Public Corporations—Who are Employees of.

All employees of a public corporation engaged in a hazardous employment and, if such public corporation is conducting a business or is engaged in work classified as hazardous, all of the employees in that work or in that department are under the Act. In most cases the determination of the question of whether or not an employee is under the Act depends upon the facts.

June 29th, 1918.

Industrial Accident Board,
Helena, Montana.

Gentlemen:

You have requested my opinion upon the question of who are employees of a public corporation, to be reported by public corporations on the monthly payroll reports to the Industrial Accident Board for assessment purposes, and as such employees entitled to the benefits of the Workmen's Compensation Act.

In this connection you have presented several specific cases now pending before your Board.

In the first case, Mr. Gallagher was injured while acting as Assistant Electrician of the City of Butte, and the question presented is whether or not he was an employee of the city within the meaning of the Compensation Law or was an official of said city and thereby excluded from the compensation provisions of the Act.

In the second case, Dr. Easton, City Chemist of the City of Butte, was injured while in the course of his employment. The question presented in this case is the same as that in the Gallagher case.

In the third case, Mr. Shellum, while in the employ of the North Montana Sub-Station, a branch of the State Agricultural College, located at Fort Assinniboine, suffered an accident while in the course of his occupation for said Agricultural College, while repairing a door in the brick building on the premises of the employer. It appears that the only employees of the Agricultural College reported by that institution in their monthly payroll reports as being engaged in hazardous occupations, consist of the engineers and firemen. It is stated in your letter that while Mr. Shellum was not working for an employer engaged in a hazardous occupation, he was certainly performing work of a hazardous nature when injured, as he was engaged in repair work on a building, which might reasonably be construed

under the law as casual to the occupation of the employer engaged in the work of an agricultural experiment station.

In the fourth case, Mr. Walker, City Engineer of the city of Glasgow, while in the course of his occupation for the city in question in connection with an excavation that was being made by the Empire Construction Company, suffered an accidental injury through the caving of an excavation. The question is presented again in this case as to whether or not Mr. Walker was an employee and entitled to the benefits of the Act, or an official of the city and as such excluded.

In the fifth case, Mr. Arnott, while in the course of his employment with the State Game and Fish Commission, suffered an accidental injury. His employment at the time of the accident consisted of attending and caring for the Fish Car, requiring heavy, laborious and dangerous work in transferring the containers of fish to and from the car. It was in this work that he was injured. While an authorized Deputy Game Warden, he was not under salary in that capacity, but was only vested with such authority for the purpose of protecting the Fish Car. It further appears that the employees of the State Fish and Game Warden have not been reported by the Commission to the Industrial Accident Board as employees within the scope of the Act. The question presented in this case is whether or not Mr. Arnott was an employee entitled to compensation, or is he excluded from the provisions of the Act as an official, or as an employee of an employer engaged in what might be considered a non-hazardous occupation, or as being engaged in work that was only casual to the occupation of the employer.

In the sixth case, Mr. Williams, while in the employ of the State Highway Commission, suffered an accidental injury arising out of and in the course of his occupation. Mr. Williams was cutting brush in the regular course of his work when he was struck on the leg with an axe, resulting in a severe injury. The State Highway Commission, as in the case of the State Fish and Game Commission, has not at any time reported a pay roll to the Industrial Accident Board. The same question is presented in this case as in the Arnott case.

Our Compensation Act is, according to its title, an Act providing for the protection and safety of workmen in all places of employment in all inherently hazardous works and occupations. By Section 3 (e), where a public corporation is the employer, the terms, conditions and provisions of Compensation Plan No. 3 shall be exclusive, compulsory and obligatory upon both employer and employee. Section 6 (i) of the Act is as follows:

> "'Employer' means any person, firm, association or corporation, and includes the state, counties, municipal corporations, cities under special charter and commission form of government, school districts, towns or villages, and independent contractors, and shall include the legal representatives of a deceased employer."

Section 6 (gg) of the Act is as follows:

> "'Public corporation' means the state, or any county, municipal corporation, school district, city, city under commission form of government or special charter, town or village."

Section 6 (j) provides that "employee" and "workman" are used synonymously, and mean *every* person in this state, who is engaged in the employment of an employer carrying on or conducting any of the industries classified in Section 4 (a), 4 (b), 4 (c), 4 (e) and 5 of this Act, whether by way of manual labor or otherwise, or whether upon the premises or at the plant of such employer, or who is engaged in the course of his employment away from the plant of his employer.

Section 4 (a) provides that the Act is intended to apply to all inherently hazardous works and occupations within this state, and it is the intention to embrace all thereof in Sections 4 (b), 4 (c), 4 (d) and 4 (e), and the works and occupations enumerated in said sections are hereby declared to be hazardous. Section 5 provides that if there be or arise any hazardous occupation or work other than hereinbefore enumerated, it shall become under this Act and its terms, conditions and provisions, as fully and completely as if hereinbefore enumerated.

It will thus be seen that it was the intention of the legislature to make our Compensation Act cover all hazardous works and occupations within this State. It also follows that the Act was not intended to apply to non-hazardous work. It was said in Udey v. City of Winfield, 97 Kan. 279, 155 Pac. 43, at 44:

> "It is not within the letter or spirit of this statute that clerical employees like the clerk and stenographer in the City Clerk's Office should be included within the list of those engaged in the hazardous enterprise of operating an electric light and water works system."

In Griswold v. City of Wichita (Kan.) 162 Pac. 276, it was held that a police officer of a city is not a "workman" as defined by the Compensation Acts. The following is from the opinion of the Court in that case:

> "It has been held that a policeman in performing his duties of exercising the rights of sovereignty, and represents the state and not the city, inasmuch as the state requires the city to appoint him, and because his duties are those of a public nature. In Peters v. City of Lindsborg, 40 Kan. 654, 20 Pac. 490, it was said:
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> "'The police officers of a city are not regarded as the servants or agents of the city; their duties are of a public nature; their appointment is made by the city as a convenient mode of exercising a function of government; their duties are to preserve the good order and provide for the safety of the people of the city.'
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> "In Haney v. Cofran, 94 Kan. 332, at page 334, 146 Pac. 1027, at page 1028, it was said in the opinion:

"'There is no end of authority that a policeman is a public officer (citing cases). * * * In many respects a policeman is a municipal officer, but in other and important respects the legislature and the courts have raised him out of the class of a mere subordinate or employee like a fieldman of a local department of health (Jagger v. Green, 90 Kan. 153, 133 Pac. 174), or a cellhouse man at the penitentiary (Jones v. Botkin, 92 Kan. 242, 139 Pac. 1198.'

"The primary purpose in the enactment of the compensation acts has been considered in former decisions. In McRoberts v. Zinc Co., 93 Kan. 364, 366, 144 Pac. 247, 248, it was said:

"'In the enactment of the compensation law the legislature recognized that the common-law remedies for injuries sustained in certain hazardous industries were inadequate, unscientific, and unjust, and therefore a substitute was provided by which a more equitable adjustment of such loss could be made, under a system which was intended largely to eliminate controversies and litigation and place the burden of accidental injuries incident to such employment upon the industries themselves, or rather upon the consumers of the products of such industries.'

"See, also, Menke v. Hauber, supra. The theory is that the employer who obtains a profit from the labor of workmen may very easily add to the cost of the manufactured goods a limited amount to cover the cost of compensation to the workmen injured in certain hazardous employments, and thus, without loss to himself, the burden may be distributed upon the consumers which constitute the public. Many good reasons might be suggested for including within the scope of the act workmen employed in hazardous enterprises by cities engaged in conducting a business for profit, as electric light or water works plants, because a city, like any private individual engaged in trade or business, could pass on to the public at large the burden by adding to the cost of the service. But where a city is engaged merely in the exercise of of its governmental functions, we think it clear that the workman, no matter how hazardous his employment, would not come within the spirit and purpose of the Compensation Act any more than the clerks and stenographers in the case of Udey v. City of Winfield, supra. So that, even though a policeman be regarded as a workman in the employ of the city, and notwithstanding the performance of his duties places him at times in a dangerous and hazardous situation, still the employer, the city, is not engaged in trade or business, and therefore a policeman is not within either the spirit or letter of Section 2 of the act, which limits its application to persons employed for the purpose of the employer's trade or business.

> "In operating electric light and power plants and water works systems, cities are engaged in the exercise of their proprietary functions, while in enforcing the laws of the state against crime they are exercising a purely governmental function. This proposition is so elementary as not to require the citation of authority."

Our own Supreme Court has held that a policeman is a public officer, State ex rel. Quintin v. Edwards, 38 Mont. 250, 99 Pac. 940; and that a fireman is not a municipal officer. State ex rel. Driffill v. City of Anaconda, 41 Mont. 577, 111 Pac. 345. In Blynn v. City of Pontiac, 185 Mich. 35, 151 N. W. 681, 8 N. C. C. A. 793, it was held that a policeman was not an "employee" of the city within the contemplation of the Compensation Act, but was an "officer" holding an office of public trust. In relation to the distinction between an officer and an employee, the following quotations from the opinion in this case are instructive:

> "Chief Justice Marshall distinguished an office from a simple employment in the case of United States v. Maurice, 2 Brock, 96, 102, 102, Fed. Cas. No. 15, 747, as follows:
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> " 'Although an office is an "employment," it does not follow that every employment is an office. A man may be certainly employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if the duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.'
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> "In the case of Thropp v. Langdon, 40 Mich. 673, Mr. Justice Cooley expresses the distinction as follows:
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> " 'The officer is distinguished from the employee in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position.' "

In two Minnesota cases, State ex rel. City of Duluth v. District Court, 158 N. W. 790 and 791, it was held that both a policeman and a fireman were under the Compensation Act, but this was based upon a section of the Minnesota act including as employees or workmen, every person in the service of a city under any appointment or contract for hire. In Sibley v. State, 89 Conn. 682, 96 Atl. 161, L. R. A. 1916, C. 1087, it was held that a sheriff is not an "employee" of the state within the Compensation Act. The following is from the opinion of the Court in this case:

"We do not agree with the claimant in the suggestion that compensation by the state to public officers in case of their injury while employed about their duties is within the intent and spirit of the Compensation Act. Its title, Workmen's Compensation Act, its history showing at whose instigation such acts were brought forward and passed, the considerations which were urged in support of them, as well as the fact that in nearly all of the states which have compensation acts such officers and their dependents are excluded from compensation under them, are a sufficient answer to the suggestion."

In White v. City of Boston, (Mass.) 111 N. E. 481, a city janitor was held to be under the act, and in Lesuer v. City of Lowell, (Mass.) 111 N. E. 483, a teacher employed at an annual salary in the automobile department of an industrial and vocational school maintained by the City of Lowell, his work being to teach and demonstrate the theoretical and practical use of mechanics as applied to the use of tools, appliances and machinery in repairing automobiles, was held not to be a "laborer," "workman" or "mechanic" within a statute extending the Workmen's Compensation Act to certain city employees.

Sections 3216 to 3218, inclusive, of the Revised Codes specify the different offices of cities and towns. By Section 3259, the city or town council has power (1) to pass all ordinances necessary for the government or management of the affairs of a city or town and for the execution of the powers vested in the body corporate, and also (47) to fix the compensation and to prescribe the duties of all officers and other employees of the city or town, subject to the limitations mentioned in the Codes. There will thus be many persons in the service of a city or town by virtue of some ordinance fixing their duties and providing for their pay, that for some purposes might be considered as officers of a city, and yet for the purposes of the Compensation Act would be considered as employees engaged in hazardous work.

Section 2957 of the Revised Codes as amended by Chapter 112 of the 1913 Session Laws, provides that the officers of a county are a treasurer, acounty clerk, a clerk of the district court, a county auditor, except in the 6th, 7th and 8th class counties, a county attorney, a surveyor, a coroner, a public administrator, an assessor, a county superintendent of schools and a board of county commissioners.

You will notice that in Section 6 (j) of our Act, the word "every" is used in connection with the definition of the term "employee." While in Section 3 (e), making Plan 3 compulsory upon public corporations, it simply states that Plan 3 shall apply "to both employer and employee." If the legislature had intended that *all* employees of a public corporation should come under and be entitled to the benefits of the Act, it could very easily have used the words "upon both employer and *all* employees." Reading these two sections together, Sections 3 (e) and 6 (j), it would seem that it was the intention of the legislature to extend the benefits of the Act to all employees of a public corporation engaged in a hazardous employment, and if such public corporation is conducting a business or is engaged in

work classified as hazardous, *all* of the employees in that work or in that department are under the Act. In most cases the determination of the question of whether or not an employee is under the Act, depends upon the facts. If a public corporation is conducting a work or occupation classified as hazardous by Sections 4 and 5 of the Act, all of the employees in that department are under the Act, exactly the same as though such work or occupation was conducted by a private corporation rather than by a public corporation, and the wages of all such employes would be considered in computing the assessments to be paid into the Industrial Accident Fund. This view is supported by the following statement in the case of Lewis and Clark County v. Industrial Accident Board, 52 Mont. on page 11, 155 Pac. 268:

> "They therefore employed the term 'workmen' in the title to this Act in its generic sense and intended thereby to include all employees of a county, as well as the servants of individuals or private corporations engaged in the extra hazardous occupations enumerated in the Act."

It therefore occurs to me that the determination of the first case above mentioned depends upon the facts and is a question to be determined by your Board. If Mr. Gallagher, as an employee of the city of Butte, was engaged in hazardous work within the meaning of our Act, and while in the course of such employment suffered an accidental injury arising out of the employment, he is entitled to compensation. If Mr. Gallagher has not been reported upon the pay rolls of the city of Butte, such pay rolls should be adjusted not only to include him, but all other employees of the city engaged in hazardous work. It occurs to me that this city and all other cities and public corporations, should report to your Board their entire pay roll and then assessments should be based upon the pay rolls of those who are within the terms of the Compensation Act as above indicated.

What I have stated above with reference to the Gallagher case applies equally as well to the case of Dr. Easton.

Although farm laborers and those engaged in agricultural pursuits are not entitled, ordinarily, to the benefits of the Workmen's Compensation Act, it occurs to me that Mr. Shellum is entitled to compensation for the reason that he suffered an accidental injury while engaged in hazardous work for a public corporation. It will doubtless be necessary for an adjustment of the pay rolls to be made on the part of the Agricultural College, so as to include all of its employees who are engaged in hazardous work. Of course, many employees may not be engaged in hazardous work except during a small part of the year and their pay rolls should be computed for that portion of the year.

Although a city engineer would ordinarily be considered a city official, yet if his duties require him to inspect construction work or excavations, or the installation of wires or any other hazardous work, I believe that he should be included in the pay rolls of the city and that an assessment should be made upon such pay rolls,

and that in case he suffers an accidental injury arising out of and in the course of his employment, he is entitled to compensation.

In the case of Mr. Arnott and Mr. Williams, employees of the State Fish and Game Commission and the State Highway Commission, respectively, if your Board determines that these men have suffered accidental injuries arising out of and in the course of their employment and are engaged in work denominated hazardous, I believe that they are entitled to compensation. In this connection, I would suggest that your Board require the State Fish and Game Commission and the State Highway Commission to report their pay rolls to the end that your Board may make proper assessment thereon, and such assessments should be paid into the Industrial Accident Fund in accordance with the provisions of Section 3 (e) of the Act.

Respectfully,

S. C. FORD,

Attorney General.