Opinion No. 63-71

June 24, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. R. F. Apodaca Superintendent of Insurance State Corporation Commission Santa Fe, New Mexico

QUESTION

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Are the maximum benefits payable under § 58-10-18.2, N.M.S.A., 1953 Compilation, 38 dollars per week or 40 dollars per week?

CONCLUSION

38 dollars per week.

OPINION

*{*149}* **ANALYSIS**

Basically there are three Statutes involved in your question. Section 59-10-18.4, N.M.S.A., 1953 Compilation, which sets forth the maximum compensation benefits payable for disability resulting from an accidental injury to specific body members, was amended by Laws 1963, Chapter 269, Section 2, to increase the maximum compensation from 38 dollars per week to 40 dollars per week.

In certain other places the 38 dollar figure was also changed to 40 dollars. Section 59-10-18.7 (C) and (G), N.M.S.A., 1953 Compilation, as amended in 1963.

However, Section 59-10-18.2, N.M.S.A., *{*150}* 1953 Compilation, which sets out the maximum compensation that can be paid for total disability, was not amended and the maximum figure remains at 38 dollars per week.

To further complicate the matter, while Section 59-10-18.3, N.M.S.A., 1953 Compilation, the provision dealing with certain partial disabilities was amended by Laws 1963, Chapter 269, Section 2, the portion referring back to § 59-10-18.2, supra, was not changed. Thus, Section 59-10-18.3, supra, still provides that benefits not provided for in § 59-10-18.4, supra (where the maximum benefits were increased) shall be a certain percentage of the benefits payable for total disability as provided in § 59-10-18.2, supra (where the maximum benefits were not increased).

What we have then is a situation where compensation benefits payable for an injury to a specific body member have been increased from a maximum of 38 dollars a week to a maximum of 40 dollars a week, while the section relating to maximum benefits payable for total disability was not amended and remains at 38 dollars a week. In addition, those partial disabilities not expressly enumerated in the section where the maximum was increased are to be determined by using the unamended total disability section which still has a 38 dollars per week maximum.

We are asked the net result of this somewhat unusual legislative action (or non-action).

The limitation in Article IV, Section 18, of the New Mexico Constitution that "no law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended, shall be set out in full, "does not absolutely proscribe and prohibit the amendment of an act by implication. **State v. Mirabal,** 33 N.M. 553, 273 Pac. 928.

However, amendment of statutes by implication, like repeals by implication, are not favored and will not be upheld in doubtful cases. **Tondre v. Garcia,** 45 N.M. 433, 116 P.2d 584; **Johnson v. Board of Education of Portales,** 65 N.M. 147, 333 P.2d 1051.

In order to find an amendment by implication there must be an irreconcilable inconsistency between the pre-existing law and the statute being construed. **State v. Adams,** Del., 27 A.2d 401. If both provisions can co-exist and be given effect, the courts will not find an amendment by implication. **United States v. 24 Cans Containing Butter,** 148 F.2d 365.

In the present situation there is no inescapable conflict between the provisions expressly amended and the total disability provision which was not expressly amended. It may seem incongruous that the maximum compensation benefits for some injuries was increased while the maximum benefits for other injuries was not, but the provisions can stand together with effect being given to each.

It is our feeling that the reason Section 59-10-18.2, supra, was not amended was due to an oversight. Nonetheless, the intention of the legislature to amend an existing law by implication must be unquestionably shown by the provisions of the amendatory act, since an implied amendment to an existing law cannot arise out of a supposed legislature intent in no way expressed, however proper such an amendment may seem to be. **Brinkley v. *{*151}* Dixie Construction Co.,** 205 Ga. 415, 54 S.E. 2d 267.

Mere omission to amend a section of a general law at the time of passing an amendment to certain other sections of the same general law does not of itself give rise to an implication that the omitted section was intended to be amended. And as the court said in **Sambor v. Home Owners' Loan Corp.,** 283 Mich. 529, 278 N.W. 674:

"Particularly is this true, when, as in the legislative acts herein considered, the amendatory acts specifically designate the sections of the preceding act or acts which the Legislature proposed to amend."

If we were to hold that § 55-10-18.2, supra, was amended by implication, we would be saying that even though it expressly provides for a 38 dollar maximum it should be read as though it said 40 dollars. Such, in our opinion, would be going far beyond the established rules of statutory interpretation and construction. 1 Sutherland, Statutory Construction, § 1913 (1943); **United States v. Silverman,** 132 F. Supp. 820; **Richards v. State,** Del., 77 A.2d 199.

As much as we personally would like to conclude otherwise, it is our opinion that the $ 38 maximum benefits provision contained in § 55-10-18.2, supra, must be given effect.

By: Oliver E. Payne

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