Workmen, Who are Under Compensation Act. Compensation Act, Who are Workmen Under. Officers, Whether Under Compensation Act. Public Officers, Whether Under Compensation Act. Employees, in Public Office Whether Under Compensation Act. Hazardous Employment, as Applied to Public Officers. Workmen's Compensation Act, Construed. Industrial Accident Board, Reports Made to Include Whom.

Public officers, and employees in public offices, who perform the same duties as those devolved by law upon the

official, are not within the meaning of the Workmen's Compensation Act.

Mere designation of a certain position as a public office is not sufficient to deprive the workman or employee of the rights given by the Act, provided the duties performed by such employee are hazardous within the meaning of the Act.

Helena, Montana, April 1, 1916.

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

Dear Sir:

I am in receipt of your communication submitting the following question:

> "Who should be included in the pay-roll reports * * * from public corporations, for the purpose of fixing the amount of premium or assessments due the Industrial Accident Fund * * * as provided in the Workmen's Compensation Act?"

The Supreme Court of Montana has decided that public corporations (counties and cities) are within the meaning of Chapter 96, Laws of 1915, known as the "Workmen's Compensation Law".

Lewis & Clark Co. v. Accident Board, 155 Pac. 268;
City of Butte v. Accident Board, decided Feb. 24, 1916.

The court did not in either one of the decisions go beyond the point of deciding that the city and the county are subject to the provisions of the Act. Nor is there any intimation in the discussion as to who constitutes employees of either city or county within the meaning of the law.

Under the provisions of the Act, compensation plan No. 3 is the only one that applies to public corporations. Hence, the law must be examined with reference to plan No. 3. The Act itself attempts to define its own terms, and also to specify the employments to which it applies.

The term "pay-roll" is defined by Section 6 (ee), "means the average annual pay-roll of the employer for the preceding calander year, etc." It is comparatively easy to ascertain who shall be included to make up this pay-roll where the employer is a private corporation, individual or association. But the wide difference which exists between public and private employment render the determination of the one but little aid to the determination of the other. The duties of employees as to private employments, are not defined by law, but are left exclusively to the employer, and the duty enjoined upon the employee may be varied at the will of the employer, and the employee may be changed from hazardous to non-hazardous employments at any time the employer so desires; hence, the doctrine "Non segregation of pay-roll", as to private employers. In public employment, however, especially with reference to public officers and offices, the law spe-

cifically defines the duties, and no other may be enjoined; nor is anyone vested with authority to relieve the public officer from the discharge of the duties which the law enjoins upon him, for any attempt to add to or detract from the duties of a public official, would be in effect an attempt to amend the statute, which cannot be done, except by act of the legislature itself. Not only are the duties of the public officer defined by statute, but the duties, emoluments etc., of those whom he is permitted under the law to employ to assist him in the discharge of his public duties, are likewise defined, and there is not any duty enjoined upon an employee in a public office which the officer himself cannot properly discharge as a part of his official duties. Hence, the employee in such cases is in effect the officer himself acting.

Under the provisions of Section 4 (a) the Act appears to relate primarily to employments which are hazardous. This section reads as follows:

> "This 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."

No where in the enumeration which follows is there any statement made which includes a public officer, or those employed by him in the discharge of his official duties as such public officer. In Section 3 (g), it is provided that:

> "Every employe in the industries, works, occupations or employments in this Act specified as 'Hazardous' shall become subject to and be bound by the provisions"

of the Act. The words used, to-wit: "Industries", "Works", "Occupations", "Employments", never have been construed as including public offices. Section 6 (j) of the Act defines "employee" as being synonymous with "workman",

> "and means every person in this state * * * engaged in the employment of an employer, carrying on or conducting any of the industries classified in Section 4 (a)."

By the provisions of this section (6 j), we are again referred to the industries classified in Section 4 b, c, d and e.

The industries, occupations, etc., included within compensation plan No. 3, are classified in Section 40 (a), and no where in that classification is there any statement which warrants the inclusion of public officers, or the discharge of official duty, among the hazardous employments, so as to bring them within the meaning of the term "payroll", as used in the Act. Section 5 of the Act contains the general clause to the effect that if any hazardous occupations have been omitted in the enumeration, they may be added, or if any new occupations shall arise which are hazardous, they may also be added, and the provisions of Section 40 (c) confer authority upon the Board to make the classification necessary to carry out the purpose and intent of the provisions of said Section 5. The title of the Act indicates that its provisions relate to "workmen", as that term is defined

in the Act itself. We have not been able to find any authority whatsoever which would justify us in applying either the term "workman," "mechanic", "artificer", "laborer", or "craftsman", to a public officer, or an employee in a public office, whose duties are defined by law as being the same duties enjoined upon the public officer. A long list of cases defining these terms, many of which hold that officers and those engaged by them in the discharge of their official duties, are not within the meaning of such terms, may be found collected in

40 Cyc. 2861, also 4 Words and Phrases, 2nd Series, 1343 et seq.

The Supreme Court of Kansas, in discussing a law of that state relating to hours of employment of workmen, mechanics, etc., reached the conclusion that the words "laborers, workmen, mechanics, or other persons", as used in the Act, do not embrace public officers, or employees in public offices.

State v. Martindale (Kan.), 147; 27 Pac. 852.

But it must be kept in mind that the persons intended to be under the Act, are characterized by the kind of work they do, rather than by the incidental fact of the amount or frequency of the payment of wages, and whether such wages are called salary, compensation or wages. As was said by the Supreme Court of Kansas:

"The statute cannot be evaded by calling compensation 'salary', and making it payable at long intervals."

State v. Ottawa, 84 Kan. 100, 113 Pac. 391.

Hence, if the work done by an employee as an electrician, street commissioner, firemean or otherwise is within the employments named and included in the act as "inherently hazardous", the city cannot evade the payments required by the Act merely by calling such employees public officers.

The Act itself being "a human life, health and welfare statute", should be given a beneficial and liberal interpretation and construction, but in its application to public corporations, we are dealing with public funds and public moneys raised by taxation, the greater part of which is collected from persons who are not under the Act, and we cannot, therefore enlarge its terms by bringing in persons who are not within the meaning of the Act, any more than we can abbreviate its terms by excluding those who are covered by the provisions of the law. Whether or not an employment is hazardous is more a question of fact than of law, and in doubtful cases, must be left to the judgment and discretion of the Board.

Policemen are public officers.

State ex rel Quintin v. Edwards, 38 Mont. 250, 99 Pac. 940;
State ex rel Quintin v. Edwards, 40 Mont. 287, 106 Pac. 695, 20 Ann. Cas. 239;
Bailey v. Examining & Trial Board, 45 Mont. 197, 122 Pac. 572.

But firemen are not public officers.

State ex rel Driffill v. Anaconda, 41 Mont. 577, 111 Pac. 345;
Section 3327 R. C., as amended by Chap. 46, Laws of 1911.

We can only add here that in our opinion public officers and those employed by them in the discharge of their official duties, as assistants, clerks, deputies, stenographers, etc., are not within the meaning of

the Act, but generally speaking all others employed either by the city or county in the discharge of any of the things enumerated in the law, are within the Act, and should be listed and accounted for as employees of the county or city.

Yours very truly,

J. B. POINDEXTER,

Attorney General.