minors under 18 years of age, who otherwise conform to the requirements of the Child Labor Law, may be employed in work which requires riding on a freight elevator when said elevator is manned or operated by a competent adult.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: GRACE J. FORD,
Assistant Deputy Attorney General.

May 13, 1949.

HONORABLE HARRY C. HARPER, *Commissioner,*
Department of Labor and Industry,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 49.

DEAR COMMISSIONER HARPER:

This is to acknowledge the receipt of the copy of letter transmitted to you by the Director of the Division of Employment Security requesting an opinion as to the authority and method to be pursued by the agency in securing reimbursement of disability benefits erroneously paid. The erroneous payment of benefits was occasioned by the employer improperly advising the agency that the claimant was covered under the State Fund when in fact he was entitled to benefits under the Insured Private Plan of the employer. The agency asks whether it should proceed to collect from the claimant or the insurer or against both, and, if so, in what order.

In the absence of any proof of a false statement or representation having been made to obtain his benefits, the Temporary Disability Benefits Law does not specifically provide for repayment of benefits by a claimant whether erroneously paid or collected. Section 18 thereof, authorizes the payment of disability benefits out of the Disability Benefits Fund to be made in accordance with and subject to the laws and regulations pertaining to the payment of unemployment benefits. Subsection 16 (d) of the Unemployment Compensation Law, in part, provides: "When it is determined by the deputy that any person, by reason of the nondisclosure or misrepresentation by him or by another, of the material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent) has received any sum as benefits * * *."

The New Jersey Supreme Court in the case of *Tube Reducing Corporation* vs. *U. C. C., et als.,* 62 A. (2d) 473, in its opinion, in part, held as follows:

> "The obligation of repayment of benefits erroneously paid to one disqualified under the statute does not depend upon moral or conscious fraud in the nondisclosure or misrepresentation. The principle of the cases dealing with life insurance policies, e. g. *Kozlowski* vs. *Pavonia Life Insurance Co.,* 116 N. J. L. 295 (Sup. Ct., 1936), has no application here. It does not matter whether there be concealment or mere silence. That such was the legislative

intention is demonstrated by the use of the parenthetical clause 'irrespective of whether such nondisclosure or misrepresentation was known or fraudulent.' This qualification can have no other meaning. It clarifies and makes certain language that might otherwise be open to the interpretation that only fraud was comprehended. Even though the nondisclosure 'by him or another' be unwitting and without fraud, the benefits paid to the claimant by reason thereof while he was disqualified are recoverable, if the fact was material. The omission of the correlative adverbial phrase 'or not' has no significance. As the lexicographers say, the negative contrasting alternative is implied. *The clause is definitive; its plain sense is that benefits received under the statute while the recipient is disqualified are retrievable regardless of whether or not he knew of the vital fact undisclosed or misrepresented or was actuated by fraud in concealing or ignoring it.* It is conceded that the words 'known' and 'fraudulent' are used in the same general sense. And it goes without saying that the employer's formal notice to the Commission of the existence of the strike at its plant, before the making of the payments in question, is not a differentiating circumstance. The contrary view would ignore administrative realities and complexities and open the door to evasion of the statutory policy." (Italics supplied.)

The benefits were paid out of the State Disability Fund when they should have been paid by the insurance carrier in behalf of the employer. The fact that the claimant in this case acted in good faith or without fraud is immaterial. He must make reimbursement to the State of its property. The agency did not commit any error which resulted in the payment of the claim and even if it had, it would not have made any difference because the claimant was not entitled to the receipt of any moneys. The claimant must, therefore, return the moneys although he was innocent of any wrongdoing.

In the absence of any statutory authority therefor, the State agency has no right to collect directly from the insurer nor has it any right of subrogation to any funds or moneys in the hands of the insurer which belong to the claimant.

It is suggested that the Division of Employment Security, as one method of reimbursement, secure from the claimant an assignment of his claim to the benefits under the Private Plan, which would permit the insurance carrier to reimburse the agency of the amount of benefits erroneously paid.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General,

By: WILLIAM C. NOWELS,
Deputy Attorney General.

TDP:WNR