Opinion No. 64-61

May 7, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General George Richard Schmitt, Assistant Attorney General

TO: John F. Otero, State Labor Commissioner, 131 East De Vargas, Santa Fe, New Mexico

QUESTION

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Does the State Labor Commissioner or State Labor Commission have the authority to prescribe "safety devices" to be used by all industries located within the state by appropriate industrial safety rules and regulations?

CONCLUSION

No.

OPINION

ANALYSIS

In 1953 this office answered your question in the affirmative by Attorney General's Opinion No. 5796. However, this opinion is **no longer controlling** because the law which at that time expressly provided for such authority has subsequently been amended and the provision dealing with said authority has been deleted.

The law we are speaking about is Section 59-10-7 of the Workmen's Compensation Act. N.M.S.A., 1953 Compilation which was formerly compiled as Section 57-907 of the 1941 Statutes. As we pointed out in A.G.'s Opinion, supra, this statute originally provided for a 50% increase in Workmen's Compensation if the employer failed to provide safety devices required by law, "or prescribed by the Labor Industrial Commission." Then subsequent to this opinion in 1954, the New Mexico Supreme Court held that the above quoted language did not empower the Commission to make safety regulations "especially in the absence of any standard given by the legislature to guide and control the Commission." The court concluded by stating that the above quoted language "was left in the bill by inadvertence and, at most, standing alone must be treated as surplusage," **Clary vs. Denman Drilling Company,** 58 N.M. 723, 730; 276 P. 2d 499. The legislature in 1955 subsequently removed this language by amendment and the law presently provides for a 10% reduction in the Compensation due if the employee "fails to observe statutory regulations appertaining to the safe conduct of his employee or from the failure to use a safety device provided by law." The law also

provides for a 10% increase in the Workmen's Compensation "if the injury or death of a workman results from the failure of an employer to provide safety devices required by law, or in any industry in which safety devices are not prescribed by statute, if an injury to, or death of, a workman results from the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the workman." Nowhere in the above statute, however, (Section 59-10-7, supra), is there any indication that the Labor Commission or Commissioner, presently has power to enact safety rules and regulations.

We have continued our search through the labor laws, particularly noting the sections dealing with the powers and duties of the Labor Commission and Commissioner looking for an express grant of authority in this area, but to no avail. (See Sections 59-1-6 through 59-1-14; Sections 59-3-8 through 59-3-10; Sections 59-3-12, 59-6-15 (P.S.), 59-7-16, 59-7-17 and Section 59-5-10, N.M.S.A., 1953 Compilation.) Perhaps, a strong argument to the effect that the Labor Commissioner is granted an implied power to promulgate rules pertaining to safety can be made when Sections 59-1-9 and 59-1-11, supra, are considered. The former provides in part that the Labor Commissioner "shall inform himself of all laws . . . enacted for the protection, health and benefit of employees, and thereunder foster, promote and develop the welfare of wage earners . . . And assist in the enforcement of Workmen's Compensation Laws and the Employers' Liability Acts of the State." The latter Section of the law (59-1-11) authorized the Commissioner to inspect places of business within the state "for the purpose of gathering facts and statistics contemplated by this act and to examine safeguards and methods of protection from danger to employees, the sanitary condition of the buildings and surroundings, and make a record thereof . . ." and under Section 59-1-13, supra, the Commission must report violations of labor laws to the District Attorney for prosecution.

Though the language quoted above does require administrative action in regard to safety and welfare we believe the language is aimed at enforcement of existing law rather than the making of new law by way of regulation. This would appear to be the proper interpretation of the legislature's intent particularly when there is only negligible indication, if any, of legislative standards to guide and control the Commissioner in the enactment of industrial safety regulations, **Clary vs. Denman Drilling Company,** supra.

Thus, we reluctantly hold that neither the Labor Commissioner nor Commission have the statutory authority to prescribe rules and regulations involving industrial safety devices. Certainly this is a regrettable circumstance when the obvious importance of safe employment conditions for our workers is considered. But official powers cannot be assumed by administrative officers. They must find within the statute warrant for the exercise of any authority which they claim 1 Am. Jur. 2d, **"Administrative Law"** 865 and in this case there is none. We can only advise that the attention of the legislature be invited to provide an appropriate remedy.