

Opinion No. 65**Public Employees Retirement System—Disability—Industrial Accident Board—Limitations of Actions.**

Held: A claim which is not acted upon for purposes of the Workmen's Compensation Act, because not filed within the statutory period is not eliminated as a disability claim under the Public Employees Retirement System. The Industrial Accident Board is by statute called upon to make factual determinations for purposes of the Retirement System without regard to the statute of limitations established for purposes of payment under the Workman's Compensation Act.

October 15, 1949.

Mr. Fergus Fay, Secretary
Public Employees Retirement System
Helena, Montana

Dear Mr. Fay:

You have requested my opinion on the following circumstances:

"Mr. S., an employee of the State suffered injury while on the job, on November 24th, 1945. He continued working until April 28th, 1949, at which time he filed an affidavit of Hernia with the Industrial Accident Board.

"The Industrial Accident Board denied him benefits, because his affidavit of Hernia was not filed within the statutory period as set out in Section 2899, Revised Codes of Montana.

"The Public Employees Retirement System is paying Mr. S. on the basis of a disability not resulting from his employment. Mr. S feels that he is entitled to a disability resulting from injury on the job."

The question therefore arises:

"If an application is filed with the Industrial Accident Board and the claim is neither granted or denied because the same was not filed within the statutory period, is the Public Employees Retirement System liable for other than ordinary disability?"

Since you state in your facts that Mr. S. was injured in the course of employment, and since the Board of Administration of the Public

Employees Retirement System apparently determined that Mr. S. is incapacitated for the performance of duty, there appears little to decide.

Section 20 (h), Chapter 212, Session Laws of 1945, states in part:

"Incapacity for performance of duty shall be determined by the Board of Administration, but the Industrial Accident Board shall determine, in the same manner as for all other State employees, whether such incapacity is the result of injury or disease arising out of and in the course of employment."

Section 20 (h) sets out the procedure to be followed in this manner:

"In the absence of an application to the Industrial Accident Board, filed by a proper party, the Board of Administration hereunder shall proceed with retirement and with the payment of benefits payable under the retirement system when disability does not result from injury or disease arising out of and in the course of their employment. If the Industrial Accident Board determines on the basis of such an application subsequently filed, that disability resulted from injury or disease arising out of and in the course of employment, an amount equal to said benefits shall be deducted from the benefits payable under the retirement system because of such determination."

Thus, under the statute, it is clear that until a claim has been presented to the Industrial Accident Board, the Public Employees Retirement System is directed to make payments on the basis of a disability not resulting from injury or disease arising out of and in the course of employment.

The portion of the section above quoted which provides for a deduction of the amount of compensation awarded, however, cannot be read to preclude payment on the basis of a disability resulting from injury arising out of and in the course of employment. There is nothing in the section which makes as prerequisite to the award of disability allowance, the acceptance of the claim by the Industrial Accident Board. The portion of the act which is controlling in this regard is that portion of Section 20 (h) quoted above which states that the Industrial Accident Board shall determine whether the incapacity found to exist by the Board of Administration is a result of injury or disease arising out of and in the course of employment. This is a factual determination to be made by the Industrial Accident Board whether or not the said Industrial Accident Board allows compensation.

The statute of limitations established for the payments by the Industrial Accident Board under the Workman's Compensation Act, Section 2899, Revised Codes of Montana, 1935, can have no substantive effect on the factual determination called for by Section 20 (h) of Chapter 212, Laws of 1945.

It is a well settled principle of law that a statute of limitations does not go to the right, but removes the remedy. The bar of the statute

of limitations affects merely the legal, and not the moral obligations. (34 Am. Jur., Limitations of Actions, Sec. 11, 17 R.C.L., Limitations of Actions, Sec. 44.)

Thus, the statute of limitations under the Workman's Compensation Act merely removes the remedy established by that act. This has no application to the Public Employees Retirement System.

It becomes further apparent that the procedure set forth above calling for factual determination by the Industrial Accident Board is a matter apart from any hearing under the Workman's Compensation Act, when an examination of that act discloses no provision whatsoever for compensating time lost and disabilities resulting from an industrial disease.

It is therefore my opinion that a claim which is not acted upon for purposes of the Workman's Compensation Act because not filed within the statutory period is not definitely eliminated as a claim under the Public Employees Retirement System. The Industrial Accident Board must make a determination of fact for the purposes of the Public Employees Retirement System regardless of the time limit in Section 2899, Revised Codes of Montana, 1935, which is the statute of limitations for purposes of payment under the Workman's Compensation Act.

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