

Opinion No. 49-5194

February 4, 1949

BY: JOE L. MARTINEZ, Attorney General

TO: H. W. Atkins Assistant District Attorney Gallup, New Mexico

{*14} We are in receipt of your letter of January 20th in which you inquire as to the employees of the county on whom Workmen's Compensation must be carried and the employees or agencies of the county {*15} upon whom Workmen's Compensation may be carried if the County Commissioners so desire.

Section 57-902 of the New Mexico Statutes, 1941 Compilation, specifically places each county within the scope of the Workmen's Compensation Act provided it employs four or more workmen in an extra hazardous occupation and, among others, lists "road building and construction" and "all duly elected or appointed peace officers of the state, counties, or municipalities". It is obvious from the foregoing that employees of the county engaged in highway work and the sheriff and all his deputies are mandatorily under the Workmen's Compensation Act. To this extent the duty of the Board of County Commissioners to carry proper Workmen's Compensation insurance on these men is compulsory.

The question as to janitors is somewhat more indefinite. If the work of the janitor is devoted not merely to the cleaning of the building but involves a substantial part of his time in repairing and maintaining property, then coverage would be required under the provisions of 57-910 which, in describing extra hazardous occupations, lists "buildings being constructed, repaired, moved, or demolished".

The case of the janitors, like many other employees, falls into a twilight zone created by the diversity of duties of the particular employee. It is practically impossible to answer categorically the question as to whether insurance is required on any given employee until there has been a rather thorough analysis of the principal duties of the particular individual.

By way of assistance, your attention is called to Section 57-904 which gives employers the right to elect whether they will accept or reject the provisions of the Workmen's Compensation, and among other things states:

"Election on the part of any employer to be subject to this act, including the employer of private domestic servants, farm and ranch laborers or of three or less employees, may be made by filing in the office of the Clerk of the District Court for the county in which such workman is or it is contemplated at the time of such agreement, such workman is to be employed a written statement to the effect that he accepts the provision of this act".

This section was adopted by the New Mexico Legislature, Chapter 92, Section 2 of the Laws of 1937 and in effect overrules *Rumley vs. Middle Rio Grande Conservancy District*, 40 N.M. 183, where it was held in effect that the extension of the benefit of the act could be accomplished only by act of the Legislature.

It is the opinion of this office, therefore, that the county, by filing a written statement with the Clerk of the District Court electing to put all or more employees than those unambiguously described, will cover such additional employees under Workmen's Compensation Act. Your attention is invited to *Keeney v. Beasman*, 182 Atl. 566, where coverage was denied to employees outside of the classifications specifically enumerated in the act because the employer and employee had not complied with the statute requiring written election. See also *Benjamin vs. Standard Accident Insurance Co.*, 152 La. 874, 94 So. 428; *Clement v. Minnin*, 157 Maryland 200, 145 Atl. 485; *Barnes vs. Myers*, 163 Maryland 206, 161 Atl. 279; *Rugg v. Norwich Hospital Association*, 205 App. Div. 174, 199 N.Y.S. 735. Each of these cases hold that an employer cannot extend coverage of the act and if a policy is taken out to protect him, such a policy is merely precautionary.

There are, however, a substantial number of cases which hold to the effect that the mere fact {**16*} that the employer insures his liability to pay compensation is in itself an election to be brought under this act. *Edmonds v. Industrial Commission*, 350 I11, 197, 183 N.E. 12; *Hillman v. Industrial Commission*, 190 Wis. 196, 208 N.W. 928; *Heal v. Industrial Commission*, 197 Wis. 95, 221 N.W. 389.

It is recommended, therefore, that in order to avoid a judicial determination of coverage that any policy that may be written should estop the insurance carrier from denying that any given employee comes within the provisions of the act. The policy should specifically state that the employees in question are extended the benefits of the Workmen's Compensation Act regardless of whether they are engaged in extra hazardous employment.

It, is therefore, the opinion of this office that an employer, including a county, may extend the coverage of the act to persons not specifically listed as engaged in extra hazardous employment by taking out a policy of insurance covering Workmen's Compensation liability and filing said election with the Clerk of the District Court.