

Opinion No. 60-29

February 24, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Robert W. Reidy District Judge Second Judicial District P. O. Box 388
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QUESTION

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Are Supreme Court Justices, District Judges in their respective districts and Justices of the Peace in their respective counties within the operation of § 59-10-10, N.M.S.A., 1953 Comp., (Workmen's Compensation Act) relating to extrahazardous occupations by virtue of inclusion therein of "elected or appointed peace officers of the state, counties, or municipalities?"

ANSWER

1. Yes, if engaged in the type of business relating to their constitutional duties as conservators of the peace.
2. No, if engaged in duties in their judicial capacity.

OPINION

{*378} ANALYSIS

The Constitution of New Mexico, Article VI, Section 21, provides:

". . . Justices of the Supreme Court in the State, District {*379} Judges in their respective districts and Justice of the Peace in their respective counties shall be conservators of the peace."

Among other occupations enumerated in § 59-10-10, supra, as being extra hazardous is the following:

". . . All duly elected or appointed **peace officers** of the State, counties or municipalities, . . ."

The question is then: Is a conservator of the peace included within the meaning of the words "peace officers?"

Ex Parte Levy, 163 S.W. 2d 529, 204 Ark. 657, held that a "conservator of the peace" is synonymous with the term "peace officer." It noted that conservators of the peace were common law officers and their duties as such were to prevent and arrest for disturbances of the peace in their presence. **Tippett v. State**, 189 S.W. 485, 80 Tex. Cr. R. 373, expressly held that a judge was a peace officer. It was held in this case that a conservator of the peace is an officer authorized to preserve or maintain the public peace, so that one who is by statute expressly designated as "a conservator of the peace" also comes within the description of a peace officer. The majority of the decisions reviewed include and define a "conservator of the peace" as a "peace officer." We so hold.

There is, therefore, a two-fold duty imposed upon the above enumerated judicial officers, one under the judicial department and the other under the executive department of the State. The primary duty of a judge, of course, is judicial, and the fact that he is also a conservator of the peace with the duty and power to arrest and detain persons who breach the public peace, is incidental to his primary duty.

Ordinarily, if the primary undertaking is of a non-hazardous nature, which is the case here, a casual or incidental pursuit of the employer's business which is of a character to be classified as extra hazardous would not be enough to bring the workman under the act, even though the workman was injured while temporarily engaged in the incidental extra hazardous pursuit. **Rumley v. Middle Rio Grande Conservancy District**, 40 N.M. 183, 57 P. 2d 283.

However, it has also been held that:

"An employer may conduct different departments or types of business, some of which are within the Compensation Act and some of which are not. 71 C.J. 365, Section 78, . . ." **Rumley v. Middle Rio Grande Conservancy Dist.**, supra.

The judicial officers with which this opinion is concerned are charged by the Constitution and by our statutes with two distinct types of occupations; judicial officers and peace officers. The former is not extra hazardous and not within the Compensation Act while the latter is included under the Act.

We cannot escape the fact that while the judicial officer may utilize most, if not all, of his working time discharging the duties of his judicial office, he is nevertheless charged with the duty of being a conservator of the peace and if the occasion should arise where he should be required to exercise his authority in this field, he would then be engaged in exercising his duties under a separate department which is classified as an extra hazardous occupation. If injured while undertaking to discharge his duties as a peace officer, he would be entitled to compensation under § 59-10-10, supra. If injured while discharging his judicial office, the injury would not be compensable under the

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