

Opinion No. 66-76

June 16, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

TO: C. R. Sebastian, Director, Department of Finance and Administration, State Capitol Building, Santa Fe, New Mexico

QUESTION

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1. Does the State have any obligation to furnish Workmen's Compensation Insurance or to provide liability insurance covering accidental injury or death to an employee traveling in the scope and course of his employment by private aircraft?
2. Does the State incur liability to an employee or his heirs or dependents in the event of accidental injury or death to an employee caused as a result of travel in the scope and course of employment by private aircraft?

CONCLUSIONS

1. No, but see analysis.
2. No, but see analysis.

OPINION

{*96} ANALYSIS

Our Workmen's Compensation Act is compiled as Sections 59-10-1, et {*97} seq., N.M.S.A., 1953 Compilation. There have been numerous amendments to the Act which are set forth under the appropriate sections in the Pocket Supplement to the parent volume. Section 59-10-2, supra, has not been amended since the parent volume was published. This Section contains provisions concerning employers who do **or may** come within the provisions of the Act as follows:

"59-10-2. Employers who do or may come within the provisions of the act. -- The **state** and each county, city, town, school district, drainage, irrigation or conservancy district, **and public institution and administrative board thereof employing workmen in any of the extra-hazardous occupations or pursuits hereinafter named or described**, and every private person, firm, or corporation engaged in carrying on for the purpose of business, trade or gain within this state, either or any of the extra-hazardous occupations or pursuits herein named or described and intended to be affected hereby,

[which] shall employ therein as many as four [4] workmen, except as hereinafter provided, (such employer) shall become liable to, and shall pay to any such workman injured by accident arising out of and in the course of his employment in any such occupation and pursuit, and, in case of his death being occasioned thereby, to such person as may be appointed by the court to receive the same for the benefit of his dependents, compensation in the manner and amount, at the times herein required, in event previous to the occurrence of such injury, such employer and injured workman have by an agreement, either express or implied, accepted and agreed to be bound by this act [59-10-1 to 59-10-37]; Provided, that if any such injury so occurs to any such workman in such service while at work upon any derrick, scaffolding, pole or such structure ten [10] feet or more above the surface of the ground, this act shall apply without regard to the number of workmen employed at the time." (Emphasis added.)

It is apparent that, unless the particular State agency, institution or commission is one that employs workmen in one of the "extra-hazardous occupations or pursuits" named or described in the Workman's Compensation Act, it is not normally required to carry workmen's compensation insurance **although it may elect to be bound by the provisions of the Act.** If the employees are engaged in "extra - hazardous" occupations or pursuits as defined in the statute, then they are covered by the provisions of the Act. In Opinion No. 219, Report of the Attorney General, 1931-1932, it was held that certain employees of the New Mexico State Hospital would come within the provisions of the Act and that it might elect to bring all employees within the provisions of the Act. Section 59-10-2, supra, has not since been amended in any respect material to this opinion.

Section 59-10-10, supra, contains the enumeration of the occupations or pursuits deemed extra-hazardous. It reads as follows:

"59-10-10. Extra-hazardous occupations enumerated -- Saving clause. -- The extra-hazardous occupations and pursuits to which this act [59-10-1 to 59-10-37] are [is] applicable are as follows: Factories, mills and workshops where machinery is used; foundries, blast furnaces, mines, oil wells, gas works, natural gas plants, water-works, reduction works, breweries, elevators, dredges, smelters, power works, laundries operated by power, quarries, engineering works, logging, road building and construction, lumbering and saw mill operations, street railways, buildings being constructed, repaired, moved, or demolished; telephone, telegraph, electric light or power plants or lines, steam heating or power plants; bridge building, railroad construction work, but shall not include railroad construction work, of any character when done by the owner or operator of any railroad; and all employment wherein a process requiring the use of any dangerous explosive or inflammable materials is carried {*98} on; and each of which employments above named, including all employees of telephone and telegraph companies, is hereby determined to be extra-hazardous, in which, from the nature, conditions or means of prosecution of the work therein required risks to the life and limb of the workman engaged therein are inherent, necessary or substantially unavoidable. All duly elected or appointed peace officers of the state, counties or municipalities, and the warden and all guards employed at the state

penitentiary shall be deemed to be following extrahazardous occupations and to be within the provisions of this act. This act shall not apply in any case where the injury occurred before this act takes effect, and all rights which have accrued by reason of any such injury prior to the taking effect of this act shall be saved and remedies now existing therefor."

This Section, likewise, has not been amended since the opinion above referred to except to add the second sentence.

Section 59-10-12.12 is a new section and was first enacted in 1965. It reads as follows:

"59-10-12.12. Injuries sustained in extra-hazardous occupations or pursuit. -- As used in the Workmen's Compensation Act [59-10-1 to 59-10-37] unless the context otherwise requires, the words 'injuries sustained in extra - hazardous occupations or pursuit' shall include death resulting from injury, and injuries to workmen, as a result of their employment and while at work in or about the premises occupied, used or controlled by the employer, and injuries occurring elsewhere while at work in any place where their employer's business requires their presence and subjects them to extra-hazardous duties incident to the business, but shall not include injuries to any workman occurring while on his way to assume the duties of his employment or after leaving such duties, the approximate cause of which injury is not the employer's negligence."

Unless Section 59-10-12.12 has the effect of adding to the definition of extra-hazardous occupations or pursuits, the fact that an employee on occasion travels by private aircraft in the course of his employment would not require the employer to come within the provisions of the Workmen's Compensation Act.

It is assumed that the employer's business does require that they travel by such private aircraft. However, this does not change their normal occupation or pursuit, although the flight might be somewhat more hazardous than the other duties of their particular occupation or pursuit, which we assume does not meet definitions contained in Section 59-10-10, *supra*.

It is an elementary rule of statutory construction that the various sections of an Act will be construed together so as to render them harmonious with the whole and avoid inconsistency. **State ex rel Dresden v. District Court**, 45 N.M. 119, 112 P. 2d 506. The statute specifically enumerates those pursuits and occupations deemed extra hazardous and our Supreme Court in **Rumley v. Middle Rio Grande Conservancy District**, 40 N.M. 183, construed the Act (before Section 59-10-12.12 was passed) to mean that only those particular employees of an employer engaged in an enumerated occupation or pursuit came within the provisions of the Workmen's Compensation Act. See Opinion No. 5414 at page 116, Report of the Attorney General, 1951-1952. The language contained in Section 59-10-12.12, *supra*, necessarily refers to occasional requirements that a worker participate in an activity which is defined in Section 59-10-10, *supra*, as being extra hazardous. Any other interpretation would be inconsistent and inharmonious and it would place a worker occasionally engaged in some activity

deemed extra hazardous outside the definitions contained in Section 59-10-10, *supra*, within the Act; whereas a worker engaged in the same activity on a full-time basis or largely full-time basis would not be deemed to come within its provisions.

{*99} Since travel by private aircraft is not deemed an extra-hazardous occupation or pursuit, any more than is automotive travel, the activity does not come within the provisions of the Workmen's Compensation Act, and there would be no requirement that insurance be carried.

In your second question, you ask concerning any other liability that might be incurred by the State as a result of requiring such travel in the event of an accident. The State of New Mexico is immune from suits, except suits for breach of a written contract, Section 22-23-1, N.M.S.A., 1953 Comp. (P.S.), or suits sounding in tort where there is insurance coverage and then only to the extent of such coverage, Section 5-6-18, *et seq.*, N.M.S.A., 1953 Comp., Opinion No. 66-63, Report of the Attorney General, 1965-66 (as yet unpublished). This is true even where the action would normally fall under the provisions of the Workmen's Compensation Act. **Hathaway v. New Mexico State Police**, 57 N.M. 747, 263 P. 2d 690, **Day v. Penitentiary**, 58 N.M. 391, 271 P. 2d 831, **McWhorter v. Bd. of Education**, 63 N.M. 421, 230 P. 2d 1025, **Livingston v. Regents**, 64 N.M. 306, 328 P. 2d 78. We see nothing in the language contained in any amendments or additions to the Workmen's Compensation Act, since these decisions, that would compel a different result.

Insofar as the State is concerned, there is no further liability incurred by reason of the permitting or requiring the use of private airplanes for the transportation of employees on official business.

Nothing that has been said in this opinion would prevent the State or any of its agencies, commissions or institutions from purchasing and maintaining in force suitable insurance policies, including workmen's compensation policies, designed to protect an injured employee or his dependents, or heirs in case of accidental death.