Opinion No. 168.

Workmen's Compensation — Public Corporations—Counties—School Districts—Municipalities.

HELD: 1. As to public corporations (State, Counties, Municipalities) Plan No. 3 of the Workmen's Compensation Act is Exclusive, Compulsory, and Obligatory and it is mandatory upon the part of the Public Corporations to operate within the provisions and under the conditions of the act.

2. The Board of County Commissioners of counties must budget and levy for all of its employees whether such employees are performing duties in hazardous or non-hazardous employment.

3. As to whether or not an employee whose employment in the usual course of business or trade is non-hazardous comes within the rights of recovery for injuries depends entirely upon the facts connected with such injury.

October 2, 1937.

Mr. Pat R. Heily
County Attorney
Columbus, Montana

My dear Mr. Heily:

Since you have requested our opinion on several matters pertaining to the application of the Workmen's Compensation Law, we will answer the questions in the order given.

1. Is it mandatory that the county report to the State Industrial Accident Board all county officers and employees, regardless of the fact that the occupation may or may not be hazardous, and of course budget for such premiums?

By specific legislative declarations contained in Section 2840, 2886, and 2862, counties and county employees are made subject to the terms of the Act, and so as to where public corporations (counties and cities) are employers Plan No. 3 (Section 2840, R. C. M., 1935), shall be **exclusive, compulsory** and **obligatory** upon both employer and employee.

It has been contended that the Montana Act is wholly elective both as to private employers and such public employers as have elected to come within the provisions of the act. That in the

event of election to come within the act having been exercised by a public corporation, then such public corporation was compelled to operate under Plan No. 3 and none other, which means to say that the words "exclusive," "compulsory," and "obligatory" became effective after a public corporation had elected to come within the provisions of the Act. This contention was wholly upset in the case of Butte v. Industrial Accident Board, 52 Mont. 75, wherein Justice Holloway, speaking for the court, uses the following language:

"If this was the intention of the lawmakers, the least that can be said is, that they made a superlative effort to conceal their intention in a multitude of useless words. * * * It was only necessary to say: 'Whenever a public corporation elects to become subject to this Act, the provisions of Plan 3 shall be exclusive as to it.' But the legislature did not so express itself; on the contrary, it declared that where a public corporation is the employer, the terms, conditions and provisions of compensation Plan No. 3 shall be not only **exclusive**, but **compulsory** and **obligatory** as well."

and again at page 80 the court concludes as follows:

"It cannot be doubted that, after the employer elects to come under the Act his employee may elect for himself whether he will become subject to the Act or not; but under section 3 (e) (Section 2840. R. C. M., 1935), the employee has no such election; he is bound by compensation Plan No. 3."

In the above mentioned case it was also contended that sections 3 (f) and 3 (i) our Sections 2841 and 2844 are inconsistent as compared with sections 3 (e) (2840) in the use of the term employer and are repugnant. In view of harmonizing the acts of the legislature, at page 78 of the aforesaid case, the court said:

"The expression 'every employer' and 'any employer' used, respectively, in sections 3 (f) and 3 (i) * * * are used in the generic sense, and if no qualifications appeared, would include every employer, a public corporation as well as an individual. But section 3 (e) carves out of the general class all public corporations acting as employers, so that the Act is elective as to private employers, but compulsory as to public corporations * * *. The City of Butte had no election, but was bound by the Act, as was its employee, from the time it became effective, July 1, 1915."

Again at page 79:

"As before observed, the same section 3 (f), (2841) which gives an election to every employer also requires every employer who has such election to designate his choice of the three plans under which he prefers to act,—the words 'every employer' as there used, cannot possibly include a public corporation; for if they do, section 3 (e) (2840) is rendered meaningless."

In construction of statutes, the office of the court is to ascertain and declare what is in terms or in substance contained therein and where there are several particulars or provisions such construction is, if possible, to be adopted as will give effect to all. (R. C. M., 10519.)

2. Has the Board authority to include or budget a levy for the employees in obviously non-hazardous employment?

This question is fully answered by our courts in the case of Lewis and Clark County v. Industrial Accident Board, 52 Mont. 6, wherein the Court speaking through Justice Holloway, at 12, makes the following statement:

"A county subject to the provisions of this Act will, of necessity, be compelled to levy taxes to meet the assessments made upon it under section 40, and this cannot be done unless the purpose to which the money so raised is to be devoted is a public purpose. Section 11, Article XII, of the Constitution, provides: 'Taxes shall be levied and collected by general laws and for public purposes only.' Whether a particular purpose is 'public,' as that term is employed above, is not always easy of solution. The power of taxation is a legislative prerogative, and therefore the determination of the question whether a particular purpose is or is not one which so intimately concerns the public as to render taxation permissable is for the legislature in the first in-

stance. (37 Cyc. 720; State v. Nelson County, 1 N. D. 88, 26 Am. St. Rep. 609, 8 L. R. A. 283, 45 N. W. 33; 1 Cooley on Taxation, 182). The general rule of constitutional law that courts will indulge every reasonable presumption in favor of legislation is applicable with peculiar force to the case of a legislative decision upon the purpose for which a tax may be laid. (1 Cooley on Taxation, 185.) In sections 3 (e) and 6 (gg) of this Act the legislature has determined that the money to be contributed by a county to the fund for the relief of its injured employees is to be devoted to a public purpose—an ordinary and necessary county expense. In Cunningham v. Northwestern Imp. Co., 44 Mont. 180, 119 Pac. 554, we held that a statute which in effect levied a tax upon the coal mining industry to provide an insurance fund for injured miners was a valid exercise of the taxing power, and that the purpose sought to be subserved was a public purpose, within the meaning of section 11 above."

As to the portion of the subject relating to those employees in obviously non-hazardous employment, we call attention to section 2847, reading in part as follows:

"* * * And any employer having **any** workmen engaged in **any** of the hazardous works or occupations herein listed shall be considered an employer engaged in hazardous works or occupations as to all of his employees."

Section 2847 is an amendment to the original Section 4 of Chapter 96 of the Act of 1915, amended apparently to meet this very question. In Williams v. Brownfield-Canty Co., et al., 95 Mont. at page 371, the Court says:

" * * * 'This section (referring to Section 2847) as amended apparently means what it says, and the purpose of the amendment was to preclude any doubt as to the intention of the legislature to include in the Act all of the employees engaged in an occupation where a part of them were engaged in hazardous work.' (Volume 2, Decisions of the Industrial Accident Board of Montana, p. 51.) Thus it will be seen that, from the inception of the administration of the Compensation Act down to the present day, the practice has been to include under the Act all of the employees engaged in an occupation where a part of them were engaged in hazardous work."

An employer under the Act for a part of its employees is under the Act for all of them.

Williams v. Brownfield-Canty Co., 95 Mont. 372.

The Massachusetts Supreme Court in discussing this principle said:

"* * * It is clear from those provisions that the Act is not designed to be accepted in part and rejected in part. If an employer becomes a subscriber he becomes a subscriber for all purposes as to all branches of one business with respect to all those in his service under any contract of hire. All the terms of the Act are framed upon the basis that the employer is either wholly within or altogether outside its operation. There is no suggestion or phrase warranting the inference that there can be a divided or partial insurance. The practical administration of the Act renders it highly desirable that a single rule of liability should apply throughout any single business. Otherwise difficult and troublesome questions often might arise as to the liability or non-liability dependent upon classifications of employees and scope of their duties. Litigation as to the line of damarcation between those protected by the Act and those not entitled to its benefits would be almost inevitable. Instead of being simple, plain and prompt in its operation, such division of insurance would promote complications, doubts and delays. (In re Cox, 225 Mass. 220, 114 N. E. 281, 283.)"

3. Has the non-hazardous employee a right to recovery in the event of injury to him?

This question is dependent entirely upon facts connected with the injury.

Section 2837 provides that actions to recover for personal injuries shall not apply to injuries sustained by household and domestic servants or those employed in farming, dairying, agriculture, viticultural, and horticultural, stock or poultry raising, or engaged in

the operation and maintenance of steam railroads conducting interestate commerce, or persons whose employment is of a casual nature. You will note that these particular occupations are specifically excluded. It might be conceded that "casual employment" might cover a multitude of sins, but our legislature has defined "casual employment" by Section 2888, R. C. M., 1935, as meaning employment NOT in the usual course of trade, business, profession or occupation of the employer.

Sections 2847, 2848, 2849, 2850, and 2851 set out such workings and occupations as are considered hazardous and come within the provisions of the Act. In addition thereto we have Section 2851, R. C. M., 1935, which serves as a catch-all for such work and occupations that may have been missed, or such work and occupations as may later arise and become subject to the provisions of the Act.

Section 2852 reads as follows:

"Hazardous occupations not enumerated or hereafter arising. If there be or arise any hazardous occupation or work other than hereinbefore enumerated, it shall come under this act and its terms, conditions, and provisions as fully and completely as if hereinbefore enumerated."

All of this bears us out in concluding that the right of recovery of an employee in a non-hazardous employment depends entirely on the facts of the particular case.

The general rule seems to be:

"The clear objective of the Compensation Act is to protect the employee against the hazards of the employer's trade or business. When the relation of employer and employee is established, and when the employee is subjected to the hazards of his employer's trade or business, and suffers injury therefrom while so engaged, in the due course of his employment, such injury is compensable."

Industrial Accident Board v. Brown Bros. Lumber Co., 88 Mont. 375, 382;

Eddington v. Northwestern Bell Tel. Co., 201 Iowa, 67, 202 N. W. 374, 377;

Utah Copper Co. v. Industrial Commission of Utah, 57 Utah 118, 13 A. L. R. 1367, 193 Pac. 24.

It seems also to be quite the general rule, that where the employer is engaged in business of both a hazardous and non-hazardous nature, that an employee of the non-hazardous department, when called upon to perform service in the hazardous department, is compensable for injuries sustained while working at the hazardous employment.

Rates of premiums are as a rule so scaled as to protect the employees of the public corporation at a minimum cost, by reason of the fact that the business of the corporation is both hazardous and non-hazardous.