Workmen's Compensation Law, Non-Hazardous Pursuits. Common Law Defense, Pleadings of by Employers. Employers in Certain Cases, May Plead Common Law Defenses.

Employers, whose laborers are not engaged in undertakings, as defined in the compensation laws, are not estopped to plead the common law defenses in actions brought for the purpose of recovering damages by workmen injured while engaged in such non-hazardous pursuits.

June 30, 1915.

Hon. A. E. Spriggs,
Chairman Industrial Accident Board,
Helena, Montana.

Dear Sir:

Recently you requested an opinion of this office as to whether, if an employer of labor, not classified as hazardous by the Compensation Law, is sued for damages for injuries sustained by a workman, such employer is deprived of his common law defenses?

Section 3 (a) and (b) provide as follows:

> (a) "In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense; (1) That the employe was negligent, unless such negligence was wilful; (2) That the injury was caused by the negligence of a fellow employee; (3) That the employee had assumed the risks inherent in, incident to, or arising out of his employment, or arising from the failure of the employer to provide and maintain a reasonably safe place to work, or reasonably safe tools, or appliances."
>
> (b) "The provisions of Section 3 (a) shall not apply to actions to recover damages for personal injuries sustained by household or domestic servants, farm or other laborers, engaged in agricultural pursuits, or persons whose employment is of a casual nature."

The term "employee," as used in Section 3 (a), is limited in its meaning by the definition of the term found in Section 6 (j), a reference to which will disclose that the workman must be engaged in a hazardous pursuit, such as is specified in Sections 4 (a), (b), (c), (e) and 5 of the Act. In view of the restricted meaning of the term "employee," as thus defined, I am of the opinion that the exceptions contained in Section 3 (b) are not exclusive, but that there is an implied exception of the employer of labor, not classified as hazardous.

This view is strengthened by a reference to Section 40 (a), Class 27, which reads as follows:

> "Any employer and his employees engaged in non-hazardous work or employment, by their joint election, filed with and approved by the Board, may accept the provisions of Compensation Plan Number Three. In such event, such employer and employees shall be known as Class Twenty-seven, the rate of as-

sessment in which shall be *one-half of one per centum.*"

This section, it will be observed, permits the employer and his employees, engaged in non-hazardous pursuits, mutually to become bound by the provisions of Plan No. 3. It can readily be seen, that if the employer under this section, desires to become bound, and an employee refuses to become bound thereunder, and is subsequently injured, and brings action against his employer for damages, it can scarcely be contended the employer in such a case would be deprived of the defenses he was privileged to interpose prior to the enactment of the Compensation Law.

It is my opinion, therefore, that employers whose laborers are not engaged in hazardous work or employment, are not estopped to plead the so-called common law defenses in an action brought for the purpose of recovering damages by workmen injured while engaged in non-hazardous pursuits.

Yours very truly,
J. B. POINDEXTER,
Attorney General.