

**OPINION
70-338**

April 15, 1970 (OPINION)

Colonel Ralph M. Wood

Superintendent

North Dakota Highway Patrol

RE: State - Highway Patrol Retirement System - Disability Retirement

This is in reply to your letter of April 7, 1970, concerning sections 39-03A-15 and 39-03A-16 of the North Dakota Century Code, relative to the North Dakota Highway Patrol Retirement System. You state the following question:

Is an officer of the North Dakota Highway Patrol who becomes physically unable to continue to perform the duties of an officer and yet may be qualified for other employment eligible for benefits provided for in Sections 39-03A-15 and 39-03A-16?"

Section 39-03A-15, as amended, provides:

DISABILITY RETIREMENT. Each contributor who shall become totally disabled, regardless of the amount, if any, of his accumulated deductions, may apply to the board for disability retirement allowance provided for in section 39-03A-15."

Section 39-03A-16 of the North Dakota Century Code provides:

DISABILITY RETIREMENT ALLOWANCE. Each contributor qualifying under section 39-03A-15 shall be entitled to receive from the fund for the duration of the period of total disability a monthly disability retirement allowance which when added to the compensation allowance, if any, to which the contributor may be entitled under the workmen's compensation laws will equal one-half of the average monthly salary of the contributor.

The answer to the question presented must be based upon the definition of the term "totally disabled." Section 39-03A-01(6) defines the term total disability" as follows:

The following words and phrases as used in this chapter, unless a different meaning is plainly implied by the context, shall have the following meanings:

* * *

6. 'total disability,' the degree of disability which is recognized under the workmen's compensation laws as sufficient to entitle the claimant to an award for temporary total disability;

* * *."

In examining the Workmen's Compensation Laws (Title 65, North Dakota Century Code) we do not find a statutory definition of the term "temporary total disability", although the statutes do permit an award of compensation for temporary total disability. See section 65-05-09 of the North Dakota Century Code, as amended. Therefore, we must rely on administrative and judicial decisions relative to the term "temporary total disability" in order to arrive at a definition of this term.

It is our understanding that the term "temporary total disability" as construed by the Workmen's Compensation Bureau is, generally speaking, considered to be that degree of temporary disability which prohibits the injured person from returning to productive labor for a temporary period of time. In this instance we are not, however, concerned with the degree of permanence of the disability, since that is not a factor under the Highway Patrol Retirement System Act. In construing section 65-05-09 of the North Dakota Century Code, the North Dakota Supreme Court adopted a definition from 99 C.J.S., Workmen's Compensation, sec. 299, p. 1055, which reads:

The words 'total disability' as used in the workmen's compensation acts should be taken in their plain or ordinary and usual sense. In order to determine total disability under the statutes, both the type of work being done at the time of the accident and the nature and extent of the injury must be considered; and regard must be had to age, experience, training, and capabilities of the employee.

Generally, an employee is totally incapacitated and entitled to the compensation provided therefor where, by reason of the injury, he is so disqualified from performing the usual tasks of a workman that he is unable to procure and retain employment, * * *." See *Lyson v. North Dakota Compensation Bureau*, 129 N.W.2d. 351, 355 (ND 1964).

In the *Lyson* case, the Court was concerned with a claim for permanent total disability rather than temporary total disability. As noted above, the question presented herein is not concerned with whether the disability is temporary or permanent, since under the definition of total disability contained in section 39-03A-01(6) it is only the degree of disability with which we are concerned. Presumably the question of whether such disability was temporary or permanent would not be a factor, except in determining the length of time the disability allowance would be paid under the provisions of chapter 30-03A.

The definition of "total disability" as adopted by the Supreme Court in the *Lyson* case is, however, of assistance to use in determining the degree of disability which must be present to entitle a member of the fund to a disability allowance. It is apparent that such a determination is as much a question of fact as a question of law. Thus the Court in the *Lyson* case cited with approval a decision of the Nebraska Court holding that a workman unable, solely because of injury, to perform or obtain any substantial amount of labor in his particular line of work, or in any other for which he would be fitted, is totally disabled within the meaning of the Workmen's Compensation Act. See *Wilson v. Brown-McDonald Co.*, 134 Neb. 211,

278 NW 254, cited on page 356 of the Lyson decision, supra.

In this instance, we do not have any facts concerning any given individual before us. Presumably each case must be determined on the facts peculiar thereto, including the degree of disability, the ability of the officer to secure other gainful employment and the availability of other employment if the officer is able to perform same. However, it is also obvious that the fact an officer of the North Dakota Highway Patrol becomes physically unable to continue to perform the duties of an officer, considered alone, is not sufficient to entitle such officer to a disability allowance under the provisions of chapter 39-03A of the North Dakota Century Code. The question presented implies such officer may be physically able to accept other employment. If such officer, would in fact, be physically and mentally able to perform other work in other gainful employment, we do not believe he would be entitled to the disability allowance if such other employment is available to him.

If the officer is entitled to and awarded workmen's compensation based on temporary total disability, we believe he would, as a matter of law, be entitled to the Highway Patrol Retirement disability allowance. If such officer is not entitled to an allowance from workmen's compensation because of the fact his injury did not occur in the course of employment, it is our opinion that such officer, if he is physically unable to continue to perform the duties of an officer, is not eligible for benefits provided for in sections 39-03A-15 and 39-03A-16 of the North Dakota Century Code if such officer is qualified for other ordinary gainful employment and if such employment is available to him.

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