Opinion No. 65-144

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BY: OPINION OF BOSTON E. WITT, Attorney General Olivar E. Payne, Deputy Attorney General

TO: David F. Cargo, State Representative, 2020 Muriel, N.E., Albuquerque, New Mexico

QUESTION

FACTS

By Chapter 252, Laws 1965, the legislature amended Section 59-10-18.2 to provide that for total disability a workman may receive a maximum weekly benefit of forty dollars. Prior to the effective date of the amendment the weekly maximum was thirty-eight dollars per week. A workman was injured in the latter part of 1964. The insurance carrier commenced paying him the maximum compensation of thirty-eight dollars per week and has been paying him this amount since that time.

QUESTION

Is this workman entitled to receive forty dollars per week as of the effective date of the amendment?

CONCLUSION

No.

OPINION

*{*241}* ANALYSIS

In the case of **Wilson v. New Mexico Lumber and Timber Co.,** 42 N.M. 438, 81 P.2d 61, our Supreme Court was dealing with an amendment to the Workmen's Compensation Act. The claimant was seeking to recover from the defendant under the Workmen's Compensation Act for injuries sustained on April 13, 1937. At that time a claim had to be filed within six months after refusal or failure of the employer to pay compensation. On June 11, 1937 an amendment to the Act became effective which substituted the words "one year" for the words "six months". Claimant's suit was not filed until December 16, 1937. The district court dismissed the complaint because the six-month period in which to file had expired.

The claimant contended that the one-year period within which claims may be filed under the amendment was applicable to the injury which occurred before the amendatory act

became effective, especially since the six-month period had not expired prior to the effective date of the amendatory act. The court said, "We cannot agree with him".

Continuing, the court said:

"In order for the claimant to come under the amended act, said act would have to receive a retroactive construction."

The court then defined retroactivity as that term used in connection with statutes as follows:

"As applied to statutes the words "retroactive' and 'retrospective' may be regarded as synonymous and may broadly be defined as having reference to a state of things existing before the act in question. A retrospective law may be defined more specifically as one 'which is made to affect acts or transactions occurring before it came into effect, or rights already accrued, and which imparts to them characteristics, or ascribes to them effects, which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence.' Black on Interpretation of Laws, 247."

The court said that the particular amendment was more than a mere regulation of procedure -- that it was a change affecting substantive rights. (Certainly if the change in the time period in which to file a claim is substantive, increasing the amount of the benefit is also a substantive change.)

The court concluded with the following language:

"There is nothing in the amendatory act involved in the case at bar to indicate that the Legislature intended it to receive a retroactive construction. Whether, if so intended, the amendment would violate constitutional guaranties, a contention urged by the employer, we need not determine."

Here too, we find no indication that the amendment of Section 59-10-18.2, supra, was to operate retroactively.

In the case of **Tarnow v. Railway Express Agency, 331** Mich. 558, 50 N.W. 2d 318 the court said that "The law which must control the compensation to be paid is that which was in effect at the time the right to the compensation springs into existence." The court further noted that "Courts, as a rule, are loath to give retroactive effect to statutes, and this is especially so when, by doing so, it would disturb contractual or vested rights."

The case of **V. W. Ferguson Co. v. Seaman,** 119 N.J.L. 575, 197 Atl. 245 involved a procedural amendment only and there the court noted that "There is no enlargement of the primary statutory liability; no new or additional burden is imposed." Such, however, *{*242}* is not the case in the present situation.

Kelley v. Prouty, Idaho, 30 P. 2d 769 involved an amendment to the workmen's compensation act and the court had this to say:

"Under the statute, before the amendment, the substantive rights of the respective parties were kept within the control of the Industrial Accident Board indefinitely, while under the amendment such control is limited to a period of four years from the date of the accident. In the instant case compensation was being paid pursuant to a contract entered into between the parties, which was approved by the board, **and the law in force as of the time when the contract was entered into and approved became a part of the contract the same as if expressly written into the same."** (Emphasis added).

To the same effect is the case of **Wahs v. Wolf,** Pa., 42 A. 2d 166.

There is an additional consideration implicit in the question before us. Bear in mind that a policy of workmen's compensation is a contract. The rates for such insurance are revised from time to time to reflect, among other things, changes in statutory provisions. **Somers, Workmen's Compensation,** P. 105 (1954). But the present agreed on premiums are based on the pre-amendment thirty-eight dollars a week. To now require, under this same contract, the insurance carrier to pay additional benefits to one whose injury occurred prior to the amendment and whose award was also confirmed prior to the amendment might well impair the obligation of contract.