

Opinion No. 24-3767

June 11, 1924

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: Hon. James A. French, State Engineer, Santa Fe, New Mexico.

Moral Claims Against the State can be Recognized Only by the Legislature.

The State Highway Commission Cannot Carry Workmen's Compensation Insurance on Behalf of Its Employees.

OPINION

{*143} There are two inquiries upon which this proposition arises: one inquiry is with reference to an employee of the State Highway Commission who was injured in McKinley County by an explosion while he was at work on the state highway under employment of the State Highway Commission. This employee, through his attorney, has written to the Highway Commission asking for some equitable adjustment on account of the losses sustained by this employee because of the injury. He realizes that he can prosecute no claim against the state, and that the state is not liable to him on account of the injury but evidently submits his case on the idea that there is a moral obligation on the state and the Highway Commission to compensate him for his injuries, which moral obligation might be recognized in some fashion.

The other inquiry is somewhat similar in subject matter and, consequently, both inquiries will be answered in this one opinion. By the second inquiry it is asked whether the State Highway Commission may lawfully carry Workmen's compensation insurance for the men who are employed directly by the State Highway department on work which is done directly by the state and not by a contractor.

The first inquiry regarding the injuries of the employee in McKinley County must be answered by saying that the State has no authority, in my opinion, to make any payment on account of the moral obligation owing to the injured employee. It is true that moral obligations of this sort can be recognized and assumed by the state, but such recognition and assumption must be done by the legislature. I think it would be altogether fitting and proper for the State Highway Commission to set a fair figure for the compensation of the injured employee and submit it to the Governor, with the request that the Chief Executive in turn submit it to the next session of the legislature with a recommendation for legislative relief. However, if this method appears to be cumbersome and works too great a hardship on the {*144} injured employee, and if the amount of compensation is not too large, I think the State Highway Commission might take a chance by paying the amount and requesting the next legislature to ratify its act in so doing. Of course, if the legislature failed to ratify this act I presume the members of the Commission would be individually responsible for the expenditure.

In answer to the second inquiry, it is my opinion that the present Workman's Compensation law of New Mexico must be amended in order to allow the state to insure its employees. If this can be accomplished then cases like the one mentioned in the first inquiry will be automatically taken care of. The Workman's Compensation law of New Mexico, which is Chapter 83 of the Laws of 1917, defines an employer as:

"Any 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."

The original Workman's law of New York was similar to the New Mexico act in this respect, and in the case of *Allen v. State of New York*, 160 Sup. 85, compensation was denied to a foreman of a concrete gang employed by the Commissioners of Highways of the State of New York, on the ground that the Commissioners of Highways were not engaged in business for pecuniary gain under the New York act. After the decision in this case the New York act was amended to include such employees.

In the case of *Miller v. Pillsbury*, 164 Cal. 199, 128 Pac. 387, it was held that the California Workman's act did not apply to employees of the state, but after this decision the legislature of California amended the act to include certain public employees.

In my opinion, the New Mexico Compensation Law must be amended by the legislature before the State Highway department can carry insurance for its employees.