

VOLUME NO. 40

OPINION NO. 56

WORKERS' COMPENSATION - Water commissioner;
MONTANA CODE ANNOTATED - Title 85, chapter 5; sections
39-71-116 to 39-71-118, 39-71-401, 85-5-301.

HELD: When a district court judge appoints a water
commissioner pursuant to Title 85, chapter 5,
MCA, the district court judge is considered
the employer for the purpose of payment of
workers' compensation.

26 June 1984

Donald D. MacIntyre
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and Conservation
32 South Ewing
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Dear Mr. MacIntyre:

You have requested my opinion on the following question:

When a district court judge appoints a water commissioner pursuant to Title 85, chapter 5, MCA, is the district court judge considered the employer of the water commissioner or are the users considered the employer of the water commissioner and therefore liable for payment of workers' compensation?

Before I address the specifics of your question, I will say a word about the general applicability of Montana's Workers' Compensation Act to this situation. Your opinion request and the accompanying legal research assume that a water commissioner is covered by workers' compensation if he or she has been appointed pursuant to Title 85, chapter 5, MCA. That is correct. The Workers' Compensation Act applies to all employers and employees, with specific exceptions. § 39-71-401, MCA. Questions might arise about the applicability to water commissioners of the "casual employee" or "independent contractor" exceptions. However, the detailed statutory basis of the position of water commissioner (Tit. 85, ch. 5, MCA) rules out the application of either of those two exceptions. §§ 39-71-116(3), 39-71-120, MCA. Therefore, as you have properly recognized, the only question is: Who is the "employer" for purposes of workers' compensation?

The Montana Supreme Court has addressed the question of the existence of the employer-employee relationship many times:

"The test to determine whether or not an employer-employee relationship exists ... is the so called control test. Under that test an individual is in the service of another when that other has the right to control the details of the individual's work." State ex rel. Ferguson v. District Court (1974), 164 Mont. 84, 88, 519 P.2d 151, 153.

Carlson v. Cain, 40 St. Rptr. 865, 872, 664 P.2d 913 (1981). See also Sharp v. Hoerner Waldorf Corporation, 178 Mont. 419, 424, 584 P.2d 1298, 1301 (1974); Kimball v. Industrial Accident Board, 138 Mont. 445, 449, 357 P.2d 688, 691 (1960). The Court usually employs the control test to determine if the employment relationship exists with a known employer; but the Court has also spoken in cases analogous to this one:

[W]hile this test [the control test] has most often been used to determine whether or not an individual was an independent contractor or an employee, it may also be used to determine who the employer is, in a given situation. Biggart v. Texas Eastern Transmission Corp. (Miss.1970), 235 So.2d 443. Under this test an employee will have been transferred from one employer to another when the right to control the details of his work has passed from one to another.

State ex rel. Ferguson v. District Court, 164 Mont. 84, 88, 519 P.2d 151 (1974).

Thus, we must apply the control test in this situation. Montana statutes clearly establish that the district judge has the right to control the details of the water commissioner's work:

Upon the determination of the hearing [upon the complaint of dissatisfied water user], the judge shall make such findings and order as he considers just and proper. If it appears to the judge that the water commissioner or water commissioners have not properly distributed the water according to the provisions of the decree, the judge shall give the proper instructions for such distribution. The judge may remove any water commissioner and appoint some other person in his stead if he considers that the interests of the parties in the waters mentioned in the decree will be best subserved thereby, and if it appears to the judge that the water commissioner has willfully failed to perform his duties, he may be proceeded against for contempt of court, as provided in contempt cases. The judge shall make such order as to the payment of costs of the hearing as appears to him to be just and proper.

§ 85-5-301(2), MCA.

I conclude that although the affected water users have the duty to pay a water commissioner's compensation and expenses as authorized by law, for the purposes of the

Montana Workers' Compensation Act, the district court judge is the water commissioner's employer.

THEREFORE, IT IS MY OPINION:

When a district court judge appoints a water commissioner pursuant to Title 85, chapter 5, MCA, the district court judge is considered the employer for the purpose of payment of workers' compensation.

Very truly yours,

MIKE GREELY
Attorney General