suant to Executive Order No. 11074 of January 9, 1963, any state or local school system and any public or nonpublic recreation agency may apply for information and assistance for beginning or improving health and physical education activities. There are numerous other federal programs designed to assist students attending both public and nonpublic schools. It is, however, beyond the capacity of my office to determine whether the adoption of the proposed amendment would jeopardize any of the numerous federal programs. This is a matter for determination by the appropriate federal agency and, where a federal regulation requires assurance that nonpublic school children will participate in the program, the federal agency will be required to make a determination of whether the proposed amendment would result in a limitation or prohibition of federal assistance.

FRANK J. KELLEY,
Attorney General.

701109.1

WORKMEN'S COMPENSATION: Second Injury Fund

Employees who are totally and permanently disabled as a result of an injury that occurred prior to the effective date of Act 227, P.A. 1968 (July 1, 1968), are entitled to receive from the second injury fund all statutory increases in the schedule of benefits without regard to the two-thirds maximum.

Where an employee suffers total permanent disability as a result of an injury occurring after the effective date of Act 227, P.A. 1968, he is not so entitled.

No. 4711 November 9, 1970.

Mr. Barry Brown, Director
Department of Labor
300 E. Michigan Avenue
Lansing, Michigan

You have indicated that as a result of recent legislative enactments and court interpretations thereof in the area of workmen's compensation, a great deal of confusion exists concerning the liability of the second injury fund to pay differential benefits to totally and permanently disabled persons. You therefore asked for my opinion on certain questions concerning statutory amendments and the decision of the Michigan Supreme Court in *King* v. *Second Injury Fund*.[1]

You ask:

> Is the second injury fund obligated to pay the kind of benefits granted to the claimant in *King v. Second Injury Fund* after July 1, 1968, which is the effective date of Act 227, P.A. 1968, (a)

[1] 382 Mich. 480 (1969). The court determined that the claimant, Eva King, was entitled to receive from the second injury fund the current maximum payments allowed in the applicabale schedule without regard to the limitation of two-thirds of the average weekly wage.

where the injury occurred prior to July 1, 1968, (b) where the injury occurred on or after July 1, 1968?

In replying to your question it is necessary to review pertinent amendments to the workmen's compensation act.[2] The responsibility of the second injury fund to pay differential benefits where the legislature provides by amendment of the act for a higher schedule of payments or for a longer period was first inserted by Act 250, P.A. 1955, which incorporated this concept in Section 9(a) of Part 2 of Act 10, P.A. 1912, 1st Ex. Sess. thereof. The constitutionality of this provision was upheld by the Supreme Court. *Verberg v. Simplicity Pattern Co.* (1959), 357 Mich. 636.

Subsequently, by enactment of Act 195, P.A. 1956, Part 2, Section 9(a), was amended to read as follows:

> "* * * *. Any permanently and totally disabled person as defined in sections 8a and 10 who, on or after June 25, 1955, is entitled to receive payments of workmen's compensation under this act in amounts per week of less than is presently provided in the workmen's compensation schedule of benefits for permanent and total disability and for a lesser number of weeks than the duration of such permanent and total disability shall *after the effective date of this amendatory act* receive weekly, without application, from the second injury fund, an amount equal to the difference between what he is now receiving per week and the amount per week now provided for permanent and total disability with appropriate application of the provisions of paragraphs (b), (c), (d) and (e) of this section since the date of injury. *Payments from this second injury fund shall continue after the period for which any such person is otherwise entitled to compensation under this act for the duration of such permanent and total disability according to the full rate provided in the schedule of benefits.*"
> (emphasis added)

The next change in this language occurred by virtue of enactment of Act 44, P.A. 1965, as a result of which Part 2, Section 9(a) was again amended to read:

> "* * * Any permanently and totally disabled person as defined in this act who, on or after June 25, 1955, is entitled to receive payments of workmen's compensation under this act in amounts per week of less than is presently provided in the workmen's compensation schedule of benefits for permanent and total disability and for a lesser number of weeks than the duration of such permanent and total disability shall *after the effective date of any amendatory act, by which his disability is defined as permanent and total disability or by which the weekly benefit for permanent and total disability is increased,* receive weekly, without

[2] Originally Act 10, P.A. 1912, 1st Ex. Sess.; M.C.L.A. § 412.1 et seq.; M.S.A. § 17.141 et seq. This act, however, was repealed, the current version of the workmen's compensation act being Act 317, P.A. 1969; M.C.L.A. § 418.101 et seq.; M.S.A. § 17.237(101) et seq.

application, from the second injury fund, an amount equal to the difference between what he is now or shall hereafter be entitled to receive from his employer under the provisions of this act as the same was in effect at the time of his injury and the amount now provided for his permanent and total disability by this or any other amendatory act with appropriate application of the provisions of paragraphs (b), (c), (d) and (e) of this section since the date of injury. *Payments from this second injury fund shall continue after the period for which any such person is otherwise entitled to compensation under this act for the duration of such permanent and total disability according to the full rate provided in the schedule of benefits.*"
(emphasis added)

In 1968 the legislature adopted certain modifications of the workmen's compensation laws which, along with *Eva King, supra,* created the confusion that precipitated your request for this opinion. Pertinently, this act created a new Part 8 which sought to assemble those portions of the former act dealing with the second injury fund and the silicosis and dust disease fund in one place. Former Part 2, Section 9(a) was split; the first part dealing with the benefit schedule remained as Part 2, Section 9(a), while the latter portion dealing with the obligations of the second injury fund to pay differential benefits became Part 8, Section 3(2). In addition, a new Part 8, Section 3(3) was added. Thus the pertinent portions of Part 8 of Act 227, P.A. 1968, provided as follows:

"(2) On and after the effective date of this part any permanently and totally disabled person as defined in this act, if such total and permanent disability arose out of and in the course of his employment, who, on and after June 25, 1955, is entitled to receive payments of workmen's compensation in amounts per week of less than is presently provided in the workmen's compensation schedule of benefits for permanent and total disability, and for a lesser number of weeks than the duration of such permanent and total disability, shall, after the effective date of any amendatory act by which his disability is defined as permanent and total disability, or by which the weekly benefits for permanent and total disability are increased, receive weekly from the carrier on behalf of the second injury fund differential benefits equal to the difference between what he is now or shall hereafter be entitled to receive from his employer under the provisions of this act as the same was in effect at the time of his injury, and the amounts now provided for his permanent and total disability by this or any other amendatory act, with appropriate application of the provisions of subsections (a), (b), (c), (d), (e), (f), (g) and (h) of section 9 of part 2. Such payments shall continue after the period for which such person is otherwise entitled to compensation under this act for the duration of such permanent and total disability. Any payments so made by a carrier pursuant to this section shall be reimbursed to such carrier by the second injury fund as provided in this part.

"(3) Any person who prior to the effective date of this part has been receiving or is entitled to receive benefits from the second injury fund pursuant to any prior provisions of the workmen's compensation law shall continue to receive or be entitled to receive such benefits from such fund which shall be paid directly to him from such fund unless such payments are paid in accordance with an agreement made pursuant to section 7.

"(4) If any carrier is unable to make the payments on behalf of the fund as provided for herein, the trustees of the second injury fund may make such payments directly to the permanently and totally disabled employee."

The current workmen's compensation act, Act 317, P.A. 1969, retained the new provisions of Act 227, P.A. 1968, but placed them in Chapter 5, Section 521, Subparagraphs (2), (3) and (4), which currently reads as follows:

"(2) Any permanently and totally disabled person as defined in this act, if such total and permanent disability arose out of and in the course of his employment, who, on and after June 25, 1955, is entitled to receive payments of workmen's compensation in amounts per week of less than is presently provided in the workmen's compensation schedule of benefits for permanent and total disability, and for a lesser number of weeks than the duration of such permanent and total disability, *after the effective date of any amendatory act by which his disability is defined as permanent and total disability, or by which the weekly benefits for permanent and total disability are increased,* shall receive weekly from the carrier on behalf of the second injury fund differential benefits equal to the difference between what he is now or shall hereafter be entitled to receive from his employer under the provisions of this act *as the same was in effect at the time of his injury, and the amounts now provided for his permanent and total disability by this or any other* amendatory act, with appropriate application of the provisions of sections 351 to 359. Such payments shall continue after the period for which the person is otherwise entitled to compensation under this act for the duration of the permanent and total disability. Any payments so made by a carrier pursuant to this section shall be reimbursed to the carrier by the second injury fund as provided in this chapter.

"(3) Any person who prior to July 1, 1968, has been receiving or is entitled to receive benefits from the second injury fund pursuant to any prior provisions of the workmen's compensation law shall continue to receive or be entitled to receive such benefits from such fund which shall be paid directly to him from such fund unless such payments are paid in accordance with an agreement made pursuant to section 541.

"(4) If any carrier is unable to make the payments on behalf of the fund as provided for herein, the trustees of the second

injury fund may make the payments directly to the permanently and totally disabled employee."
(emphasis added)

Addressing now the question of whether the second injury fund is obligated to pay the benefits allowed under the *King* decision after July 1, 1968 when the injury occurred prior to that date, it should first be noted that, although *King* was decided on September 3, 1969, its holding was grounded upon the status of the workmen's compensation act as last amended by Act 44, P.A. 1965 (382 Mich. 480, 482). Thus, in seeking to discern legislative intent, it may not be assumed that enactment of Act 227, P.A. 1968, was in response to the *King* decision so that it may not be construed as an attempt to effect any change from the position of the court.

The basic philosophy expounded by the court in its promulgation of *King* is indicated by its reference to the quote from *Larson's Workmen's Compensation Law,* Section 2.20, that appeared in Member Storie's opinion. He said:

" ' "The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obligated to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product." ' "
(p. 486)

The court then ruled that the claimant, whose injury had occurred in 1948, was entitled to the increases from the second injury fund that appeared in the schedule of benefits in Part 2, Section 9(a), without regard to any limitation of two-thirds of the average weekly wage. This holding resulted from its interpretation of the phrase that first appeared in the last sentence of Part 2, Section 9(a) of Act 250, P.A. 1955, that stated:

"* * * Payments from this second injury fund shall continue after the period for which any such person is otherwise entitled to compensation under this act for the duration of such permanent and total disability *according to the full rate provided in the schedule of benefits.*"
(emphasis added)

As has been noted, Act 227, P.A. 1968, which took effect July 1, 1968, omitted this phrase but nowhere does the legislature purport to cut off any benefits to any claimant that have been court determined. With respect to Eva King, the Supreme Court said that under the then existent compensation act she is entitled to receive from the second injury fund payments pursuant to the statutory schedule without the two-thirds limitation. This decision must, of course, apply to all claimants similarly situated. See *Verberg v. Simplicity Pattern Co.,* supra.

Nor has the legislature exhibited in Act 227, P.A. 1968, any inclination to freeze Eva King Benefits as of July 1, 1968. On the contrary, the language of Part 8, Section 2(3) quoted above requires the second injury fund to continue paying benefits to "any person who prior to the effective date of this part has been receiving or is entitled to receive *benefits* from the second injury fund pursuant to any prior provisions of the workmen's compensation law." (emphasis added) It has been suggested that Part 8, Section 3(3) was inserted as a bookkeeping measure to authorize the Fund to make direct payments to injured employees unless the carrier agreed to pay them on behalf of the Fund. But this provision cannot be dismissed that summarily. In the first place the language of Section 3(3) taken at its face value supports an interpretation that all *benefits* in effect on July 1, 1968 are to be preserved intact — and this would include Eva King benefits — and, in the second place, the immediate succeeding subparagraph, Section 3(4), could also be used as the source of authority to make direct payments to injured employees. It must therefore be presumed that Section 3(3) was inserted to accomplish a different purpose than Section 3(4). This view would be in keeping with the rule of statutory construction cited from 2 Sutherland, Statutory Construction (3d ed), §4705, p. 339, in *King* on page 492 which states:

> " 'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.' "

It must also be recognized that generally a statute is to be construed as having prospective operation only unless its terms clearly indicate a legislative intent that its terms should operate retrospectively. *Tarnow v. Railway Express Agency* (1951), 331 Mich. 558, 564.

Therefore, in view of the philosophy of the court that ambiguities in the workmen's compensation act should be liberally construed in favor of accomplishing its social purpose of providing efficient and dignified financial and medical benefits to victims of work-connected injuries, I am of the opinion that persons who are, or shall become, totally and permanently disabled as a result of an injury that occurred prior to July 1, 1968 are entitled to receive and shall continue to receive from the second injury fund all statutory increases in the schedule of benefits without regard to the two-thirds maximum.

Insofar as employees who become totally and permanently disabled because of any injury occurring subsequent to June 30, 1968, a different picture is presented. Their benefits must be determined solely by reference to the workmen's compensation act, Act 227, P.A. 1968, supra, as subsequently amended. As stated in *Bovee v. Robert Gage Coal Co.* (1952), 332 Mich. 259, 264-5, the workmen's compensation act is solely of statutory creation and must be given effect by the courts so long as its provisions do not contravene constitutional provisions.

The *King* decision is no longer applicable where the injury occurred subsequent to June 30, 1968 because the statutory language that provided for payments from the second injury fund "according to the full rate provided in the schedule of benefits" was deleted by Act 227, P.A. 1968. Therefore, in respect to employees who are or become disabled because of an injury occurring on or after July 1, 1968, they shall receive differential benefits in accordance with the two-thirds limitation.

FRANK J. KELLEY,
Attorney General.

701112-3

PUBLIC HEALTH: Food and beverages.

FUNERAL DIRECTORS AND EMBALMERS: Service of food and beverages.

The department of public health is authorized to regulate the serving of food and beverages at funeral establishments; and, where a substantial hazard to public health is found to exist, the department of public health may prohibit the serving of food or beverages in any funeral establishment.

No. 4701 November 12, 1970.

Mr. George Van Kula, Chairman
Board of Examiners in Mortuary Science
1033 South Washington Avenue
Lansing, Michigan 48926

On behalf of the board you have requested my opinion as to whether Act 269, P.A. 1968, which deals with the licensing of food service establishments and vending machine locations, authorizes the department of public health to regulate or prohibit serving of food and beverage at funeral establishments. Your letter was apparently prompted by an action against the board brought by one of its licensees[1] challenging the constitutionality of a promulgated board rule prohibiting funeral establishments from serving food and beverages to the public in connection or in conjunction with any part of funeral service operations.[2]

In *Ware-Smith & Co. v. State Board of Mortuary Science, supra,* the Midland county circuit court signed a consent judgment which read in part as follows:

> "...Article V of the Rules and Regulations promulgated by the Defendant Michigan State Board of Mortuary Science is invalid to the extent same prohibits the serving of beverages to the public in connection with funeral services...

[1] *Ware-Smith & Co. v. State Board of Mortuary Science* (filed January 5, 1970, decided June 19, 1970), Midland County Circuit Court, file No. 2564.

[2] Article V of the board's rules, being R. 338.865 of the Michigan administrative code of 1954, as amended, reads in pertinent part as follows:

> "In the interest of safeguarding public health, safety, welfare and sanitation, and to promote the ethical standards of funeral service, the serving of food and/or beverages to the public in connection, or in conjunction, with any part of funeral service operations in a funeral establishment is prohibited."