Workmen's Compensation for Public Employees in Ohio

The Ohio Workmen's Compensation Act, with some exceptions, expressly applies to employees of the state, county, city, township, incorporated village, and school district on a basis of equality with employees in private enterprise.[1] The state and its subdivisions fall within the ambit of the compensation legislation as employers and must contribute to the public insurance fund.[2]

One of the most serious problems arising out of workmen's compensation laws generally is that of determining what classes of persons come within the application of the statute as employees.[3] Public employment is a phase of that problem and one which has frequently vexed the state courts of the United States. The Ohio act specifically excludes elected officials from the category of public employees;[4] city police and firemen may not participate if they are within the provisions of local pension plans which compensate them to the same extent as the state compensation act would; the right to remuneration under a municipal plan diminishes the policemen's or firemen's right to participate under the same act.[5]

Defining "employee" by exclusion and in general terms the statute[6] has left the burden upon the courts in Ohio to determine in the peripheral cases whether or not one in the service of the state or one of its subdivisions is a public employee and consequently compensable. It has been decided that a juror is an employee and entitled to participate in the public insurance fund when injured at the courthouse.[7] Deputy county officers were held to be employees,[8] while a village marshal was regarded as an "official" as

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[1] OHIO GEN. CODE §1465-61 (1946).

[2] OHIO GEN. CODE §§1465-59, 1465-60, 1465-62 (1946).

[3] Esling, *The Relationship between Municipal Employment and Workmen's Compensation,* 21 CHI-KENT REV. 209 (1943).

[4] OHIO GEN. CODE §1465-61 (1946).

[5] OHIO GEN. CODE §1465-61 (1946). Cases interpreting the police and firemen exclusion of this provision are: Industrial Commission v. Flynn, 129 Ohio St. 220, 194 N.E. 420 (1935); Industrial Commission v. Cramer, 15 Ohio L. Abs. 408 (1933); City of Columbus v. Thatcher, 16 Ohio L. Abs. 405 (1934); Brown v. Industrial Commission, 34 Ohio L. Abs. 557, 38 N.E. 2d 422 (1941).

[6] OHIO GEN. CODE §1465-61 (1946).

[7] Industrial Commission v. Rogers, 34 Ohio App. 196, 170 N.E. 600 (1929), *aff'd,* 122 Ohio St. 134, 171 N.E. 35 (1930). *Contra,* Board of Commissioners v. Evans, 99 Colo. 83, 60 P. 2d 225 (1936).

[8] State *ex rel.* Alcorn v. Beaman, 34 Ohio App. 382, 170 N.E. 877 (1929). North Carolina has adjudged a fee deputy sheriff to be an official

distinguished from an employee and hence not within the terms of the act.[9] Also an appraiser in a replevin suit is not within the public employee status, his compensation being dependent upon the receipt of costs of the action rather than upon an "appointment or contract for hire."[10] The uncertainty of payment as a sound basis for a decision against the appraiser is questionable because it does not negate the fact that the appraiser accepts the appointment with the expectancy of reimbursement.

A fertile field for workmen's compensation litigation and one of considerable importance in periods of economic depression is the status of the relief worker. In spite of the modern conception of the dignity of labor, many courts have treated the relief worker as a "pauper" or a "ward of the municipality" and not an employee[11] or have held that the service rendered is not under a voluntary contract for hire, the sub-division being bound by statute to relieve and support indigent persons.[12] Ohio, however, early recognized the relief worker as a public employee by judicial decision,[13] the supreme court stating that "The question is not answered by technical legal principles. . . . It must be considered in the light of the public policy which prompted the [workmen's compensation] legislation involved."[14] Legislation was thereupon enacted declaratory of the decision and establishing a special compensation fund for relief workers.[15] The constitutionality of the act creating the special fund has been upheld.[16] Allied with the problem of the relief worker is that of the convict. Clearly the latter's service is not founded upon a voluntary appointment or contract for hire, the statutory prerequisite to the acquisition of employee status.[17] A private act of the Ohio General Assembly directing the Industrial Commission to pay workmen's compensation to the dependents of a convict killed

and not an employee, the dissenting judge stating that the decision rendered the deputy *nullius filius*. Styers v. Forsyth County, 212 N.C. 558, 565, 194 S.E. 305, 309 (1937).

[9] Davis v. Industrial Commission, 54 Ohio App. 453, 7 N.E. 2d 829 (1936).

[10] Industrial Commission v. Shaner, 127 Ohio St. 366, 188 N.E. 559 (1933).

[11] Horovitz, *Current Trends in Basic Principles of Workmen's Compensation*, 12 LAW SOCIETY JOURNAL 765, 779 (1947).

[12] Scordis's Case, 305 Mass. 94, 25 N.E. 2d 226 (1940); *accord*, Vaivida v. City of Grand Rapids, 264 Mich. 204, 249 N.W. 826 (1933).

[13] Industrial Commission v. McWhorter, 129 Ohio St. 40, 193 N.E. 620 (1934); *accord*, Hendershot v. City of Lincoln, 136 Neb. 606, 286 N.W. 909 (1939).

[14] Industrial Commission v. McWhorter, *supra* note 13.

[15] OHIO GEN. CODE §3496-1 et seq. (1937).

[16] State *ex rel.* Slaughter v. Industrial Commission, 132 Ohio St. 537, 545, 9 N.E. 2d 505, 509 (1937).

[17] OHIO GEN. CODE §1465-61 (1946).

while performing duties assigned by prison officials was deemed unconstitutional by the Attorney General on the ground that the state does not "employ" convicts.[18] But it would be reasonable to allow compensation to convicts in fact employed outside of prison by a private employer, or "borrowed" by a particular state department even though the service rendered is not strictly voluntary.[19]

There have been divergent views as to the compensability of a school superintendent in Ohio. The Attorney General resolved that the superintendent is a public official and not an employee on the ground that the courts had permitted quo warranto proceedings against him and that action lies only against public officials.[20] Shortly thereafter a court of appeals overruled this determination, holding that the superintendent was a functionary of the school board exercising no independent sovereign resolution and therefore merely an employee.[21]

It has never been doubted in Ohio that public school teachers and professors of state and municipal universities are public employees. But the problem of "course of employment" and "arising out of employment"[22] has presented some difficulty. The supreme court held in *Inglish v. Industrial Commission*[23] that the dependents of a school teacher killed while returning home after school hours with examination papers to be graded at home were entitled to compensation, that the teacher was in the course of, and the death arose out of his employment. This decision stood in opposition to the general rule obtaining in Ohio that injury suffered in going to or returning from the place of employment does not arise out of the employment.[24] The court expressly overruled the *Inglish* case two years later stating that there was no causal connection between the injury sustained and the employment notwithstanding the fact that the teacher performs some pedagogic duties at home.[25] However attendance at a teachers' institute at the request and direction of the school superintendent is within the course of employment.[26]

[18] 1915 OPS. ATT'Y. GEN. (Ohio) No. 383. See Greene's Case, 280 Mass. 506, 182 N.E. 857 (1932).

[19] Horovitz, *Current Trends in Basic Principles of Workmen's Compensation*, 12 LAW SOCIETY JOURNAL 765, 781 (1947).

[20] 1942 OPS. ATT'Y. GEN. (Ohio) No. 5168.

[21] Anderson v. Industrial Commission, 74 Ohio App. 77, 57 N.E. 2d 620 (1943).

[22] *See* Walborn v. General Fireproofing Co., 147 Ohio St. 507, 72 N.E. 2d 95 (1947), 9 OHIO ST. L. J. 184.

[23] 125 Ohio St. 494, 182 N.E. 31 (1932).

[24] 42 OHIO JUR. 632 (1936).

[25] Industrial Commission v. Gintert, 128 Ohio St. 129, 190 N.E. 400 (1934).

[26] Bower v. Industrial Commission, 61 Ohio App. 469, 22 N.E. 2d 840 (1939).

Likewise where a college professor's duties expressly include lectures and addresses at Ohio high schools in furtherance of the university's prestige, death suffered from an infectious thorn of a rose pinned to the professor's lapel by admiring students is within the scope and arising out of the employment.[27] However a later Attorney General's opinion[28] held that an Ohio State University professor injured at a national educational meeting during summer vacation may not be compensated; it was stated that such injury does not arise out of the employment because it is "not required or contemplated" by the contract of employment, thus distinguishing the situation from the preceding case. It is arguable however that an Ohio State professor receives payment for his services on the basis of a twelve month year and that there is an implied obligation in his contract to keep abreast of new developments in his field through attendance at meetings of his colleagues.

One of the chief sources of litigation under the Ohio act has been in the area which might be termed casual public service. For example, is a person called upon by a sheriff or a police officer to assist in an arrest or other emergency an employee of the subdivision? Overruling an earlier determination by the Attorney General,[30] a court of appeals decided that such an informally deputized person was an employee, a deputy de jure, and his dependents eligible to participate in the insurance fund when he was killed while helping a regular deputy sheriff apprehend a criminal.[31] Previously the supreme court had held that one injured while aiding a village patrolman upon request in routine investigations was not an employee of the village;[32] but this case was distinguished because no emergency existed, a condition precedent to enlisting the aid of a private citizen as a temporary employee.[33] The question arose again recently in *Stoeckel v. Industrial Commission*[34] wherein it was held that a bystander who responded to a general call of a police officer of the city to "stop that man" was not an employee of the city entitled to compensation. The court reasoned that a statute providing for a fine upon a private citizen for refusing to heed an

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[27] Industrial Commission v. Davison, 118 Ohio St. 180, 160 N.E. 693 (1928).

[28] 1934 OPS. ATT'Y GEN. (Ohio) No. 2988.

[29] OHIO GEN. CODE §§2833, 12857 (1937).

[30] 1933 OPS. ATT'Y GEN. (Ohio) No. 85.

[31] Mitchell v. Industrial Commission, 57 Ohio App. 319, 13 N.E. 2d 736 (1936).

[32] Industrial Commission v. Turek, 129 Ohio St. 545, 196 N.E. 382 (1935).

[33] Mitchell v. Industrial Commission, 57 Ohio App. 319, 323, 13 N.E. 2d 736, 738 (1936).

[34] 77 Ohio App. 159, 66 N.E. 2d 776 (1945) .

officer's call for aid[35] is purely penal and cannot be the basis for the relationship of employer and employee. The code provision specifically creating the power to draft private citizens applies only to sheriffs and not to city police.[36] Volunteer firemen of an incorporated village have been deemed to be employees for purposes of workmen's compensation by specific statute[37] the same as though regularly employed. Without statutory guidance, it seems that a contract for hire exists and therefore an employee status. However compensation is computed not on total weekly earnings from all sources but only on the basis of average weekly payment from the village for services as a volunteer fireman.[38] The attorney general has concluded that where a village has established a pension plan for volunteer firemen the compensation from such a fund shall be in diminution of the right to compensation from the state insurance fund. In effect this applies the statutory restriction on benefits to city police and firemen to the village volunteer fireman. Ohio has not faced the scope of employment problem with relation to the volunteer fireman but the Nebraska supreme court held that injury in the volunteer's home while hastening to respond to an alarm was not in the course of or arising out of his employment.[41] It is not beyond the realm of reason however to say that there was a causal connection between the injury and the employment. California has dealt with the casual employment of an election officer appointed to serve at a general election and has found him to be an employee. Because the nature rather than the length of the employment is controlling in Ohio[42] it is probable that Ohio would hold in accord with the California case. Still in the area of casual public service are the large numbers of national guardsmen under state authority in the time of peace. Apparently injury to a guardsman has not been a subject of workmen's compensation litigation in Ohio[43] as it

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[35] OHIO GEN. CODE §12857 (1937).

[36] OHIO GEN. CODE §2833 (1937).

[37] OHIO GEN. CODE §3298-57 (1937). See OHIO GEN. CODE §3298-60 (1937) granting compensation coverage where fire fighting is beyond the corporate limits of the village.

[38] State *ex rel.* Smith v. Industrial Commission, 127 Ohio St. 217, 187 N.E. 768 (1933).

[39] 1940 OPS. ATT'Y GEN. (Ohio) No. 2520.

[40] OHIO GEN. CODE §1465-61 (1946).

[41] Henry v. Village of Coleridge, 147 Neb. 686, 24 N.W. 2d 922 (1946), 32 IOWA L. REV. 802 (1947).

[42] State *ex rel.* Bettman v. Christen, 128 Ohio St. 56, 190 N.E. 233 (1934).

[43] The office of the Adjutant General of Ohio states that compensation to Ohio national guardsmen is by private enactment of the General Assembly.

has been in other states where a split of authority has resulted as to his status.[44]

An independent contractor as distinguished from an employee is not entitled to participate under the Ohio act whether engaged for public[45] or private[46] endeavor. But one renting buses to a school board and receiving a portion of his reimbursement for supervision of the drivers and maintenance of the vehicles has the co-existing functions of an independent contractor and an employee and is compensable.[47]

Ohio has espoused a policy of liberal construction in workmen's compensation with respect to the eligibility of public employees to benefits from the state fund.[48] It appears from the cases that the courts have generally adhered to that policy. Since the basic aim of workmen's compensation legislation is to place the burden of safe working conditions on the employer, it is meritorious that Ohio has followed such a policy as to the public employee. The governmental unit as an employer should be bound by the philosophy of workmen's compensation just as the private employer is bound in view of the fact that the public service represents a sizeable part of the country's manpower.[49] The protection afforded Ohio's public servants by both the judicial and the legislative departments of the government is extensive, and compares favorably with that afforded by other states.[50]

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[44] 13 A.L.R. 1251 (1921); 150 A.L.R. 1456 (1944).

[45] Industrial Commission v. McAdow, 126 Ohio St. 198, 184 N.E. 759 (1933) (court house interior decorator); Industrial Commission v. Henderson, 43 Ohio App. 20, 182 N.E. 603 (1932) (resurfacing bridge).

[46] Coviello v. Industrial Commission, 129 Ohio St. 589, 196 N.E. 661 (1935) (taxi driver). For other cases, see ADAMS AND RAPP, OHIO INDUSTRIAL COMMISSION CASES (1942).

[47] George v. Industrial Commission, 26 Ohio L. Abs. 10 (1937).

[48] Industrial Commission v. Rogers, 34 Ohio App. 196, 198, 170 N.E. 600 (1929), *aff'd*, 122 Ohio St. 134, 171 N.E. 35 (1930).

[49] MAGNUSSON, WORKMEN'S COMPENSATION FOR PUBLIC EMPLOYEES (Public Administration Service No. 88, 1944).

[50] Esling, *The Relationship between Municipal Employment and Workmen's Compensation*, 21 CHI-KENT L. REV. 209 (1943).