

Opinion No. 66-50

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BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Mr. Frank Brown, State Representative, 2009 Georgia, Carlsbad, New Mexico

QUESTION

FACTS

A worker covered by workmen's compensation loses one eye in an industrial accident. Under the Workmen's Compensation Act this worker would be eligible for workmen's compensation benefits for a period of 120 weeks. Subsequently this same worker loses the other eye in an industrial accident while employed by an employer covered by workmen's compensation.

QUESTIONS

1. Is this person eligible for benefits under the second-in-jury fund?
2. Would this person be entitled to additional benefits as provided by Section 59-10-18.4?
3. Is it possible for an injured employee to receive benefits in excess of 500 weeks if he qualified for benefits under both the Workmen's Compensation Act and the second injury fund?

CONCLUSIONS

1. Yes.
2. Yes.
3. No.

OPINION

{*59} ANALYSIS

We will answer your three questions in narrative form by examining the Workmen's Compensation Act and the Subsequent Injury Act. For a number of years the courts were divided as to apportionment when an employee with one eye, one leg, one arm, etc., lost the other member. The {*60} majority, like Massachusetts, held that by losing

the remaining eye the employee had lost all he had, and therefore that the insurer of the second injury had to pay for the entire disability. **Nottee v. Rutland R. Co.**, 112 Vt. 498 and many cases cited; **J. Branconnier's Case**, 223 Mass. 273.

Other states however provided that only the second loss be compensated for, without regard to the prior loss. See **Horovitz, Injury and Death under Workmen's Compensation Laws**, p. 286 (1944).

As Horovitz points out in the treatise just mentioned, "many states have provided for such contingencies by creating what is known as **second-injury funds**, usable to pay part of the loss, to reduce the employer's cost, and thus encourage employers to hire cripples."

The treatise, **Workmen's Compensation and Rehabilitation Law, published by the Council of State Governments** (1965) states the above principle in a little more detail as follows:

"The original conception of the Second Injury Fund was this: A one-eyed man applies for a job. The prospective employer, so the theory runs, might reason as follows: 'If I hired a two-eyed man and he lost one eye, the schedule loss would be, say 150 weeks. If I hire this one-eyed man and he loses his one remaining eye, his schedule loss will be, say 750 weeks, and quite probably I will be liable to pay total permanent disability benefits for life.' The solution of the Second Injury Fund is to provide a separate fund which pays something like the difference between these two potential liabilities, and thus is supposed to remove the impediment to the hiring of handicapped workers."

The New Mexico Subsequent Injury Act (Section 59-10-126, et seq., N.M.S.A., 1953 Compilation (P.S.)) states as follows in Section 59-10-127, the statute dealing with declaration of policy and legislative intent:

"Declaration of policy and legislative intent. -- As a guide to the interpretation and application of this act, the policy and intent of this legislature is declared to be as follows:

A. That every person in this state who must work for a living should have a reasonable opportunity to maintain his independence and self-respect through self-support if he has been physically handicapped by injury;

B. That a plan which will reasonably, equitably and practically operate to remove obstacles to the employment of physically handicapped persons honorably discharged from the armed forces of the United States, or any other physically handicapped person, is of vital importance to the state, its people and this legislature; and

C. That it is the considered judgment of this legislature that the provisions embodied in this act, which make a logical and equitable adjustment of employer's liability under the

Workmen's Compensation Act, constitute a reasonable approach to the solution of the problem of employing physically handicapped persons."

The Subsequent Injury Act sets forth definitions, the make-up of the fund, payments therefrom, compensable injuries, apportionment of payments, awards, and certificates of pre-existing physical impairment.

"Permanent physical impairment" means a permanent physical condition which is, or which is likely to be, an obstacle to employment. Section 59-10-128, supra. A person who has lost one eye certainly comes within the definition.

Turning next to the section dealing with compensable injuries, Section 59-10-134, we find that a person with such an impairment "who incurs a subsequent disability by accident arising out of and in the course of his employment, which results in a permanent disability, that is materially and substantially greater than that which would have resulted from the subsequent injury alone, then the employer or his insurance carrier shall ^{*61} pay awards of compensation for the **combined condition** of disability as provided in Section 11 of this Subsequent Injury Act (59-10-136) and all medical and related expenses provided by the Workmen's Compensation Act."

Section 11 of the Act (59-10-136) provides that for injuries which occur after July 1, 1963, the employer or his insurance carrier shall pay all compensation benefits for the first eight weeks for the **combined condition** of disability. Thereafter liability is to be apportioned by the judgment. The "overpayment" by the employer or insurance carrier is later returned to such employer or his insurance carrier. Section 5-10-136 (F).

The phrase "liability shall be apportioned by the judgment" means "a judicial determination of the extent of an employer's or his insurance carrier's liability under the Workmen's Compensation Act without regard to any further and additional liability imposed upon him or it by the Subsequent Injury Act and a further judicial determination of the benefits to which an employee is entitled to receive as compensation for the **combined** condition of disability." Section 59-10-136, supra.

As is pointed out in **Workmen's Compensation and Rehabilitation Law**, supra, the second employer must have had prior knowledge of the permanent physical impairment. Here again, the requirement stems from the original justification of the second injury principle. The purpose of the principle is to prevent discrimination in the hiring of handicapped workers. It follows that an employer is not going to discriminate on the basis of something he does not know. This is the reason that Section 59-10-133, supra, makes the Subsequent Injury Act applicable only when the provisions regarding a certificate of pre-existing physical impairment have been met.

In the case you pose the Workmen's Compensation Act and the Subsequent Injury Act would mesh with the following result. While the loss of the eyesight of one eye is compensable for a maximum of 120 weeks, a subsequent injury causing the loss of eyesight of the other eye results in total, permanent disability compensable for a

maximum of 500 weeks. Sections 59-10-18.4 and 59-10-18.2, N.M.S.A., 1953 Compilation.

This person who has now lost the eyesight of the second eye in an accident compensable under the Workmen's Compensation Act and the Subsequent Injury Act may receive benefits for a maximum of 500 weeks. The second employer or his insurance carrier is responsible for 120 weeks out of this total and, presumably, the court would decree that the remaining weekly benefits be paid out of the subsequent injury fund. Now if the person is still drawing weekly benefits from the first employer or insurance carrier when he loses the sight of his second eye, the first employer would continue to pay the benefits for the remaining weeks entered in the first decree, the second employer for up to a maximum of 120 weeks and the subsequent injury fund for the balance of the 500 weeks, all as decreed in the apportionment order.

Section 59-10-137, supra, provides that payments prescribed by the Subsequent Injury Act are subject to the same limitation **in time and amount** as those under the Workmen's Compensation Act. The time limitation for the loss of sight of both eyes as prescribed in the latter Act is 500 weeks so there is no way that this time period can be exceeded.