

Opinion No. 58-218

October 31, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Howard M Rosenthal,
Assistant Attorney General

TO: J. P. Roach, Chief, New Mexico State Police, P. O. Box 919, Santa Fe, New
Mexico

QUESTION

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1. Would our Workmen's Compensation coverage include New Mexico Mounted Patrol members should they become injured while working under the direct supervision of a State Police officer?
2. Would there be State insurance coverage for a sheriff's posseman, layman, or a volunteer citizen, who might become injured if working on an emergency under the direct instruction or supervision of a State Police officer?

CONCLUSIONS

1. Yes.
2. See opinion.

OPINION

ANALYSIS

Because of the wide range of material covered in your letter dated September 17, 1958, in which you request four opinions, it has been deemed advisable to break the four questions in accordance with the subject matter contained in them.

Questions No. 1 and 4, dealing with public liability coverage for State Policemen and the purchase of a court transcript in a liability damage suit against one of your officers, respectively, will be answered separately after research.

Referring now to inquiry No. 1 above, we refer to § 9-11-5 enumerating the duties of the Mounted Patrol and including "It shall be the duty of the New Mexico mounted patrol and the members thereof to assist in the enforcement of law by cooperating with all law enforcement agencies . . . of the state of New Mexico when requested by them and under their direction and control. . ."

Also, referring to § 9-11-6, we find "Members of the New Mexico mounted patrol may be detailed to assist and render aid in specific instances involving law enforcement or other matters when request is made for such assistance and aid by the New Mexico state police . . . When acting upon such call members shall be deemed to be the agents or deputies of the authority issuing such request and shall be possessed of the same powers and duties as such requesting authorities."

Other sections pertinent to the Mounted Patrol authorize their being called into service in various named emergencies by the Governor. Hence, it would appear uncontradictable that the relationship of employer and employee and a contract indicating such, express or implied, exists in the case of the Mounted Patrol when duly commissioned with a task.

While this office has issued a previous opinion (Attorney General Opinion No. 6505) in which volunteer firemen are held not to come within the Workmen's Compensation Act, we believe this opinion can be differentiated on several grounds. While the opinion does refer to the uncompensated status of volunteer firemen as one of the reasons for excluding such from the Workmen's Compensation Act, this evidentiary consideration is used to show the lack of employer-employee relationship, which relationship definitely exists in this instance by statute.

The case of *Eaton v. Bernalillo County*, 46 N.M. 318, is our authority for the fact that the volunteer nature or the uncompensated effort of a citizen commandeered by the police arm of the government does not necessarily exclude the employer-employee relationship required under our Workmen's Compensation Act. While the decision in that case barred recovery under the Workmen's Compensation Act, such result was had not because the individual was uncompensated, but because the Court held that no employer-employee relationship existed.

A full discussion of this matter is contained in Volume I of Larson's Workmen's Compensation Law § 47 et seq.

Section 59-10-10 of the Workmen's Compensation Act provides "All duly elected or appointed peace officers of the state . . . shall be deemed to be following extrahazardous occupations and to be within the provisions of this act."

Referring again to the status of the Mounted Patrol, as indicated by the above cited statutes, this office is of the opinion that members of the Mounted Patrol duly deputized by the State Police would be included in the Workmen's Compensation plan.

The second question raises substantially different issues. For one thing the Courts of many states, including New Mexico, have frequently passed upon the obligation of a citizen to assist the Police Authorities in various situations. These situations are frequently referred to as "posse comitatus". In the *Eaton v. Bernalillo County* case, above cited, our Supreme Court said:

"This power of the sheriff . . . to summon aid in a proper case, in enforcing the criminal laws, is not open to question. It is of ancient origin and in the early days of our country's growth often was exercised. More recently . . . the occasion for resorting to the posse comitatus has diminished greatly. Nevertheless, the power is there. . . . Under such circumstances, it was logical to hold that the person injured while so assisting occupied the status of a deputy sheriff, and, hence, of an employee, thereby entitling him or his dependents, to compensation."

In short, there can be no question that any citizen, whether he be a sheriff's posseman, layman, or of any other status, who would be legally subject to an assistance call of posse comitatus and who was indeed duly and legally so called, and who in the course of such duties was injured, would be included in Workmen's Compensation.

The doubtful situation arises where no employer-employee relationship comes in to being because of the lack of one of several bases for this relationship. Phrasing it another way, if the circumstances do not give rise to a posse comitatus situation, or if the individual injured has not been duly deputized, we are of the opinion that the necessary employer-employee relationship does not exist. If this relationship does not exist, then we are of the opinion that the individual does not come within our Workmen's Compensation Act.

Hence, each situation must be evaluated on its own. If the circumstances are such as to give rise to the employer-employee relationship, an injured individual comes within the Workmen's Compensation Act. If the necessary relationship does not exist, he does not.