Opinion No. 42-4167

October 14, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. J. V. Taylor State Conservationist United States Department of Agriculture Soil Conservation Service Albuquerque, New Mexico

*{*259}* We have your request of September 29, 1942 for an opinion of this office concerning possible liability of soil conservation districts for injuries to employees of the district where these employees are being paid from district funds and operating district equipment. We also have your letter of October 9 in response to our inquiry of October 7, wherein you stated that you did not have a specific New Mexico fact situation in mind when requesting information on the above question.

It is necessary, in answering this question to first determine whether the Workmen's Compensation Statute of this State affects such a soil conservation district. Chapter 92, Section 1, of the Laws of 1937, provides:

"EMPLOYERS WHO DO NOT COME WITHIN THE PROVISIONS OF THIS ACT. The State and each county, city, town, school district, drainage, irrigation or conservancy district and public institution and administrative board thereof employing workmen in any of the extra-hazardous occupations or pursuits hereinafter named or 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, * * * *"

It is noted that a soil conservation district is not mentioned although other Governmental subdivisions of the State are specifically mentioned. In view of this specific language, it must be held that our Workmen's Compensation Law does not apply to conservation districts organized under Chapter 219, Laws of 1937.

We, in effect, have the further question whether irrespective of the Workmen's Compensation Law such a district may become liable for injuries to its employees. In order to arrive at the issue involved Chapter 219, Section 8 of the Laws of 1937 provides:

"Powers of Districts and supervisors. A soil conservation district organized under the provisions of this act shall constitute a governmental subdivision of this State, and a public body corporate and politic, exercising public powers, and such district, and the supervisors thereof, shall have the following powers in addition to others granted in other sections of this act: * * *

"To sue and be sued in the name of the district; * * *"

It is, therefore, noted that such a district is a Governmental subdivision of this State and may sue and be sued as such. We do not have any statute which specifically provides that such a Governmental subdivision shall be liable for injuries to its employees even through negligently caused *{*260}* by such district. Neither has our Supreme Court ever considered the question of the liability of such a subdivision in the absence of a statute providing for such possible liability. Therefore, in order to determine this question, it is necessary to refer to the general law as expressed by the Courts of various states wherein the question has been raised, and by referring to the rule as stated by the legal encyclopedias.

In 38 Am. Jur. page 265, it is stated:

"Following the decision in Russell v. Devon County, it became a settled principle of the common law that an individual could not maintain an action against a political subdivision of the state for injury resulting from negligence in the performance of any governmental function. * * *"

As further stated in such section this rule has been modified in many modern jurisdictions, but it is further pointed out that the doctrine as to governmental functions is so well established by the overwhelming weight of authority that the law must be considered settled until altered by the Legislature. Until the legislature acts the Courts generally decline to alter the rule. Similar questions to the one herein involved have been raised in states that have created drainage districts which are similar in legal effect to the districts herein involved.

17 Am. Jur, page 790 states:

"There is, however, a diversity of opinion as to its responsibility for injuries resulting from the wrongful or negligent acts of its officers and employees. One line of authorities hold that since such a district is a quasi-public corporation there is no liability unless it has been imposed by statute, either expressly or by clear implication, and that in such case the only remedy of a person injured is against the officers of the district personally. Thus, it has been held that, in the absence of any such enactment, a drainage district cannot be held responsible for an injury suffered by one of its workmen through the negligence of his foreman, or for an injury sustained by a traveler on a public highway through its failure to keep in a safe condition a bridge crossing one of its ditches. On the other hand, however, there are several courts which, while admitting that drainage and reclamation districts may be quasi-public corporation, hold that they are not in reality governmental agencies, and are not therefore exempt from liability for damages. Accordingly, recoveries have several times been awarded for injuries to land arising from such causes as the deliberate diversion of water thereon, the overflowing of a faulty designed ditch, etc. The conclusions reached depend, therefore, to a large extent, upon the view taken with respect to the nature and status of the district in the particular instance."

In the present case it seems clear that in view of our statute, a soil conservation district would be held to be a governmental subdivision and its functions public and should come within the rules relating to non-liability of such districts.

33 A.L.R. page 77 states:

"There are two well-defined theories as to the liability of drainage, levee reclamation, sanitary, and sewer districts for damages. One line of authorities holds in accord with TODD v. KAW VALLEY DRAINAGE DIST. (reported herewith) ante, 64 and SHERWOOD v. WORTH COUNTY DRAINAGE DIST. (reported herewith) ante, 68, that such districts are quasi public cor porations, subdivisions of the state, and that the rules which *{*261}* govern the liability of governmental subdivisions generally govern the liability of such districts. Other courts, while admitting that such districts may be quasi public corporations hold that they are not in reality governmental agencies, and are not exempt from liability for damages. * * * *"

Since the conservation districts are specifically subdivisions of the state it seems that, in any event, under the rule herein stated that there could be no liability of the district to its employees for any injuries which they have incurred during their employment.

We are also helped, to a certain extent, in determining this question by considering the liability of agriculture societies, which are very similar to conservation districts in certain pertinent respects.

2 Am. Jur. page 57 states:

"An agricultural society is liable for injuries due to the negligence of its officers, agents, or servants while acting in the course and scope of their duties or employment, unless it is a state agency performing governmental functions. * * * *"

Also, we notice that if governmental functions are being performed, there is no liability.

Similar questions have also been raised in the absence of a governmental statute concerning the liability of counties which are also subdivisions of a State. The general rule is stated in 20 C.J.S., page 1067, which provides:

"Except in a few jurisdictions, it is the general rule that counties are not subject to liability for torts, in the absence of statutory or constitutional provisions which either expressly or by implication impose such liability on them. * * * *"

In view of the foregoing, it would appear that in the absence of a specific statute making a conservation district liable for its torts, or subjecting it to a Workmen's Compensation Statute, that it cannot be held liable for its torts and, consequently, it would not be liable for injuries to its employees that might be injured in the scope of their employment. However, it is necessary to state that since this question has never been submitted to our Supreme Court, and since there is no specific statute definitely determining the

question that it cannot be positively stated whether or not it would not be liable in a given circumstance.

We have merely stated the general rule which our Supreme Court can be expected to follow, but, of course it would not be bound to follow such a rule, and this opinion, in effect, merely raises the questions which are involved and submits our opinion as to what we think should be the applicable rule of law.

By HARRY L. BIGBEE,

Asst. Atty. General