

Opinion No. 186.**Firemen—Fireman's Disability & Pension Fund—Compensation.**

HELD: A fireman disabled in line of duty is entitled to compensation from the disability and pension fund of the fireman's disability and pension fund, regardless of whether his salary as a fireman is paid during such disability.

2. The amount of compensation allowed is within the sound discretion of the board of trustees.

January 3, 1940.

Hon. John J. Holmes
State Auditor and Ex-Officio Insurance
Commissioner
The Capitol

Dear Mr. Holmes:

Your letter of December 26th encloses a copy of a letter from Clare P. Kern, Missoula, Montana, and submits the following question:

Can the fire department relief association pay hospital bill, doctor bill and ambulance bill, regardless of its size, so long as funds will provide, and still pay one-half of fireman's salary?

To answer the question properly requires a short resume of the disability fund. The legislative session of 1899 created by legislative act (House Bill 17, p. 37, Laws of 1899), a fund from which injured firemen would be paid for disability received in the line of active duty. The fund was distinctly named "disability fund." Under the same legislative act provision was made for the organization, government and

control of fire departments, all of which was placed under the control of the city, likewise was the control of the disability fund placed under the city. The act carried with it a provision of penalty to punish fraud on the part of those misrepresenting to obtain benefits. This original act was amended in 1907 but only as to the sources of the fund and still retained the name "disability fund." Section 6 of Chapter 71, Laws of 1907, sets out specifically:

"Said fund shall not be used for any purpose whatsoever, other than the relief of firemen of such city or town, who may be disabled in the line of duty in such fire department; nor shall this Act render the city or town liable for such disability, * * *."

The said section further provides for the relief of disabled firemen until such fund is exhausted, and you will note that up to 1907 no provision was made for pensions nor was the term ever used. In fact the only indication we have of pension being connected with the disability fund occurs under Chapter 129, Laws of 1911, in which, under Section 8, provision is made for the payment of service pension in an amount not exceeding one-half of the monthly salary last received by such pensioner. The title of the fund was not changed; it was still called "disability fund." The Act of 1911 further provided for the organization of the fire department relief association and the handling of the funds within its own organization. Another amendment occurs under Chapter 66, Laws of 1919, providing for the incorporation of the fire department relief association, the election of its officers and the control of the fund remains with the corporation under the name of "disability fund." Under Chapter 58, Laws of 1927, we find the Act amended wherein the name of the fund is changed and is now called "disability and pension fund."

The purpose of mentioning the history of the Act is to show that the original intention was for the care of disabled firemen who were disabled in the line of duty. It was not a fund set aside and intended to be kept set aside for the benefit of pensions. In fact, pensioning of retired firemen, pensions of widows of deceased firemen, etc., were all secondary and it is

my opinion that firemen disabled in the line of duty should be paid from the disability and pension fund. The association has its trustees, whose duty it is to pass upon all claims and the matter of the size of a claim paid depends largely upon their discretion, which, of course, should not be abused. (Section 5121, R. C. M., 1935.)

Mr. Kern's letter indicates that the city refused to pay a bill amounting to \$35.85. I do not see any reason why the city should be asked to pay this account for the law specifically provides that it shall be paid out of the disability and pension fund of the fire department relief association since the fireman was injured in the line of active service and that is the sole and only purpose of the original creation of the disability and pension fund.

It is also indicated by the letter from Mr. Kern that the question of firemen's salary must be taken into consideration, in reference to which I believe that the fireman's salary has nothing to do with the payment of the disability. The question of salary is mentioned in the Act for the only purpose of giving the association a basis upon which to establish a retirement or pension fund, and I quote from *State ex rel. Barry v. O'Leary et al.*, 83 Mont. 445, 450:

"Sections 5132 and 5133 provide that every fire department relief association may pay out of the disability and pension fund a service pension not to exceed one-half of the monthly salary last received by the pensioner. Each of these two sections covers some of the same ground covered by the other. In other words, in certain respects they are duplicates. This is one illustration of the bungling manner in which the subject has been legislated upon. Again, Section 5135 practically duplicates in part Section 5123, *supra*. These sections—5123 and 5135—demonstrate clearly enough that a service pension granted to a member, who by reason of service has become entitled thereto, is one thing, and a benefit or allowance to a member who has contracted sickness in the line of duty is quite another thing. We think it is likewise clear that the provision that the service pension shall not exceed one-half of the monthly salary last received by

the member has no application to the benefit allowed to a member who has contracted sickness in the line of duty."