Opinion No. 39-3280

September 18, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. Walter A. Koons, Regional Counsel, PWA, Region No. 5, Electric Building, Fort Worth, Texas.

In re: Legal MLC/f.

OPINION

*{*105}* In your letter of September 14 you make two inquiries:

First you inquire as follows:

"1. Do the provisions of the workmen's compensation laws for New Mexico require every employer of four or more workmen engaged on public works construction in the State of New Mexico to take out and carry workmen's compensation insurance in the name of such employer, provided such employer has elected to come within the provisions of such laws?"

A reading of our Workmen's Compensation Act would seem to disclose an unequivocal legislative intent requiring those employers who elect to come under the provisions thereof to file with the proper clerk of the district court "good and sufficient undertaking in the nature of insurance or security" for the payment of claims that might arise against the employer under the Act, unless this requirement is dispensed with by certificate of the proper district judge. Section 156-103, New Mexico Statutes, Annotated, 1929 Compilation. See also Chapter 92, New Mexico Session Laws of 1937. This requirement of "insurance or security" would likewise apply to public works construction if the work involved is such as to be classified as extra hazardous within the meaning of the Act. See Section 2 of Chapter 178, New Mexico Session Laws of 1933, and Sections 1 and 6 in Chapter 92, New Mexico Session Laws of 1937.

Your second inquiry is as follows:

"2. Where a principal construction contractor on public works constructions enters into a sub-contract for a portion of the work covered by the principal contract (and said principal contractor having elected to come within the provisions of the Act) may the employees of such subcontractor be covered by the workmen's compensation insurance policy of the principal contractor by attaching an appropriate rider to the policy of such principal contractor, assuming that the subcontractor has also elected to come within the provisions of the Act?"

There is very little that I can add as to my views on this phase of your inquiry other than to refer you again to our previous correspondence had with you in March of 1938. See Attorney General's Opinion No. 1914, a copy of which I enclose herewith for your further information.

Where both the principal contractor and the subcontractor elect to come within the provisions of the Act, an arrangement may, no doubt, be worked out as a matter of contract wherein complete coverage may be had under the same general policy, **provided, however, that both the principal contractor and the independent contractor are parties to the insurance contract and are parties insured therein.** However, I do not believe that the employees of the sub-contractor would be fully protected in a contract of insurance entered into merely between the insurer and the original contractor as the insured, notwithstanding the attachment of a rider to the original policy unless, by virtue of the rider, the sub-contractor is actually made a party to the insurance contract.

Ultimately this is a matter which the contractors and sub-contractors involved and the insurer must specifically cover by way of contract with the end in view of giving the employees of the sub-contractor full protection.

My views are expressed from the standpoint of the employee of a sub-contractor who, in case of injury, sues the insurer of the principal contractor and the insurer raises the defense that there is no liability because the principal contractor is not liable for injuries sustained by the employee of an independent contractor, and in this connection we again refer you to the New Mexico authorities cited in our former correspondence to you, supra.

In other words, my views are based on the idea of giving the employee of a subcontractor **unquestionable** coverage. In this, *{*106}* I may be taking too narrow a view, and courts might well hold that the arrangement outlined in your letter could give such employees ample coverage. No doubt a proper contract of insurance would be executed giving both the employee of the principal contractor and the employee of the subcontractor full and complete coverage, in which case compliance could be had with the law by filing originals or duplicate copies of the contract of insurance with the proper clerk of the district court on behalf of both principal contractor and the subcontractor.

Trusting the foregoing will be of some additional information to you, I am.

By: FRED J. FEDERICI,

Asst. Atty. Gen.