Opinion No. 43-4418

December 3, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. E. T. Hensley, Jr., District Attorney, Portales, New Mexico

We regret that we have been so long in answering your letter of November 23, 1943, in which you ask our opinion as to whether or not Article 9 of Chapter 57 of the N.M. 1941 Compilation prevents a municipal corporation from securing Workmen's Compensation Insurance on janitors alone.

Section 57-902 provides in part as follows:

"The state and each county, city, town, school district * * * and administrative board thereof, employing workmen in any of the extra-hazardous occupations or pursuits hereinafter named and described * * * shall become liable to, and shall pay to, any such workmen injured by accident * * *"

I do not have sufficient information available to determine whether or not the janitors employed by the municipal school board, or any of their other employees, come within the extra-hazardous occupations enumerated in Section 57-910.

Your attention is called to the case of Rumley vs. Middle Rio Grande Conservancy District, 40 N.M. 183, 57 P. 2d 283, in which the court held that the mere fact that the Defendant was a conservancy district does not subject it to the Workmen's Compensation Act, but that liability only attached when employers were engaged in extrahazardous occupations. The same would appear to be true of employees of a municipal school board.

I do not find any provision of the Workmen's Compensation Act authorizing a municipal school board, or any other employer, to voluntarily come within the act as to part or all of its employees, unless such employer is engaged in an extrahazardous occupation.

In reading this act, it is noted that the act works in the other manner, that is to say, that the act becomes operative immediately upon the employer engaged in any of the occupations listed, with the option vested, however, in both the employer and employee, to place themselves outside the act by entering the agreements, or giving the notices specified. See Jones vs. George F. Getty Oil Co., 92 F.2d 255.

It is also noted that prior to the 1937 amendment of Section 57-902, that an employer engaged in a nonhazardous occupation might bring himself within the act by filing a written agreement in the office of the County Clerk. Thus, it would appear that by deleting this provision, the Legislature intended to limit the operations of the act exclusively to employers engaged in extra-hazardous occupations.

There is also some question in my mind as to whether a school district, under the present wording of the statute, need employ more than one workman at any of the extrahazardous occupations. A copy of Opinion No. 4224, covering this question, is enclosed.

Trusting that the foregoing is of some benefit to you, I am

By ROBERT W. WARD,

Assistant Attorney General