

Opinion No. 51

**Public Welfare—Silicosis Benefits—Gainful Occupation, Definition of—
Pensions, Do Not Affect Eligibility For Silicosis Benefits.**

- Held:**
- 1. Under the provisions of Section 1 of Chapter 192 of the Session Laws of 1949 a person carried on the allowance roll of a company, such allowance being in the nature of a pension, is eligible to receive silicosis benefits.**
 - 2. A person suffering from silicosis so as to be unable to do manual labor cannot pursue a gainful occupation within the Legislative contemplation.**

September 6th, 1949.

Mr. N. C. Briggs, Administrator
State Department of Public Welfare
Helena, Montana

Dear Mr. Briggs:

You have requested an opinion interpreting the provisions of the Public Welfare Act with reference to the payment of silicosis benefits.

You state that several recipients of silicosis payments have been carried on the payroll of the Anaconda Copper Mining Company of Butte and that although these men remain on the payroll of the company the men are no longer employed, but receive a small allowance, which is apparently similar to a pension payment. Your question is whether or not these persons are eligible for continued receipt of silicosis payments, if they received such payments prior to July 1st, 1949.

The portion of the Public Welfare Act containing the eligibility requirements for aid to persons having silicosis was originally enacted as Section 3 of Chapter 5 of the Session Laws of 1941. As last amended by Section 1 of Chapter 192 of the Session Laws of 1949, this portion of the act reads as follows:

"Payments shall be made under this part to any person who (a) has silicosis, as defined in this part, which results in his total disability **so as to prevent him from engaging in a gainful occupation. The term 'gainful occupation' as used herein shall not be construed to mean occasional or intermittent light employment where the ability to do manual labor is not essential.**

(b) Has resided in and been an inhabitant of the State of Montana for ten (10) years, or more, immediately preceding the date of the application.

(c) Is not at the time of receiving payment under this part an inmate of any public institution, except Montana State Tuberculosis Sanitarium. If the person to whom payment has been ordered to be paid is an inmate of the Montana State Tuberculosis Sanitarium, then and in that case the payment herein provided for shall be made to his wife and children, if any.

(d) Is not receiving, with respect to any month for which he would receive a payment under this part, compensation under the Workmen's Compensation Act of the State of Montana, which will equal the fifty (\$50.00) dollars payment allowed hereunder. If he is receiving payments from either or both of these plans which is less in the aggregate than fifty (\$50.00) dollars per month, then if he is entitled to a payment under this part that payment shall be the difference between the amount which he is receiving under these plans and fifty (\$50.00) dollars per month." (Emphasis mine.)

I assume that the recipients in question meet the requirements of parts b, c, and d of Section 1 of Chapter 192, above quoted, and that the only question here involved is whether or not such persons meet the requirements of part (s) of Section 1 of Chapter 192 with relation to ability to engage in a "gainful occupation."

In construing the term "gainful occupation" the courts uniformly hold that a "gainful occupation" is a position comparable with the job formerly held. In *Great Southern Life Insurance Co. v. Johnson*, Texas Commission of Appeals, 25 S.W. (2d) (Texas) 1093, the court held that

the term "gainful occupation" is a relative one and that what would be a "gainful occupation" for one may not be such for another. The court stressed the point that benefits derived from the later job must be relatively proportionate to those of the former position if the second is to be considered a "gainful occupation."

In *Gibson v. Equitable Life Assur. Soc. of the United States*, 84 Utah 452, 36 Pac. (2d) 105, the court held that the term "totally and presumably permanently disabled from pursuing any and all gainful occupations" must receive a liberal and reasonable construction, and that it could not be literally construed for, in a literal sense, a person would have to be practically insane and so physically helpless as to require some one to attend to all his wants to render him unable to engage in some line of gainful work. The court went on to say that "gainful occupation" is a relative term and upheld an instruction of the trial court which read as follows:

"Wholly disabled" and "Wholly and presumably permanently disabled thereby for life from pursuing any and all gainful occupations," mean such disability as would prevent the insured from, with any degree of success, within the range of his normal capabilities, earning wages or profit in some occupation or gainful pursuit, and that such disability is founded on conditions rendering it reasonably certain throughout the person's life."

Section 1 of Chapter 192, supra demonstrates the Legislative frame of mind by saying that "gainful occupation" as used herein shall not be construed to mean occasional or intermittent light employment where the ability to do manual labor is not essential. The only interpretation possible from this portion of the act is that if the recipient was unable to do manual labor he was not in any condition to engage in a "gainful occupation." It is reasonable to surmise that the Legislature was viewing the situation from a practical standpoint and knew that persons suffering from silicosis were generally not trained for employment other than that requiring manual labor, inasmuch as such recipients were all miners of long standing. It is also reasonable to find that the Legislature contemplated that a person suffering from silicosis which resulted in his inability to do manual labor could not further pursue a "gainful occupation."

It should be pointed out that the silicosis benefits are not based upon need, i.e., the actual need of the recipient. It is apparent then that merely because a recipient receives a pension, as in the instant situation, he is not thereby disqualified from receiving silicosis benefits.

In view of the evidence of Legislative intent displayed in Section 1 of Chapter 192 of the Session Laws of 1949 and the case law construing the phrase, "gainful occupation", it is my opinion that a person who receives a pension or allowance as set forth in the instant situation is eligible to receive silicosis benefits, and that the payment of such benefits is not to be construed as a form of relief based solely upon

need; that a person who is a manual laborer and is so suffering from silicosis as to be unable to do manual labor is unable to pursue a gainful occupation within the Legislative contemplation. Employment at a job wherein the work is not manual but is intermittent light work, is within the contemplation of the Legislature, and cannot be construed as gainful employment.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.