

Opinion No. 48-5171

September 15, 1948

BY: C. C. McCULLOH, Attorney General

TO: Hon. William C. Porter, M. D. Superintendent and Medical Director Los Lunas Mental Hospital Los Lunas, New Mexico

{*165} In your letter of recent date, you inquire as to the necessity of the Los Lunas Mental Hospital purchasing Workman's Compensation Insurance, and ask further questions regarding the scope of coverage, if insurance is required.

Section 57-902, N.M. S. A., 1941 Compilation provides in part as follows:

"The state and . . . public institution and administrative board thereof employing workmen in any of the extra-hazardous occupations or pursuits hereinafter named or described, and every private person, firm, or corporation engaged in carrying on for the purpose of business, trade or gain within this state, either or any of the extra-hazardous occupations or pursuits hereinafter named or described and intended to be affected hereby, (which) shall employ therein as many as four (4) workmen, except as hereinafter provided, (such employer) shall become liable to, and shall pay to any such workman injured by accident. . . . Provided, that if any such injury so occurs to any such workman in such service while at work upon any derrick, scaffolding, pole, or such structure ten (10) feet or more above the surface of the ground, this act (Sections 57-901 -- 57-931) shall apply without regard to the number of workman employed."

The above quoted section has been construed by this office to include the state or public institutions thereof who employ one or more workmen in extra-hazardous occupations under the provisions of the act. See Opinion No. 4224 (Attorney General's Report 1943-44, p. 19.) Extra-hazardous occupations are defined by Section 57-910, N.M. S. A., 1941 Compilation, and the classifications therein set forth would, no doubt, include some of the persons in the employ of your institution, thereby making it subject to the Act.

You further inquire which of the employees of the institution would be considered as "workmen" under the Act. Section 57-912 (i) N.M. S. A., 1941 Compilation sets forth the definition of "workman" as follows:

"'Workman' means any person who has entered into the employment of or works under contract of service or apprenticeship, with an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business. The term 'workman' shall include 'employee' and shall include the singular and plural of both sexes."

Since our act specifically provides that "employees" shall be included, it is my opinion that both the regular unskilled employees of the hospital and those termed by you as "regular state employees" would be included under the terms of the Act. Provided, of course, that they are engaged in one or more of the extra-hazardous occupations as defined by the Act.

The category defined by you as "per diem skilled workers when employed by this hospital on a day to day basis at a stipulated per hour wage," would be excluded only if their employment is "purely casual and not for the purpose of the employer's trade or business."

In 71 Corpus Juris, Workmen's Compensation Acts, Section 179, it is said:

{*166} "The compensation acts commonly contain provisions designed to except from their provisions mere casual employees. . . . Except where casual employment is specifically defined by statute, the courts have generally considered it inadvisable to attempt to give a general definition of 'casual', and each case must be decided quite largely upon its special facts. . . . The meaning of the term may be more clearly understood by referring to its antonyms, which are 'regular', 'systematic', 'periodic', and 'certain.' . . . It may be said that, where one is employed to do a particular kind of work, which employment recurs with regularity, and where there is a reasonable period of time, such employment is not casual, but where the employment cannot be characterized as permanent or periodically regular, but occurs by chance or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is casual. . . . An employment on a building or in repairing a structure will not be regarded as casual where the work for which claimant was engaged will extend for an indefinite period, or will require a considerable length of time for its completion. If an employer is not engaged in a labor-employing enterprise or business, this may be an influential circumstance tending to establish the casual character of the occasional employments which he may make."

From the above, it may be seen that it is not easy to set a general standard of casual employment, and each situation must be judged separately on the facts therein involved.

You further ask whether patients, i. e., inmates, of the hospital are to be considered workmen where they assist skilled workmen employed by the hospital. 71 Corpus Juris, Workmen's Compensation Acts, Section 247 b. (1) states:

"Where a municipality or the state is the employer and is within the terms of the statute, in order to bring a person within the benefits of the Compensation Act, the relation of master and servant must ordinarily exist."

Section 169 (5) of the above provides:

"In order that a person may be an employee under a compensation act, it is essential that some consideration be paid or payable to him."

If no compensation is paid these inmates, I believe they would be excluded from the application of the Workmen's Compensation Act. If they do receive compensation, it is possible that they might be included, in view of Section 37-202, N.M. S. A., 1941 Compilation, Pocket Supplement, which provides:

"There shall be established and hereafter maintained by this state an institution to be known as 'Los Lunas Mental Hospital,' for the care, custody, **employment**, education, and training of mental defectives."

However, it is my opinion that the relation of master and servant does not exist between the inmates of the hospital, and that such inmates would not be considered as having entered into the employment of, or having worked under a contract of service or apprenticeship with, the hospital, since such inmates are under your control as director in accordance with a court order rather than a contract of employment.

Therefore, it is my opinion that the Los Lunas Mental Hospital is subject to the provisions of the Workman's Compensation Act if it employs one or more workmen in extra-hazardous occupations as defined in Section 57-910, N.M. S. A., 1941 Compilation. All regularly employed personnel who work in such { *167 } occupations would be included in the coverage.

Pursuant to your request, copy of this opinion is being sent to Mr. A. H. McLeod, Attorney at Law, Albuquerque, New Mexico.

By W. R. KEGEL,

Asst. Atty. General