Opinion No. 52-5548

June 13, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Honorable Paul Tackett District Attorney Second Judicial District County Court House Albuquerque, New Mexico

*{*260}* Recently you requested an opinion of this office whether it is legal for an individual to draw salary from an employer and compensation for disability, at one and the same time.

In the case of Helms vs. New Mexico Ore Processing Company, 50 N.M. 243, our Supreme Court held that for an injured employee to be totally and permanently disabled within the meaning of the Workman's Compensation Act, he need not be so disabled as to be unable to perform any kind of work. But the Court stated in that case that Section 57-925, N.M.S.A., 1941, indicated that a proper test to be applied is not whether the employee is able to do the same kind of work that he did before the injury but whether he is able to do any kind of work. In that case the Court sustained an award of 40% partial permanent disability.

The decision in that case turned in part upon the consideration given to Section 57-925, supra, which provides for examination before the payment of any installment under the Workmans Compensation Act. Prior to the amendment of 1945, that statute stated that the purpose of the examination was to determine whether the workman had recovered so that his earning power at any kind of work was restored.

§ 57-925, N.M.S.A., was amended by the 1945 Legislature, Laws 1945, Chapter 65. It is to be noted that the amendment in effect completely revised the first paragraph of § 57-925 which contained the reference above had as to whether the workman had recovered so that his earning power at any kind of work is restored. § 57-925 was further amended in 1951 but the amendment is not important in the matter under consideration.

It is the opinion of this office that the 1945 amendment to § 57-925 had the effect of repealing that statute, as it existed before the amendment, in so far as the restoration of earning power of the workman, at any kind of work, determined the question whether compensation should be terminated or diminished.

*{*261}* This statement is made for the reason that the first paragraph of that statute was completely changed. This change, purporting to provide the means under which compensation could be decreased or increased after award, for the reasons set forth in the statute, contains no reference to the ability of the workman to earn at any kind of work.

In 50 American Jurisprudence, Page 556, the following statement is found:

"552. **Repeal by Amendatory or Supplementary Statutes.** -- An amendment of an act of course operates as a repeal of provisions of the amended act, which are changed by, and repugnant to, the amendatory act. As to the effect of an omission from an amendatory act of provisions contained in the act amended, as a repeal of the omitted provisions, the result depends on the legislative intent, that is, whether the amendatory act is intended as a complete revision of, and as a substitute for, the act amended, or is intended as supplemental legislation merely. If the later act is intended to cover the entire subject, and to be a substitute for the earlier act, the omitted parts are deemed to be repealed by implication."

It would appear that the later act was intended to cover the entire subject matter and therefore it seems reasonable to believe that the Legislature intended that the ability of the workman to earn at any kind of employment was no longer the sole test to be followed by the Court in determining whether compensation should or should not be diminished or increased. By implication, therefore, it further appears that there is nothing in the Workmans Compensation Act which makes payment for total and complete disability repugnant to the idea of the injured party's earning wages even while so disabled under the Act.

It is to be noted that Workmans Compensation benefits are payable for the disabilities incurred under the Act as provided in the statute. One who is disabled is entitled to the awards provided under the Act. The fact that such an injured workman may earn more in another line does not make him any the less disabled. For one thing, if the injured party through cessation of his new endeavor at which he may be earning, is forced to rely up employment within the general field of labor in which he is disabled, his disability becomes a matter painfully evident to him. And he can obtain little solace from the fact that he is not totally incapacitated from engaging in some kind of gainful occupation if no opportunity exists for him to obtain employment in such restricted occupations.

It must be noted further that in construing Workman's Compensation Statutes, one is dealing with particular statutes at all times. Consequently while assistance may be obtained from decisions of Courts of other jurisdictions, these decisions cannot be controlling unless one finds comparable situations and the usual circumstances which would have the effect of making decisions binding.

It is interesting to note that the effect of earning as much or more than before the injury, upon the right of the employee to compensation, is treated in a discussion appearing at 118 ALR, beginning at Page 731.

The discussion follows the report of the case in J. W. McGhee vs. Sinclair Refining Company, 146 Kansas 653, 73 Pacific 2nd 39. In the latter case the Court, in disallowing as credit, wages received by an employee, to apply upon 60% partial permanent disability, discussed the question raised that a claimant cannot be working and at the same time be disabled.

The Court in that case reviewed several Kansas cases in rejecting this contention. The Court stated, Page 729; "It will be seen that this Court has uniformly held that the fact the workman returned to work *{*262}* for the same employer or for another employer, at the same, or higher wages, does not prevent him from receiving compensation when the Workmans Compensation Commission and the Trial Court have found on substantial evidence that he has sustained a compensable injury."

In the review appearing after this case the following is stated: "The rule stated in the earlier annotation that the mere fact that after an injury the employee receives or is offered his former wages, or a larger sum, does not necessarily preclude recovery of compensation under the various Workmans Compensation Statutes is supported by the following later cases:" It would appear that this rule has been followed in the United States Court and in the Courts of twelve of the sister states in which the question in one form or another has arisen. It would appear that the rule has been otherwise in seven of the states.

This office is informed that the Honorable Waldo H. Rogers, in a case tried before his Court involving this precise question, at a recent date, rejected the contention that one cannot be totally and permanently disabled under the Workmans Compensation Act and at the same time draw his salary from his employer.

For the various reasons, stated, it is the opinion of this office that the ability of the employee to earn wages is no longer the test in determining whether one is entitled to compensation under the Workmans Compensation Act of New Mexico and in view of this and the general rule above referred to, it is the opinion of this office that it is legal for an individual to draw salary from his employer while at the same time drawing compensation for disability.

I trust this fully answers your inquiry.