

Opinion No. 43-4287

May 18, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Robert J. Doughtie, State Labor Commissioner, Santa Fe, New Mexico

We are in receipt of your letter of May 11, 1943, and the inclosed letter from the Hardware Mutual Casualty Company; also a copy of a letter written by you on October 10, 1942, to this company.

In your letter of October 10 you state that:

"Individual owners and copartners are subject to the Act only when they are on the payroll of the company as employees."

In reply to this the Hardware Mutual Casualty Company asks the following question:

"Is there any basis in the New Mexico Workmen's Compensation Law, or in any previous Court or Industrial Commission decision in an actual case, in support of the premise that co-partners or individual proprietors can occupy the status of employees?"

You ask our opinion concerning the proper answer to the question propounded.

If your question relates to individual owners of a business which is owned privately by such persons, without any legal entity, such as a corporation, then it is my opinion that such individual owners are not subject to the Workmen's Compensation Law, even though they do the same type of work as employees. However, it appears to me that the writer of the letter of October 10th undoubtedly had in mind stockholders of a corporation, as he refers to employees of a company.

First, I might state that there is no provision of the Workmen's Compensation Law specifically covering this question, nor has there ever been, to the knowledge of the writer, any court decision in the State of New Mexico, on this case.

Taking up first the question of whether or not a stockholder or officer of a corporation may be an employee of such corporation, I refer you to the Annotations in 15 A.L.R. 1288, wherein the author states:

"The cases appear generally to hold that the mere fact that one is a stockholder, officer, or director of a corporation does not necessarily preclude recovery for his injury or death, as an employee of the company, under Workmen's Compensation Acts, but that he may be an employee, depending upon such factors as the nature of the work for which he receives pay, the proportion of the stock which he owns, and whether, in case

he performs the work of an ordinary employee, this is not merely occasional or incidental, but in his regular work."

For further cases on the subject see 25 A.L.R., 376, 44 A.L.R. 1217, 47 A.L.R. 843 and 81 A.L.R. 644. I have examined with care the cases collected in these A.L.R.

Annotations and believe that they adequately support the statement of the author set forth above. However, no hard and fast rule can be laid down as to just when a proprietor of a corporation may also be considered an employee within our Workmen's Compensation Act, as each case must be determined on its individual facts.

Nevertheless, it is my opinion that a person is not disqualified from the benefits of the Workmen's Compensation Act simply because he appears to be an officer, director or stockholder of the employing company.

As to the question of whether or not a member of a co-partnership may also be an employee under the Workmen's Compensation Act, it is again impossible to lay down any hard and fast rule. The majority of the cases have held that a partner may not also be an employee, basing their decision on the theory that a co-partnership is not, in and of itself, a legal entity and, for this reason, the individual partners are the employers, so that if the other result was reached it would be holding that the same person was an employer and an employee at the same time, which result the courts have said, was not contemplated by the Workmen's Compensation Act.

However, the Michigan Supreme Court, in the case of Gallie v. Detroit Auto Association, 195 N. W. 667, held under a section of their statute defining employees to mean "every person in the service of another under any contract of hire, express or implied," that a working member of a partnership received wages irrespective of profits was entitled to relief under the Workmen's Compensation Act, following Ohio Drilling Company v. State Industrial Commission, 86 Okla. 139, 207 P. 314, 25 A.L.R. 367.

It is noted that the Michigan Statute relied on is very similar to 57-912 of the New Mexico 1941 Compilation, defining Workman as:

"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."

In the Oklahoma case above referred to the Court rejected the theory that since a partnership is not a legal entity, that a person cannot be both an employer and an employee at the same time, saying:

"We see no good reason why the members of a partnership cannot, jointly or severally, perform the work or labor incident to the success of the business, and at the same time draw wages from the earnings of the partnership."

Nonetheless, in view of the weight and number of the English and American decisions holding that a person cannot be a partner and an employee at the same time, it is my opinion that the Labor Commission should not adopt this position.

You will please find enclosed herewith your letter from the Hardware Mutual Casualty Company and an extra copy of this opinion.

Trusting that the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General