Opinion No. 65-52

March 22, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General George Richard Schmitt, Assistant Attorney General

TO: John F. Otero, State Labor Commissioner, State Labor and Industrial Commission, Santa Fe, New Mexico

QUESTION

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Does an employee, covered under the Workman's Compensation Law, when he sustains an injury while in the course of his employment, have the right to choose his own physician or must he see the doctor designated by his employer?

CONCLUSION

See analysis.

OPINION

*{*89}* ANALYSIS

Your question involves an interpretation of Section 59-10-19.1 and Section 59-10-20 of the Workmen's Compensation Act, N.M.S.A., 1953 Compilation (P.S.). The pertinent part of the above cited section, which relates to medical and related benefits, reads as follows:

"D. In case the employer has made provisions for, and has at the service of the workman at the time of the accident, adequate surgical, hospital and medical facilities and attention, and offers to furnish these services during the period necessary, **then the employer shall be under no obligation to furnish additional surgical, medical or hospital services or medicine than those so provided;** Provided, however, that the employer furnishing such surgical, medical and hospital services and medicines shall be liable to the workman for injuries resulting from neglect, lack of skill, or care on the part of any person, partnership, corporation, or association employed by the employer to care for the workman. In the event, however, that any employer becomes so liable to the workman, it shall be optional with the workman injured in such a manner to accept the foregoing provisions and hold the employer liable for the injuries, or to reject those provisions and retain the right to sue the person, partnership, corporation, or association employed by the employer who injures the workman through neglect, lack of skill, or care. Election to accept or reject the provisions of this section shall be made by a notice in writing, signed and dated, given by the workman to his employer; and if the workman

elects to hold the employer liable for the injuries, the cause of action of the workman against the third person, partnership, corporation, or association shall be assigned to the employer, who may institute proceedings thereon in any court having jurisdiction, in the workman's name." (Emphasis supplied)

*{*90}* The above cited provision of the Workmen's Compensation Act appears to be fairly clear. In essence, the employee does not have an absolute right to a physician of his choice, in the event the employer already has available adequate medical services at the time of the employee's injury. Note, however, the law expressly provides the employe with a legal remedy in the event he is injured as a result of the negligence of the medical personnel furnished by the employer. In this event, the employee has an election. He may hold his employer liable or sue the particular person responsible.

The right of choice of a physician is given to both the employer and the employee under Section 59-10-20 of the Workmen's Compensation Act. This section of the law provides that any employer or insurer shall be entitled to have a physical examination of the claimant "by a physician of its choice" before or after the filing of a claim in order to determine the extent of the claimant's disability. Under paragraph 6 of this law, the claimant is also entitled to have a physician of his own choice present at such examination. However, if the claimant chooses this procedure under the law, he must pay for the services of the physician he brings to the physical examination.

In conclusion, it also should be pointed out that under Paragraph 1 of Section 59-10-20, supra, a court is given the authority to reduce or suspend the compensation of an injured workman if he refuses to submit to such medical treatment that is reasonably essential to promote his recovery. Our Supreme Court has occasion to interpret this provision in **Rhodes v. Cottle Construction Co.,** 68 N.M. 18, 357 P.2d 672, 675 (1960, and held that said compensation may not be denied unless it is shown the failure or refusal of the workman to submit to medical treatment was "arbitrary and unreasonable."