Opinion No. 43-4224

February 4, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. D. A. Paddock, Assistant District Attorney, Clayton, New Mexico

We are in receipt of your letter of January 27, 1943, in which you state that three men were employed by Union County in maintaining the highway, and that while so engaged, one of the employees was injured. You ask our opinion as to whether or not such employees come within the protection of the Workmen's Compensation Act.

Section 57-902 of the 1941 Compilation, relating to employees who come within the Workmen's Compensation Act provides in part as follows:

"The state, and each county * * * employing workmen in any of the extra-hazardous occupations or pursuits hereinafter named and 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 herein named or described, and intended to be affected hereby (which) shall employ therein as many as four (4) workmen * * * shall become liable to, and shall pay to any such workman injured * *"

On the face of this section, it would appear that before a county comes within the provisions of the Workmen's Compensation Act, that it must employ at least four workmen in an extra-hazardous occupation. However, as originally enacted (Chapter 113, Section 2, Laws of 1939) this act read as follows:

"The State and each county * * * employing as many as four workmen in any extra-hazardous occupation * * *"

It was not until the 1933 Amendment that the words "as many as four" were deleted. It would thus appear that the Legislature, by deleting these words, intended that a state or county, or any of the other political subdivisions named, should come within the provisions of this act, if it employed any workmen in such dangerous pursuits.

In view of the foregoing, it is my opinion, that the injured employee is entitled to relief for his injury from Union County under the Workmen's Compensation Act.

You ask whether or not Union County might be subjected to common law liability in the event the workmen were not covered by the Workmen's Compensation Act. A county is not liable for damage arising out of a tort unless a right of action is given by statute. See Murray vs. Board of County Commissioners, 28 N.M. 309.

There is, however, one exception, and that is where the county is engaged in proprietary capacity, rather than Governmental. While there is a split in these cases, the better reasoned cases hold that the construction and maintenance of highways is a Governmental function. For the reasons above stated, I am of the opinion that Union County could not be subjected to common law liability for the injuries sustained by the above mentioned employee.

As a word of caution, however, your attention is directed to the fact that our Supreme Court has not passed on either of these questions, and therefore, it is impossible to say with certainty just what the court might do. For this reason, it occurs to me that it might be advisable for you and the County Commissioners to keep this uncertainty of our law in mind, and take such action as seems proper to you under the particular circumstances of the case. I say this for the reason that this is primarily a local question and a matter of policy, and for this reason, I would not want to substitute my discretion for yours.

By ROBERT W. WARD,

Asst. Atty. General