as the college of A & M A are at liberty to disobey the law. They are clearly within the terms of the workmens compensation act and must comply therewith.

An examination of Sec., 59-10-3, N.M.S.A., 1953 Compilation reveals that according to the last proviso thereof state institutions are not required to carry insurance but presumably may be self insured if they choose to do so. We can not say with certainty that if insurance is not carried and if the compensation claims reserves are insufficient to meet compensation claims that the board of regents would be subjecting themselves to personal liability. There is at least a possibility of liability. Accordingly we advise and urge that the workmens compensation insurance be carried at least until such time as either the supreme court or the legislature has clarified this question.

Trusting that this fully answers your inquiry, we remain