SEPTEMBER 27, 1963

HONORABLE RAYMOND F. MALE
Commissioner of Labor and Industry
Trenton, New Jersey

FORMAL OPINION 1963—No. 5

DEAR COMMISSIONER MALE:

You have requested advice as to the legality of a rule or regulation permitting joinder of the Commissioner of Labor and Industry, as custodian of the 1% Fund,[1] as a party in appropriate workmen's compensation proceedings. Such a rule has been adopted by the Workmen's Compensation Board, subject to the Attorney General's opinion as to its legality.

As we have previously advised you informally, in our opinion the adoption of a rule for permissive joinder of the 1% Fund through its representative, the Commissioner, is authorized by law. The rule is consonant with the spirit of the 1% Fund law and the Workmen's Compensation laws and has been encouraged by decisions of our courts noted below.

Payments are made from the 1% Fund to persons who become totally disabled "as a result of experiencing a subsequent permanent injury under conditions entitling such persons to compensation therefor, when such persons had previously been permanently and partially disabled from some other cause * * *." N.J.S.A. 34:15-95. The Fund is sometimes referred to as the second-injury fund. *Ratsch* v. *Holderman*, 31 N.J. 458, 468 (1960) (dissenting opinion). There, Justice Burling, in his dissenting opinion, sets forth the history of the 1% Fund law and the problems it was designed to cure. He cites the classical example as follows (31 N.J. at 468):

> "A has lost the sight of one eye in an accident. He is therefore rendered 25% totally disabled. He subsequently secured a job with B firm. Due to an industrial accident he loses his other eye, rendering him totally blind, and 100% disabled."

The problem is whether the second employer should pay compensation for the second disability at the rate of 25% for the loss of one eye or for the resulting total disability. The solution was found in establishing a fund to share the burden of the totally disabling subsequent injury.

Our highest court has expressed the purpose of the 1% Fund law in the following terms in *Balash* v. *Harper*, 3 N.J. 437, 442 (1950):

> "The intent of the statute is to insure the employee full compensation where a compensable disability succeeds but has no causative connection with the results of a prior disability, the combination of the two leaving the employee permanently and totally disabled. The intention is to relieve the employer of the undue burden of a prior disability, with which or its results, the disability arising in his employ has no causative connection."

[1] The "1% Fund" derives its name from a fund accumulated through payments by self-insured employers and insurance companies writing compensation or employer's liability insurance in New Jersey, based upon 1% of the compensation paid out by such companies in the preceding year. N.J.S.A. 34:15-94.

Relieving the second employer from the burden of paying for part of the disability that he did not cause is said to provide an incentive to employers for hiring handicapped people. *Ratsch* v. *Holderman, supra,* 31 N.J. at 469.

The proposed joinder rule is as follows:

> "In any workmen's compensation case where it appears that the One Per Cent Fund may be answerable for a portion of the compensation payable to the petitioner by virtue of his alleged or indicated permanent total disability, either party may make application for an order to join the Commissioner of Labor and Industry as a party to the proceeding as custodian of the One Per Cent Fund. Such application shall be by ten days' written notice served upon the adverse party and the Attorney General. Said notice shall recite the facts and be accompanied by copies of the medical reports upon which the application is based. In an appropriate case, the judge of compensation or referee may, on his own motion, join the Commissioner as a party to the proceeding.
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> "If the motion is granted, an application for One Per Cent Fund benefits shall be filed in accordance with the provisions of R.S. 34:15–95.1, and the hearing official shall proceed to hear the compensation and the One Per Cent Fund cases as a consolidated matter. The hearing official shall make a determination as to the compensation petition and render an advisory report as to the eligibility for One Per Cent Fund benefits. Prior to the commencement of payments from the One Per Cent Fund and thereafter, the petitioner shall submit himself to such further examinations and interviews as may be required to establish his continued total disability."

A.

N.J.S.A. 34:15–64 authorizes the Commissioner, Director and Deputy Directors of Workmen's Compensation, now known as Judges of Compensation (N.J.S.A. 34:1A–12) to make "such rules and regulations for the conduct of the (compensation) hearing not inconsistent with the provisions of this chapter as may, in his judgment, be necessary." The Commissioner, Director and Judges of Compensation meet as a group called the Workmen's Compensation Board and promulgate rules and regulations as such. The first question posed is whether the rule of said Board will control proceedings involving the 1% Fund.

The 1% Fund law, originally enacted by Laws of 1923, c. 81, has been said to be "not part of the Workmen's Compensation Act." *Walker* v. *Albright,* 119 N.J.L. 285, 288 (Sup. Ct. 1938). And in *El* v. *Toohey,* 125 N.J.L. 150, 151 (Sup. Ct. 1940), aff'd o.b., 125 N.J.L. 510 (E. & A. 1921), although the court said "in the Revision of 1937 the one per centum statute was incorporated with the Workmen's Compensation act," the counsel fee portions of the Workmen's Compensation laws were held not applicable to claims on the 1% Fund.

But in *Walker* v. *Albright, supra,* decided in January of 1938, the court held that although the two laws were separate laws, the Commissioner, as custodian of the 1% Fund, need not be joined formally as a party to the workmen's compensation proceeding, because he is a " 'party' *ex officio* in every such proceeding." The court held that the "award is *res adjudicata* of the fact of total disability when it was made * * *" and was binding upon the Commissioner because of his status as a so-called *ex officio* party to the proceeding. 119 N.J.L. at 286-288. Because of subse-

quent developments we need not consider now the validity of these determinations. In May 1938, following the decision in *Walker* v. *Albright*, the Legislature amended the 1% Fund law expressly to require that: "In all proceedings affecting the fund under this act, the Commissioner of Labor[2] shall be a necessary party." L. 1938, c. 198; N.J.S.A. 34:15–95.1. See also *In re Glennon*, 18 N.J. Misc. 196, 198 (C. P. 1940); *Wexler* v. *Lambrecht Foods, infra,* and *Ratsch* v. *Holderman*, 31 N.J. 458, 461 (1960), where the court left open the question whether a finding made against petitioner in his workmen's compensation proceeding forecloses a contrary assertion against the Fund on principles of *res judicata* or collateral estoppel.

The court in *Walker* recognized the close relationship between workmen's compensation proceedings and proceedings for benefits from the 1% Fund. The same view was taken in *Voessler* v. *Palm Fetchteler & Co.*, 120 N.J.L. 553, 556 (Sup. Ct. 1938), aff'd o.b., 122 N.J.L. 434 (E. & A. 1939), where the court held that the procedure in Workmen's Compensation cases is applicable to proceedings against the Fund.

At the outset, therefore, we conclude that the Workmen's Compensation Board may validly exercise its rule-making power so as to bind the Commissioner, as custodian of the 1% Fund, whether or not the 1% Fund law is a part of the Workmen's Compensation laws. The Board has the rule-making power to bind the workmen's compensation proceeding, and the Commissioner acting alone also has the power to make "rules and regulations, not inconsistent with law as he shall deem necessary to enforce the provisions of this title." R.S. 34:1–20. That power was confirmed in 1948 in the reorganization laws following the adoption of the 1947 Constitution of New Jersey. N.J.S.A. 34:1A–3 (e).[3]

It is noted that the Commissioner has concurred in the promulgation of the rule in question. Since the Board's rule is binding on parties to the workmen's compensation hearing and the Commissioner, by his concurrence in the rule, has agreed to be bound thereby as custodian of the 1% Fund, it is not strictly necessary to determine whether a regulation adopted by the Workmen's Compensation Board, as a departmental unit, may bind the Commissioner without his consent. We conclude, therefore, that the rule will validly control proceedings in the Workmen's Compensation Division to which employees and employers are parties and in which the 1% Fund may be required to participate.

B.

The questions remaining are whether an application may be made for benefits from the Fund before the adjudication of a claim by petitioner against his employer and whether the Fund may be compelled by order of a Workmen's Compensation Judge to join in the original workmen's compensation proceeding. Administrative Directive No. 9, promulgated on July 29, 1958 and rescinded on October 20, 1962, provided as follows:

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[2] Now known as the Commissioner of Labor and Industry following the reorganization of the Executive Branch of State Government under L. 1948, c. 446, N.J.S.A. 34:1A–2.

[3] The Commissioner has broad authority to administer the work of the department, to organize the work in such divisions, bureaus and "other organizational units" as he may find necessary for the efficient operation of his department, may adopt rules "for the efficient conduct of the work and general administration of the department," may co-ordinate the activities of the department and the several divisions and other agencies therein so as "to eliminate overlapping and duplicating functions," may integrate within the department, "so far as practicable, all staff services of the department and of the several divisions and other agencies therein" and may "delegate to subordinate officers or employees in the department such of his powers as he may deem desirable * * *." N.J.S.A. 34:1A–3 (a), (d), (f), (i), (j), and N.J.S.A. 34:1A–4. See also: *Esso Standard Oil Co.* v. *Holderman,* 75 N.J. Super. 455 (App. Div. 1962), aff'd 39 N.J. 355 (1963), appeal filed, 32 U.S.L. Week 3070 (U.S. Aug. 2, 1963) (No. 326).

"Applications for benefits for the Second Injury Fund shall not be filed earlier than 6 months prior to the date when the final payment of compensation is payable by the employer for the subsequent permanent injury which, in combination with the previous partial permanent disabilities, is asserted as having resulted in total disability."

This rule led the court to say in *Wexler* v. *Lambrecht Foods*, 64 N.J. Super. 489, 496 (App. Div. 1960): "A proceeding against the Fund is thus contemplated to follow the compensation proceeding against the employer (citing *Voessler* v. *Palm Fetchteler & Co., supra.*)." Speaking for the Appellate Division Judge Kilkenny there said, however:

"It would seem essential that in a case such as this, where the argument addressed to the deputy director by the respondent was for a ruling calculated to induce a proceeding against the Fund by the workman, the Attorney General should be brought into the case at the outset. It is clear that, in substance, whether or not in form, the employer was attempting to lay a foundation for liability of the Fund for part of petitioner's total disability."

Difficulties arising because of the separation of the original compensation proceedings from the proceedings for benefits from the Fund have been noted in numerous cases. At times the experience has been frustrating to claimants, attorneys and the courts, particularly when a variety of legal action may be involved in one case. See *Ratsch* v. *Holderman, supra*, involving a petitioner who was partially disabled from one accident and unrelated conditions, from a second accident on which he received an award of 12½% of total permanent disability, and, on a later petition, an additional 5% of the total. The court commented that "the record as first presented to us suggested the possibility that the second award was in fact the product of a settlement disguised as a trial." The court further noted that if it was in reality a settlement, it was "made with the understanding that the One Per Cent Fund would be visited with the burden and this despite the palpable fraud upon the Fund that such an understanding between employee and employer would plainly accomplish."

An employee who is totally disabled is posed with the problem of first proceeding against his employer without knowing how he may fare in the later proceeding against the Fund if his employer is absolved from part of the obligation. Often total disability is found and an award is fixed, or settlement made, under the mistaken belief that the claimant is eligible for benefits under the Fund. *In re Glennon, supra*, involved a compensation proceeding against an employer to which the 1% Fund was not a party. That proceeding resulted in a settlement after a hearing and the taking of testimony, in which the petitioner "was found to be disabled 100 per cent, 66⅔ per cent of permanent total being chargeable to the employer due to the compensable accident." 18 N.J. Misc. at 198. It appears that petitioner's total disability was due to the aggravation of a previous, latent condition. Petitioner had conceded the lack of connection between this latent condition and the subsequent accident, believing this put him within the scope of the Fund for the balance of the total disability. Later, the contrary fact was found to be true in the Fund was held not liable. The court said petitioner's remedy, if any, lay in further proceedings against his employer.

Problems arise because the Fund law (N.J.S.A. 34:15–95 (a), (b), (c)) expressly provides that benefits are not available:

"(a) If the disability resulting from the injury caused by his last compensable accident in itself and irrespective of any previous condition or disability constitutes total and permanent disability within the meaning of this Title.

"(b) If permanent total disability results from the aggravation, activation or acceleration, by the last compensable injury, of a pre-existing non-compensable disease or condition.

"(c) If the disease or condition existing prior to the last compensable accident is not aggravated or accelerated but is in itself progressive and by reason of such progression subsequent to the last compensable accident renders him totally disabled within the meaning of this Title."

These provisions have led to considerable litigation and misinterpretation. See: *Mayti* v. *Male*, 59 N.J. Super. 478 (Cty Ct. 1960), aff'd 79 N.J. Super. 554 (App. Div. 1963), and *Mayti* v. *Singer Mfg. Co.*, 76 N.J. Super. 379 (Cty. Ct. 1962), aff'd 79 N.J. Super. 556 (App. Div. 1963).

Procedurally the provision to be considered is N.J.S.A. 34:15-95.1. This section provides: "Applications for benefits under this act shall be made by a verified petition filed in duplicate within two years after the date of the last payment of compensation by the employer or the insurance carrier * * *." This section further provides that the application should be made to the Commissioner, who shall refer it to a Judge of Compensation, "to hear testimony and for an advisory report as to findings; * * *. The decision, however, as to whether the petitioner shall or shall not be admitted to the benefits shall be rendered by the said Commissioner of Labor. * * * In all proceedings affecting the fund under this act the Commissioner of Labor shall be a necessary party."

Under N.J.S.A. 34:15-95.1 application for Fund benefits must be made within two years from the date of last payment by the employer or carrier. The court in *Wexler, supra*, in reference to N.J.S.A. 34:15-95.1, said (64 N.J. Super. at 495):

"We observe a procedural difficulty in making any binding determination as to the applicability of the instant situation to the provisions of the One Per Cent Fund law. This case is not a proceeding against the Fund and the Fund is not represented herein by counsel charged with presenting evidence or argument against this responsibility. * * * Thus, the employee's right to apply for the benefits of the One Per Cent Fund law within that extended period makes it unnecessary to determine his right thereto when his compensation case is heard."

The statute does not prohibit filing an application before the entry of judgment in the workmen's compensation hearing between the employee and employer. As noted above, the Administrative Directive No. 9 had provided that applications for benefits from the 1% Fund could not be filed earlier than six months before the date of final payment of compensation by the employer for the employer's share of compensation for the subsequent permanent injury. See *Wexler* case *supra*, 64 N.J. Super. at 496. The proposed rule merely advances the date of the application if, on motion, a Judge of Compensation orders joinder of the 1% Fund in the compensation proceeding.

We conclude that the statutory provision requiring the application to be made within two years from the date of last payment of compensation precludes an appli-

cation from being made after that period but does not preclude the making of an application at any time before the expiration of the two-year period. We do not find any legislative intent to insist upon complete separation of the two proceedings, notwithstanding that separation of the proceedings had been the practice. See *Wexler* case *supra*, 64 N.J. Super. at 495, 496. When the Appellate Division in *Wexler* said that the "proceeding against the Fund is thus contemplated to follow the compensation proceeding against the employer," the court was referring to the practice and to the requirement of Administrative Directive No. 9. The court did not hold that the statute required the proceedings to be maintained separately. Cf. *Voessler, supra,* where the Commissioner came in on the appeal with consent of the parties. The Appellate Division in *Wexler, supra,* did not pass upon the question as to whether joinder of the proceedings was permitted or prohibited by statute. The court did recognize that it was "essential that in a case such as this, where the argument addressed to the deputy director by the respondent was for a ruling calculated to induce a proceeding against the Fund by the workman, the Attorney General should be brought into the case at the outset."

In *Esso Standard Oil Co.* v. *Holderman, supra,* the court held that the express statutory provision requiring self-insured employers to file certain accident reports after the expiration of the seven days "waiting period" did not preclude a regulation by the Commissioner of Labor and Industry requiring the filing of similar reports before the expiration of the seven day period. The court held that the specific statutory provision did not pre-empt the field to the exclusion of the Commissioner's exercise of jurisdiction through rules and regulations, especially when the regulations deal with procedural matters. 75 N.J. Super. 470-71. Our view here is that in providing that the application for benefits from the Fund be made "within two years after the date of the last payment of compensation by the employer or the insurance carrier," the Legislature's intent was primarily to provide a statute of limitations, that is, a date beyond which the application could not be made. We find no expression of legislative intent to preclude an application or adjudication concurrently with the compensation hearing prior to the expiration of the two year period. Other cases upholding administrative agency regulations notwithstanding the alleged inconsistency between the regulations and legislative enactments specifically dealing with the same subject matter are: *Grenewicz* v. *Ligham,* 34 N.J. Super. 1 (App. Div. 1955) and *Daughters of Miriam Home for Aged and Infirm, Congregation Adas Israel* v. *Legalized Games, etc.,* 42 N. J. Super. 405 (App. Div. 1956). See also *Kennedy* v. *City of Newark,* 29 N.J. 178 (1959), where the court held that a statutory provision requiring residence in a city at the time of initial appointment as a condition for appointment to a civil service position did not preclude the adoption of an ordinance by the city requiring continued residence thereafter as a condition for continued employment.

It is the duty of the Commissioner to conserve the Fund. *El* v. *Toohey, Jr., supra,* 125 N.J.L. at 152. It is also the Commissioner's duty to see to it that workers receive full and prompt compensation benefits to which they are entitled. "Under the social philosophy underlying Workmen's Compensation legislation in this state the Division is not a mere quasi-judicial tribunal confined to the duty of deciding formally litigated claims. It is properly expected to take the initiative where necessary to assure the prompt and full provision for injured workers of all statutory benefits to which they are entitled in a given case." *Esso Standard Oil Co.* v. *Holderman, supra,* 75 N.J. Super. at 467.

The proposed regulation enables the Commissioner to fulfill all of his obligations, to the Fund, to the employer and to the applicant. An early application for benefits from the 1% Fund through joinder of the Commissioner as a party to the workmen's compensation proceeding, where it appears that the Fund may be answerable for a portion of the compensation payable because of the indicated total disability, meets the needs of all parties. All interests that may be affected by the judgment will be represented. The problem of causal relationship will be clarified. The Fund will have the opportunity to present its own evidence as well as an opportunity to cross-examine other witnesses. The opportunity for mistaken judgments, as represented by the *Glennon* and *Ratsch* cases, may be avoided. The applicant otherwise eligible for 1% Fund benefits will not risk losing his rights through ignorance, error or forgetfulness in failing to file for the benefits within the two year statutory period following the last payment by the employer or carrier.

It is noted that the proposed rule requires the later establishment of continued total disability as a condition for commencement of Fund benefit payments. Except for this condition we feel that the determination of the Judge of Compensation in the hearing to which the Fund has been joined as a party will be binding on the Fund, notwithstanding the provision in N.J.S.A. 34:15–95.1 that only an advisory opinion is rendered by the Judge of Compensation and that the final decision rests with the Commissioner. In *Voessler, supra,* decided shortly after this section of the statute was enacted, the court held that the Commissioner's duty to issue payments from the Fund follows as a matter of course from the ruling of the Workmen's Compensation Division. See: 120 N.J.L. at 557, where the court said:

> "When it is judicially determined that the rights of a claimant are under the provisions of the statute it will be, of course, for the commissioner to issue the proper warrant and for the treasurer to pay. But the determination is primarily by the Workmen's Compensation Bureau subject to appeal and other subsequent procedure as under the Workmen's Compensation act."

See also: *El* v. *Toohey, supra,* 125 N.J.L. at 151.

If circumstances change so that the Fund should no longer be liable for the payment of benefits, the Workmen's Compensation law affords ample opportunity for revision of benefits downward. N.J.S.A. 34:15–27; *Rodrigues* v. *Michael A. Scaturchio, Inc.,* 42 N.J. Super. 341, 355 (App. Div. 1956); N.J.S.A. 34:15–95; N.J.S.A. 34:15–12b.

Accordingly, you are advised that the proposed rule of permissive joinder of the Fund in a workmen's compensation proceeding may lawfully be promulgated.

Very truly yours,

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Attorney General

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