Opinion No. 31-213

July 20, 1931

BY: E. K. Neumann, Attorney General

TO: Mr. Ralph E. Davy, Labor Commissioner, Santa Fe, New Mexico.

*{*88}* Your letter of July 16th requests an opinion as to whether or not it is compulsory, under the laws of this state, for employers who are enumerated in the Workman's Compensation Act to come within the provisions of and under said Act.

The Workman's Compensation Act, which is now cited as Chapter 156 of the Compilation of 1929 in Section 156-102, sets forth the various employers who are within the contemplation of the law. It is provided in said section that the employers named therein shall come under the provisions and terms of the law, "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;"

It is provided in Section 156-104 that every contract of hiring, verbal or written, made subsequent to the time the act takes effect and every such contract made previous thereto and continued thereafter shall be presumed to have been made or continued, as the case may be, with reference to the provisions of the act and "unless there be, as a part of such contract so made or continued, an express statement in writing prior to any accident, either in the contract itself, or by written notice from either party to the other in substance that the provisions of this act are not intended to apply, then it shall be conclusively presumed that the parties have accepted the provisions hereof and have agreed to be bound thereby and were working thereunder at the time of such injury."

The last paragraph of Section 156-124 provides as follows:

"Any employer who shall fail in any case covered by this act to file undertaking of insurance, guaranty or security for the payment of compensation which may become due to the injured workman from him hereunder, or in lieu thereof, the certificate of the judge as herein provided within the time herein required, shall be deemed guilty of a misdemeanor and shall be punishable by a fine of not more than one thousand dollars for any such offense."

As we view your question, it occurs to us that the question as to whether employers are or are not operating under the terms of the Workman's Compensation Act is based upon their own actions, and our construction of the above cited sections of the law is to the effect that, all employers upon making any contract of hiring and which contract pertains to the extra hazardous occupations named in the Act, are conclusively presumed to be operating under the Act.

If such employer desires not to be bound by the provisions of the Act, then he must, either by an express statement in the contract of employment or by written notice prior to any accident, indicate that the act is not intended to apply. In other words, all employers which the Act is intended and does cover shall operate under the Workman's Compensation Act, unless by contract with the employee they show an intention to operate independently of the Act.

*{*89}* As above stated, such contract with the workmen may be either express or implied to be bound by the act, whereas, the contract with the workman to the effect that the act shall not apply must be an express statement in writing prior to any accident, and may be either in the contract of employment or it may be by written notice by either the employer or the employee, to the effect that the provisions of the act are not intended to apply.

Any employer violating the provisions of law with reference to filing his undertaking of insurance or in lieu thereof and certificate of the Judge of the District Court to the effect that the employer is financially solvent and security is unnecessary can be convicted of a misdemeanor and subject to a fine of not more than $ 1,000.00.

By Frank H. Patton,

Asst. Attorney General