

1889

1. SILICOSIS—STATUTE CREATES A RIGHT IN DEPENDENTS OF WORKMAN TO COMPENSATION FOR DEATH FROM SILICOSIS—WITHIN TWO YEARS AFTER LAST INJURIOUS EXPOSURE—STATUTE ENACTED SUBSEQUENT TO EXPIRATION OF TWO YEARS CREATES NO NEW RIGHT IN DEPENDENTS OF SUCH WORKMAN.
2. RIGHT OF DEPENDENTS TO PARTICIPATE IN PROVISIONS OF AMENDMENT TO STATUTE—LAST INJURIOUS EXPOSURE—TWO YEAR LIMITATION PERIOD.
3. APPLICATION BY EMPLOYEE FOR BENEFITS ON ACCOUNT OF SILICOSIS—LIMITATIONS—ONE YEAR AFTER TOTAL DISABILITY—WITHIN LONGER PERIOD AS SHALL NOT EXCEED SIX MONTHS AFTER DIAGNOSIS—LIMITATION AS TO APPLICATION BY DEPENDENT FOR BENEFITS.

SYLLABUS:

1. Where a statute creates a right in dependents of a workman to compensation for death from silicosis only in the event of such death resulting within two years after the last injurious exposure (118 Ohio Laws, 422), a statute enacted subsequent to the expiration of the two years creates no new right in the dependents of such workman for compensation for such original disease.

2. Where a statute creates a right in dependents of a workman to compensation for death from silicosis only in the event of such death resulting within two years after the last injurious exposure (120 Ohio Laws, 451), dependents may avail themselves of the provisions of an amendment to said statute which occurs after the last injurious exposure but before the two-year limitation period has elapsed.

3. An application by an employee for benefits on account of silicosis must be made within one year after total disability or within such longer period as shall not exceed six months after diagnosis of silicosis by a licensed physician, and an application by a dependent for benefits due to death of an employee from silicosis must be made within six months after the death of said employee. The provision for exception where disability is total and continuous following the date of last exposure does not affect said requirements.

Columbus, Ohio, June 14, 1950

Hon. Joseph J. Scanlon, Secretary, The Industrial Commission of Ohio
Columbus, Ohio

Dear Sir:

I am in receipt of your communication which requests my opinion, as follows:

"The Industrial Commission of Ohio desires your opinion relative to certain phases of the law pertaining to compensation for silicosis. For example:

"1. An employee left employment where he was last exposed to silica dust on October 6, 1942, and thereafter took up other work without exposure and became finally disabled from silicosis on January 23, 1948. His death thereafter occurred on December 11, 1948. Is the claim of the widow barred by provisions of the law in effect at the time of the last injurious exposure to silica on October 6, 1942. Or, does the widow have a new and distinct right to be governed by the law in effect at the time of death?

"2. An employee was last exposed to silica dust on August 11, 1945, and accepted other work thereafter, becoming disabled September 15, 1945. A diagnosis of silicosis was not made by a licensed physician until January 10, 1950. Is the application for compensation thereafter filed on February 15, 1950, to be governed by the law of the Raymond case—140 O. S. 233, limiting the filing of the application to one year after disability? Or is it to be governed by the amendment of October 12, 1945, which limits the filing of the application to six months after diagnosis by a licensed physician?

3. Under the same facts as given in Example 2, does the provision for exception where disability is total and continuous following the date of last exposure remove all restrictions as to the date of filing the application?"

The first question presented by your communication may be phrased as follows:

Where a statute creates a right in dependents of a workman to compensation for death from silicosis only in the event of such death resulting within two years after the last injurious exposure (118 Ohio Laws, 422), may a statute enacted subsequent to the expiration of the two years from the last injurious exposure of the workman create a new right in the dependents for compensation for such original disease? Specifically, may the

amendment of Section 1465-68a, General Code, effective October 12, 1945 (121 Ohio Laws, 661) relate back and create a liability where no liability existed after October 6, 1944, which was two years from the date of last exposure to silica dust of the employee referred to in your communication.

This question was decided by the Supreme Court of Ohio in the case of State ex rel. Efford v. Industrial Commission of Ohio, et al., on March 2, 1949, 151 O. S., 109, and the first branch of the syllabus of the case reads as follows:

“Where a death from silicosis occurred more than two years after the last injurious exposure while the two-year limitation in Section 1465-68a, General Code (118 Ohio Laws, 422), was in effect and no application for compensation was made within the time then prescribed, a right to compensation therefor may not be asserted under the later amendment of Section 1465-68(a), General Code (121 Ohio Laws, 661), which changed to eight years the period of time within which a claim for death by silicosis might be made.”

I am therefore of the opinion, in specific answer to your first question that the employee referred to in your communication was forever barred from asserting any claim for compensation for silicosis after October 6, 1944, and, he having no assertable claim himself which could ever come into existence, it would necessarily follow that his dependents could have no such claim.

Your second question may be phrased as follows:

Where a statute creates a right in dependents of a workman to compensation for death from silicosis only in the event of such death resulting within two years after the last injurious exposure (120 Ohio Laws, 451), may said dependents avail themselves of the provisions of an amendment to said statute which occurs after the last injurious exposure but before the two-year period has elapsed?

The employee referred to in your communication was last exposed to silica dust on August 11, 1945, and he therefore would not have been barred under Section 1465-68a (120 Ohio Laws, 451) as it existed at that time until August 11, 1947. The amendment to Section 1465-68a became effective October 12, 1945, and provided for the filing of an application any time within six months after diagnosis by a licensed physician. It therefore follows that the employee, not having been barred

at the time of the amendment, may avail himself of its provisions. It is noted from the statement of facts in your second question that an application for compensation was filed within six months after diagnosis of silicosis was made by a licensed physician, and I am therefore of the opinion that the employee, having fulfilled the requirements of Section 1465-68a, as amended in 1945, should benefit accordingly.

There is a vital difference between workmen's compensation rights which became barred by the expiration of a limitation period before a statutory amendment and such rights which were not so barred when such amendment became effective.

This legal principle is established in the case of *The State, ex rel. Venys, v. Industrial Commission of Ohio*, 153 O. S. 238, decided March 15, 1950. The syllabus of this case reads as follows:

"Where a workman had a last injurious exposure to silicosis on September 19, 1944, present Section 1465-68a, General Code (121 Ohio Laws, 661), effective October 12, 1945, is applicable to any claim he might have for temporary or permanent total disability and is likewise applicable to any claim which his dependent or dependents might have by reason of his death from silicosis. (*State ex rel. Efford v. Industrial Commission*, 151 Ohio St., 109, distinguished.)"

It is accordingly my opinion, in specific answer to your second question, that all claims due to silicosis not forever barred before October 12, 1945, are to be governed by Section 1465-68a, General Code, as amended on said date.

Relative to your third question, the pertinent part of Section 1465-68a, General Code, reads as follows:

"Compensation, medical, hospital and nursing expenses on account of silicosis shall be payable only in the event of temporary total disability, permanent total disability, or death, in accordance with the provisions of Sections 1465-79, 1465-81 and 1465-82 of the General Code, and only in the event of such disability or death resulting within eight years after the last injurious exposure; provided that in the event of death following continuous total disability commencing within eight years after the last injurious exposure, the requirement of death within eight years after the last injurious exposure shall not apply.

"Claims of an employee for compensation, medical, hospital and nursing expenses, on account of silicosis shall be forever barred unless application therefor shall have been made to the

industrial commission within one year after total disability began or within such longer period as shall not exceed six months after diagnosis of silicosis by a licensed physician. Claims of dependents for benefits on account of death from silicosis shall be forever barred unless application therefor shall have been made to the industrial commission within *six* months after death."

It shall be noted that the two paragraphs cited from Section 1465-68a, General Code, recite two distinct requirements before a silicosis claim may be justified. The first refers to the extent of the period of limitation after the last injurious exposure and the second refers to the period of limitation for filing a claim. Neither is wholly dependent upon the other for its interpretation.

It therefore follows that even though provision is made "that in the event of death following continuous total disability commencing within eight years after the last injurious exposure, the requirement of death within eight years after the last injurious exposure shall not apply," the time limitation for filing an application for benefits is not affected. The exception referred to in your communication merely provides that both continuous total disability and death need not occur during the same eight-year limitation period.

I am therefore of the opinion, in specific answer to your third question, that an application by an employee for benefits on account of silicosis must be made within one year after total disability or within such longer period as shall not exceed six months after diagnosis of silicosis by a licensed physician, and an application by a dependent for benefits due to death of an employee from silicosis must be made within six months after the death of said employee. The provision for exception where disability is total and continuous following the date of last exposure does not affect said requirements.

Respectfully,

HERBERT S. DUFFY,
Attorney General.