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What Constitutes Covered Employment Within the Contemplation of the Ohio Workmen's Compensation Act

by Harry Kottler*

WORKMEN'S COMPENSATION acts have been generally interpreted in three ways: first, as the substitution of a statutory tort for a common law tort; second, as the regulation of the relationship between employer and employee, which is primarily contractual in character; third, as the creation of a new statutory relation between master and servant, the chief incident of which is to impose upon the master financial responsibility for certain risks of service.¹ While these represent the underlying legal philosophies in the enactment of workmen's compensation laws, the desiderata in enactment of the laws vary from state to state, and for that reason the acts of the various states are as varied in their provisions and coverage as is the imagination of man. In some states only "hazardous" occupations are covered.² In others only specified occupations are covered, the coverage seeming to bear no relation to the hazards of the occupation, with the inclusions or exclusions based, very likely, upon the historical development of these acts rather than upon any definitive concept of an underlying philosophy or desiderata.

It is at once apparent, therefore, that to undertake an analysis of the coverage contemplated by the workmen's compensation acts of each of the states would be an herculean task, and would serve no useful purpose to Ohio lawyers. This article, therefore, is limited to the coverage contemplated by the Ohio Workmen's Compensation Law. Decisions of other jurisdictions are cited as precedents only where those states have corollary provisions, or where the decisions of the courts rendering them have a direct bearing upon the effect of the Ohio law, as, for example, decisions of the United States Supreme Court.

The purpose of the Ohio Workmen's Compensation Act is "to require as a matter of justice that injuries to workmen sus-

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¹ RESTATEMENT, CONFLICT OF LAWS § 485.

² See Anno., 7 A. L. R. 1296.

tained in the course of their employment shall be regarded as a charge upon the business in which they are engaged, and compensation made therefor.”³ The language of the Ohio law and the decisions of the courts disclose a purpose to construe the act so as to extend its coverage broadly,⁴ and in the administration of the act the same broad and liberal construction appears to be given operation. Underlying this approach seems to be the desire to aid and encourage workers, so essential to our highly industrialized state.

I. *The Employment Relationship*

Under the Ohio law, compensation is payable to the injured workman, if living, or to his dependents if he is killed, but only if he comes within the definition of the terms “employee,” “workman” or “operative” under the provisions of the act; and only then if his employer is, likewise, amenable to the provisions of the act. The purview of these definitions and the limitations thereof are hereinafter discussed. In addition to the above two qualifications, the injury to the workman must have been incurred “in the course of his employment.” What constitutes “course of employment” is, however, beyond the scope of this article and will not be discussed herein.⁵

The definition of “employer” within the meaning of the act is set forth in Section 1465-60, Ohio General Code,⁶ and that of

³ *Industrial Commission v. Gintert*, 128 Ohio St. 129, 190 N. E. 400 (1934); *Prendergast v. Industrial Commission*, 136 Ohio St. 535, 27 N. E. 2d 235 (1940).

⁴ *Industrial Commission v. Rogers*, 34 Ohio App. 196, 170 N. E. 600 (1929); *Baker v. Industrial Commission*, 44 Ohio App. 539 (1933).

⁵ For the rules defining “course of employment,” see *Outland v. Industrial Commission*, 59 Ohio App. 427, 18 N. E. 2d 499 (1937).

⁶ Ohio General Code, Sec. 1465-60. The following shall constitute employers subject to the provisions of this act:

1. The state and each county, city, township, incorporated village and school district therein.

2. Every person, firm and private corporation, including any public service corporation, that has in its service three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract or [of] hire, express or implied, oral or written. Any member of a partnership, firm or association, who regularly performs manual labor in or about a mine, factory or other establishment, but not including a household establishment, shall be considered a workman or operative in determining whether or not such person, firm or private corporation, or public service corporation has in its service three or more workmen. The income derived from such labor shall be reported to the commission as part of the payroll of such employer, and such member shall thereupon be entitled to all the benefits of an employee as defined in this act.

"employee," "workman" or "operative" is contained in Section 1465-61, Ohio General Code.⁷ These two sections are to be construed in *pari materia*.⁸

With respect to employers, the act is made applicable to specified public employers, and to all private employers, including public service corporations, with certain exceptions and limitations, which are hereinafter discussed. The applicability of the act to employees depends upon two things; (1) the existence of the employer-employee relationship, and (2) the nature and character of the employment.

(a) *Existence of the Employer-Employee Relationship:*

Under the scheme of the Ohio act an injured workman is not entitled to compensation if, at the time of his injury, the rela-

⁷ Ohio General Code, Sec. 1465-61. The term "employee," "workman" and "operative" as used in this act shall be construed to mean:

1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, except any elected official of the state, or any county, city, township, or incorporated village, or members of boards of education. Provided that nothing in this act shall apply to police or firemen in cities where the injured policemen or firemen are eligible to participate in any policemen's or firemen's pension funds which are now or hereafter may be established and maintained by municipal authority under existing laws, unless the amount of the pension funds provided by municipal taxation and paid to such police and firemen shall be less than they would have received had the municipality no such pension funds provided by law; in which event such police and firemen shall be entitled to receive the regular state compensation provided for police and firemen in municipalities where no policemen's or firemen's pension funds have been created under the law; less, however, the sum or sums received by the said policemen or firemen from said pension funds provided by municipal taxation, and the sum or sums so paid to said policemen or firemen from said pensions shall be certified to the industrial commission of Ohio by the treasurer or other officer controlling such pension funds.

2. Every person in the service of any person, firm, or private corporation, including any public service corporation, employing three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer.

⁸ *State ex rel. Bettman v. Christen*, 128 Ohio St. 56, 190 N. E. 233 (1934); *Industrial Commission v. Rogers*, 34 Ohio App. 196 (1929); *Industrial Commission v. Pora*, 100 Ohio St. 218, 125 N. E. 662 (1919); *Industrial Commission v. Weigandt*, 102 Ohio St. 1, 130 N. E. 38 (1921); *Industrial Commission v. Lewis*, 125 Ohio St. 296, 181 N. E. 136 (1932).

tion of employer and employee did not exist, or if the workman were not under an "appointment or contract of hire."⁹

For example, in *Industrial Commission v. Bateman*,¹⁰ a clerk employed by the City of Hamilton was discharged. He appealed to the civil service commission for reinstatement. While in attendance at the commission's hearing he tripped on a rug and was injured, the injury causing his death eight months later. Although the hearing before the commission resulted in his reinstatement, compensation was denied on the ground that at the time of sustaining his injuries the relationship of employer and employee did not exist. The court further held that the reinstatement did not reach back to the date of the unlawful discharge.

The test for the determination of the existence of the employer-employee relationship was promulgated by the Ohio Supreme Court in *Coviello v. Industrial Commission*,¹¹ wherein the court held that "the controlling question in determining whether the relationship was that of employer and employee is the one of pay."¹² Thus, there must be a "contract of hire," express or implied, under which there is an obligation that the person denominated the employer pay the person employed. Absent this obligation, the relationship cannot exist.

In the *Coviello* case, the claimant entered into a contract to lease a taxicab at a stipulated, unconditional rental per day, with no duty to account for fares collected from its operation. Printed rules setting forth certain directions to be followed were given to the driver. These included courtesy and neatness of appearance, reports to be made to the cab company at its nearest stand upon discharge of passengers, immediate reports of accidents, prompt response to calls, wearing of a uniform cap, and possession and study of a city street directory. There were requirements as to conduct, manner of driving, and other regulations, which, it appears, were in the main a statement of the city (Cleveland) ordinance requirements. The driver was not limited to any zone or designated section of the city, nor was he required to return to any particular place. The contract further provided that the driver was "not to be considered as an em-

⁹ *Industrial Commission v. Bateman*, 126 Ohio St. 279, 185 N. E. 50 (1933).

¹⁰ *Ibid.*

¹¹ 129 Ohio St. 589, 196 N. E. 661 (1935).

¹² *Id.* at 592.

ployee of the cab company," but merely "as a hirer of a taxicab," and the driver agreed that he would not make any claim for compensation against the cab company as an employee.

Brushing aside all other factors as irrelevant, the court held that the existence of the employer-employee relationship revolved solely about the question of the duty of the alleged employer to pay compensation for the services rendered. Finding that no such obligation existed, the claim was denied.¹³

The *Coviello* case was decided after the *Bateman* case, but applying the doctrine of the *Coviello* case to the *Bateman* case, it may well be argued that if the claimant is unlawfully discharged and retroactive compensation awarded for the interim period to his reinstatement, the local government was under an obligation to pay wages to such an employee during that time, and, therefore, the unlawful suspension did not obviate the employer-employee relationship. This argument may well avail if a situation similar to that of the *Bateman* case arises again.

¹³ In determining whether or not the employer-employee relationship existed, the court said, at p. 593: "The payment of the amount stipulated for the use of the taxicab is not contingent upon earnings—not conditioned upon business done or fares collected. If the rental charges were calculated upon a percentage basis whereby an accounting of fares collected was required, the arrangement might be construed to be one for payment of the driver upon the basis of a percentage of the earnings of the taxicab; but, being for a fixed sum per day for the use of the taxicab, it is by its express terms an absolute and unconditional obligation to pay for the use of the taxicab, regardless of earnings. There being no claim that the terms of the contract in that respect were in anywise avoided or evaded in practical operation, it is impossible to make it a 'contract for hire.'"

Prior to the *Coviello* case, the Ohio Supreme Court expressed some doubts about the doctrine of compensation constituting the determinative factor. In *Industrial Commission v. Shaner*, 127 Ohio St. 366, 188 N. E. 559 (1933), the court denied compensation to an appraiser in a replevin suit on the ground that receipt of compensation by the claimant depended upon the realization of costs in the action. The court said, at p. 368: "The general rule is that the matter of compensation is not usually decisive of the relationship of employer and employee, but the manner and source of payment for services is a circumstance entitled to weight in a case of doubt and may sometimes determine the question."

In spite of the court's doubts, it felt compelled to distinguish the *Shaner* case from its earlier decision of *Industrial Commission v. Rogers*, 122 Ohio St. 134, 171 N. E. 35 (1929), where compensation was awarded to a juror injured while so serving. The court there granted compensation, pointing out that a juror was under an appointment of hire by the county, and received compensation no matter what might be the result of his services. The distinction drawn by the court seems tenuous at best.

The *Coviello* case, then, is the ultimate resolution of the problem and a final, firm stand by the Ohio Supreme Court on the rule to be applied in determining the existence of the employer-employee relationship.

The *Coviello* case was followed in the recent case of *Drexler v. Labay*,¹⁴ where an action was brought on the ground of common-law negligence by a sixteen year old boy who was engaged by defendant's employee to help extricate a large truck from soft ground. In so doing, plaintiff was injured. The defense raised to this action was that plaintiff was an employee of defendant and should have sought recovery under the workmen's compensation act. The court held that there was not an employer-employee relationship between the parties because defendant's employee had no right to hire the plaintiff; and there was not, therefore, any "contract of hire" essential to establishing the relationship. Plaintiff was, therefore, permitted to recover.¹⁵

The *Drexler* case serves to make a point which should be here noted; namely, that when the right of an injured workman to compensation is barred under the act, all of his rights to recovery under the common-law are preserved. The Act provides,¹⁶ therefore, that employers who are not amenable under the act, as for example, if they have less than three employees, may elect to pay premiums into the state insurance fund and

¹⁴ 155 Ohio St. 244, 98 N. E. 2d 410 (1951).

¹⁵ See also: *Krull v. Triangle Dairy Co.*, 59 Ohio App. 107, 17 N. E. (2d) 291 (1937); *Cloverdale Dairy Co. v. Briggs*, 131 Ohio St. 261, 2 N. E. 2d 592 (1936).

¹⁶ Ohio General Code, Sec. 1465-71:

"Any employer who employs less than three workmen or operatives regularly in the same business, or in or about the same establishment, who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employee, wherever occurring, during the period covered by such premiums, provided the injured employee has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice shall be deemed a waiver by the employee of his right of action as aforesaid.

"Any person who employs one or more workmen, operatives or servants who are not employees within the classification defined in sections 1465-60 and 1465-61 of the General Code, who shall pay into the state insurance fund the premiums provided by this act shall not be liable to respond in damages at common law or by statute, for injuries or death of any such employees, wherever occurring, during the period covered by such premiums, provided the injured employee has remained in the service of such person with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice shall be deemed a waiver by the employee of his right of action as aforesaid if such employer shall give written notice to such employee or servant that he has made such payment of premium into the state insurance fund."

thereby receive the benefits of the act for themselves and their employees. The same provisions are made for the state and all political subdivisions thereof.¹⁷

(b) *Nature of the Employment:*

Assuming all of the tests of the prior sections are met, the workman may still not recover compensation under the act unless he is "regularly" employed "in the usual course of trade, business, profession or occupation of his employer," and such employment must not be merely "casual."¹⁸

One may immediately note, with displeasure, that these terms are so nebulous as almost to defy description, and the courts appear to have fruitlessly struggled to define them. Any

¹⁷ Ohio General Code, Sec. 1465-716. (State and political subdivisions thereof may contract with industrial commission to cover groups or persons not considered employees under Section 1465-61; contract provisions; payment of premiums; benefits payable; separate records to be kept.)

"If the state or any political subdivision thereof, including any county, township, city, village, school district, and any institution or agency of the state, shall employ, enlist, recruit, solicit or otherwise secure the services of any organization, association or group of persons and the members thereof, including volunteer firemen, civilian defense workers and auxiliary policemen and patrolmen, the individual members of which are not, by reason of such service, employees as defined in paragraph 1 of Section 1465-61 of the General Code or if the state or any political subdivision thereof shall desire to secure workmen's compensation in respect of any volunteer fireman, policeman, deputy sheriff, marshal or deputy marshal, constable or other person in its service in the event of the injury, disease or death of such person while engaged in activities called for by his position but not such as would entitle such person to compensation as an employee as defined in paragraph 1 of Section 1465-61 of the General Code subject however to the limitations contained in the second sentence of paragraph 1 of section 1465-61 of the General Code the state or such political subdivision may contract with the industrial commission for coverage of such persons under the workmen's compensation law while in the performance of such service. Such contract shall contain provisions for the determination of premiums, average weekly wages or their equivalent, and the identity of the persons covered and such other provisions as may be necessary in each case to establish or define the risk and determine claims arising thereunder. Payment of premiums by the state or a political subdivision shall be made in the manner as is provided with respect to workmen's compensation premiums payable by the state or a political subdivision and at such times as may be provided by such contract. Upon execution of such contract, the persons covered thereby shall be entitled to the same benefits, payable from the public fund, which are accorded to employees as defined in paragraph 1 of section 1465-61 of the General Code.

"For the purpose of statistical and like information the industrial commission shall keep a separate record of the experience of the individual risks and groups of similar risks under such contracts." Eff. 9-18-51.

¹⁸ Ohio General Code, Sec. 1465-61, par. 2; *supra* note 7.

criticism of the unsuccessful efforts of the courts to define these terms does not mean to imply that the results reached in the cases are necessarily wrong, but rather that the legislative enactments employing such tools make the establishment of definitive rules exceedingly difficult. It is not the Ohio law alone which has seen fit to use this vague and uncertain language, and thus put the courts to great stress to define their scope and meaning.¹⁹ Perhaps legislative draftsmanship requires the use of shorthand language, but the purpose of such use would appear to be defeated when the courts are required to strain their imaginations to explain the limitations intended by the language used.

To compound the difficulty, the Ohio Legislature, in 1917, amended paragraph 2 of Section 1465-61²⁰ by substituting the conjunctive "and" for the disjunctive "or" in the last clause, which now reads:

"but not including any person whose employment is but casual *and* not in the usual course of the trade, business, profession or occupation of his employer."

The courts' response to the subtle intendment of the legislature was to leave the word "casual" in suspended inanimation, and to hold that if the employment is within the usual course of the trade, etc. of the employer it is "regular," and if it is "regular" it is *not* "casual."²¹ The necessary result of this syllogistic reasoning is that the words "regular" and "casual" are meaningless in a practicable sense, and the test of coverage in this respect is whether the work performed is within the usual course of the trade, etc. of the employer's business. Perhaps an analysis of the cases concerning these terms will serve to clarify the limitations placed thereon by the courts.

In *State ex rel. Bettman v. Christen*²² the claimants were painters who were injured when they fell from a scaffold while in the employ of a painting and decorating contractor. The contractor was amenable to the workmen's compensation act, but had failed to comply. He resisted the assessment of compensation awards against him on the ground that he was not an employer

¹⁹ See Anno's: 15 A. L. R. 735; 33 A. L. R. 1452; 60 A. L. R. 1195; 107 A. L. R. 934.

²⁰ 107 Ohio Laws, 157.

²¹ *State ex rel. Bettman v. Christen*, 128 Ohio St. 56, 190 N. E. 233 (1934).

²² *Ibid.*

within the contemplation of the Act at the time of the injuries. The court, in holding the defendant liable, was called upon to construe the meaning of the words "regular employment" and "casual employment." The language of the court is significant:

"Under Section 1465-61, if the employee is regularly employed, he is an employee to be counted in the regular employment demanded under Section 1465-60 for the purpose of fixing the status of the employer within the provisions of the act. In other words, if a man is employed 'regularly,' obviously his employer employs him 'regularly,' under the wording of these sections.

"What then is regular employment, under Section 1465-61?

"We cannot escape the significance of the fact that under Section 1465-61, which defines an employee, the word 'regularly' has been further defined by the addition of the phrase 'but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer.'

"Now 'casual,' according to the lexicographers, is the antonym for 'regular.' The Century Dictionary defines 'casual' as 'occasional: coming at uncertain times, or without regularity, in distinction from stated or regular; incidental: as casual expenses,' and this contradistinction in the terms is emphasized by the statute, which, after stating that the test of the status of the employee is that he be 'in the service of any person . . . employing three or more workmen or operatives regularly in the same business,' adds 'but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer.'

"Under the familiar rule of *expressio unius*, any person whose employment is not casual and is in the usual course of trade, business, profession or occupation of his employer, within this definite statutory provision, is regularly employed.

"Under the weight of authority as it now exists, the test as to what constitutes 'casual' employment is not the length of the employment, but the nature of the employment."

Leaving the *Christen* case for a moment, it may be well to go on to other pronouncements of the courts before summarizing the rules of limitation applied.

In *Smith v. Brockamp*,²³ a carpenter was engaged to assist in erecting an addition to a tavern and was injured in perform-

²³ 81 Ohio App. 381, 77 N. E. 2d 727 (1947).

ing the work. In allowing the claim for compensation the court, nonetheless, distinguished this case from the *Christen* case on its facts, pointing out that in the *Christen* case the facts were squarely within the concept of "usual course of trade, etc.," since a painter was engaged to perform his work for a painting contractor, but that in the *Smith* case a tavern keeper had engaged the services of a carpenter. Nonetheless, the work performed (increasing the tavern's facilities to accommodate more patrons) was directly concerned with furthering the business of operating a tavern. To exemplify its position, the court said:

"By way of illustration, if a lawyer, whose office is not maintained in his residence, should employ three or more workmen to build an addition thereto, the employees so engaged would not be included in the coverage of the act, but if, on the other hand, a physician, who uses his home for the purpose of practicing his profession as well as for his residence, employed three or more workmen to build an addition thereto, which would increase the facilities of his practice, then such employees would be included in coverage."²⁴

The court, in its opinion, referred to the *Kukes* case²⁵ as authority for the proposition that a claimant is covered when his employment is of the same business as that of his employer.²⁶

In *Holden v. Beebe Fuel Company*²⁷ a painter contracted with a retail coal dealer to paint the buildings occupied by the latter in its business. The court found that the claimant was an independent contractor, and then held, gratuitously, that he was only the "casual" employee of the company. This dictum by the court was ignored in the *Smith* case,²⁸ and does not accord with the decision of that case.

The foregoing decisions would appear to establish three basic rules for determination of whether the work performed is within the "usual course of trade, business, profession or occupation of the employer":

²⁴ *Id.* at 386.

²⁵ *Industrial Commission v. Kukes*, 53 Ohio App. 309, 4 N. E. 2d 988 (1935).

²⁶ In that case the owner of an orchard was held to be an employer within the act, although the claimant was employed for a short time during the season to pick apples.

²⁷ 60 Ohio App. 430, 21 N. E. 2d 874 (1938).

²⁸ See comments respecting this decision in *Smith v. Brockamp*, 81 Ohio App. 381, 394.

- (1) if the skill of the employee is in the same business as the employer, he will be included in coverage (e.g. a painter working for a painting contractor).
- (2) if the work performed is in connection with a business purpose of the employer, the injured workman will be covered.
- (3) if the work performed is not in same business as that of the employer nor connected with a business purpose of the employer, the injured workman will not be covered.

Since the courts have placed no time limits on the period of employment required to meet the qualification of "regular" employment²⁹ and since that phraseology was held to be the antonym of "casual" employment, the resultant confusion of terminology has served, in effect, to make these words useless as practical tools of operation. They may, therefore, be largely ignored, since the courts have pitched their decisions solely upon the "usual course of trade, etc." concept, which, in the last analysis, seems to result in substantial justice within the scope of the statutory intendment.

Two suggestions with regard to this paragraph of the statute are herewith made:

- (1) the statute should be rewritten, omitting completely any reference to "regular" or "casual" employment, since these words are useless as practical tools in the operation of the statute, or
- (2) the words "regular" and "casual" should be specifically defined in the statute so as to give them a substantial meaning in construing some valid legislative intent.

II. *Interest in the Business or in a Corporation or Firm Owning the Business as Affecting Right to Compensation:*

Section 1465-60, Ohio General Code, provides that "any member of a partnership, firm or association, who regularly performs manual labor in or about a mine, factory or other establishment . . . shall be considered as a workman or operative in determining whether or not such person, firm or private corporation, or public service corporation has in its service three or more workmen."³⁰ The corollary statute, however, Section 1465-

²⁹ In *Industrial Commission v. Kukes*, 53 Ohio App. 309, 4 N. E. 2d 988 (1935), the court said: "The length of time of employment of a claimant is not controlling."

³⁰ *Supra* note 6.

61, defining "employees," does not specifically include such persons within its coverage. This omission has necessitated a judicial determination as to whether such persons are to be included in coverage under the act.

The courts of Ohio were first called upon to adjudicate the question in *McMillen v. Industrial Commission*,³¹ where the claimant was a member of a partnership composed of three persons, whose business was the construction of roads. The partnership agreement provided that the claimant should devote all of his time to the affairs of the company, and was to receive wages for his work. While acting as foreman on a road construction project he was injured, and made claim for compensation, which was denied. The basis for the denial of compensation was that a member of a partnership could not at the same time act in the dual capacity of employer and employee, and was not, therefore, included within the coverage of the act.

Subsequently, Section 1465-68, Ohio General Code,³² was amended by adding thereto a provision specifically including members of a partnership within the coverage of the Act if their injury or death occurred while engaged in the partnership business, and if they are paid a fixed compensation for their services.³³

In the case of *Goldberg v. Industrial Commission*³⁴ however, the Ohio Supreme Court ruled that the 1925 amendment providing for the inclusion of members of a partnership within the coverage of the act was unconstitutional and void, since such members of partnerships were at once an employer and employee, and that the legislature was, therefore, without power to enact the amendment. The decision was affirmed in *Westenberger v. Industrial Commission*.³⁵ The law of Ohio, therefore, with respect

³¹ 13 Ohio App. 310 (1920).

³² 111 Ohio Laws, 218.

³³ The 1925 amendment, read as follows: "Any member of a partnership, firm or association composed of two or more individuals, who is paid a fixed compensation for services rendered to the partnership, firm or association, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, shall be paid such compensation and benefits as are provided in case of other injured, diseased or killed employees by this act, provided such partnership, firm or association includes in the payroll furnished by it to the Industrial Commission the compensation of such member and pays the premium based thereon."

³⁴ 131 Ohio St. 399, 3 N. E. 2d 364 (1936).

³⁵ 135 Ohio St. 211, 20 N. E. 2d 252 (1939).

to members of an unincorporated business organization, excludes persons having an ownership interest therein from coverage under the Act. The law is to the contrary, however, with respect to employees of a corporation, irrespective of the degree of ownership of the claimant.

The question presented for decision in *Kuehn v. Industrial Commission*³⁶ was whether an officer, director and shareholder of a corporation, injured while engaged in performing manual labor for the corporation, was its employee and included in coverage under the Act. Counsel for the Commission maintained that the position of the claimant here was no different from that of a member of an unincorporated business organization and should not be included in coverage, relying upon the *Goldberg* and *Westenberger* cases. The court awarded compensation to the claimant, although he was the president and general manager of the corporation and owner of one-half of the capital stock of the corporation.

The distinctions drawn by the court between this situation and one involving a member of a partnership were based on the following grounds: (1) that the decisions in the *Goldberg* and *Westenberger* cases related solely to members of a partnership and did not preclude coverage of an employee of a corporation; (2) that in a small corporation it is often necessary for executives to perform manual labor; (3) if the corporation had hired another person to perform the work done by Kuehn at the time of his injury, such employee would have been included in coverage under the act; and (4) that the state, through the Industrial Commission, had required the corporation to comply with the law, had collected the premiums covering its payroll including the wages of Kuehn, which took away his right to recover for his loss against the corporation.

It is interesting to note that with the exception of two judges, the composition of the court which ruled on the *Kuehn* case was the same as that in the *Goldberg* and *Westenberger* cases. The court, however, gave no signs of recanting on its decisions in the partnership cases.

With the exception of the first ground for the court's decision in the *Kuehn* case, the others would seem to apply with equal force to a member of an unincorporated association, and the distinction is, at best, a tenuous one. For the very reasons stated

³⁶ 136 Ohio St. 313, 25 N. E. 2d 682 (1940).

for the decision in the *McMillen*^{36*} case one might well argue that the result should have been just the converse. If the mere intervention of the fiction of corporate entity would justify the distinction in the minds of some, then the liberal social policy underlying workmen's compensation would be defeated by unwarranted legalism. Moreover, if an employee of a corporation owned all of the capital stock of a corporation would he not in actuality be both the employer and employee?

The *Kuehn* case was followed in *Hillenbrand v. Industrial Commission*,³⁷ but the court went even further, and stated that it could perceive of no justification for a distinction between an officer of a corporation engaged in manual labor and one not so engaged.³⁸ This view of the court, however, may be disregarded as obiter dictum, since one of the prime criteria laid down in the *Kuehn* case for inclusion in coverage was performance of manual labor by the claimant.

III. Relation of the Act to Employees of

Independent Contractors or Subcontractors:

Although many of the workmen's compensation acts did not originally include them, provisions have now been added in every jurisdiction making "principals," "principal employers," "general contractors," and the like liable for compensation to employees of independent contractors and subcontractors. Such provisions vary in the different states, appearing in nearly as many forms as there are jurisdictions.³⁹

The chief purpose of provisions of this type is to protect the employees of an independent contractor or subcontractor who is not financially responsible, and to prevent employers from relieving themselves of liability by doing through independent contractors what they could not otherwise do through their own employees.

^{36*} *Supra* note 31.

³⁷ 72 Ohio App. 427, 52 N. E. 2d 547 (1943).

³⁸ *Id.* at 431: "... it appears to this court that the references to manual labor, payroll reports and premium payments in the *Kuehn* case were and are merely descriptive of the actual facts and were so used, and were not nor intended to be used as words of limitation."

³⁹ For an exhaustive analysis of the multiplicity of rules applied by other jurisdictions to this problem, see Anno's: 3 A. L. R. 1181; 34 A. L. R. 768; 58 A. L. R. 1467; 151 A. L. R. 1359; 152 A. L. R. 816; 166 A. L. R. 813.

The Ohio Act provides that:

"every person in the service of any independent contractor or subcontractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for his employment or occupation, or to elect to pay compensation direct to his injured and to the dependents of his killed employees, as provided in section 1465-69, General Code, shall be considered as the employee of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employees, or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer."⁴⁰

The employee is thus given the option as to which of the two he will hold liable for his compensable injury if neither has complied with the requirements of the act. Where, however, the independent contractor is amenable to the act and has complied therewith, the employee of such independent contractor has no such option.

The constitutionality of the statute was challenged in *DeWitt v. State ex rel. Crabbe*,⁴¹ on the ground that the employee of an independent contractor was in no sense the employee of the original contractor, and that the statute imposed undue penalties and burdens upon the original contractor. Conceding that factually the relationship of employer and employee did not exist between the original contractor and the employee of the independent contractor, the court, nonetheless, held the provision constitutional and valid as within the legislative power; that it was not an onerous and undue burden to place upon the original contractor the responsibility of seeing to the independent contractor's compliance with the provisions of the act; and that in a sense the employee of an independent contractor may be considered as working in the business of and for the benefit of the original contractor.

Where the independent contractor is amenable to the Act and does comply therewith, his employees cannot be construed to be the employees of the original contractor, and they are not barred from bringing an action for common-law negligence against the original contractor. This defense was unsuccessfully raised by an original contractor in an action against him for

⁴⁰ Ohio General Code, Sec. 1465-61, par. 3.

⁴¹ 108 Ohio St. 513, 2 Ohio L. Abs. 69 (1923).

injuries sustained. The court, in *Trumbull Cliffs Furnace Company v. Shackovsky*,⁴² held that it is only in the event of the sub-contractor or independent contractor *not* having complied with the law by failing to pay into the compensation fund, that the injured employee is deemed to be the employee of the original contractor.

The theory upon which this rule proceeds is that the statute is for the protection of the workman and not a shield for the original contractor. Parenthetically, it is interesting to note that the claimant in the *Trumbull* case had previously been awarded compensation by the industrial commission, but was, nevertheless, not barred from an additional recovery against the original contractor with no set-off, as pro tanto recovery, allowed against the industrial commission's award.

A somewhat different question arises, however, where the independent contractor employs less than three workmen and is not, therefore, amenable to the Act. The failure of the independent contractor to comply with the provisions of the Act under these circumstances does not give rise to the operation of paragraph 3, Section 1465-61, Ohio General Code, and such employee is not regarded as the employee of the original contractor. The court, in *Industrial Commission v. Everett*,⁴³ in denying compensation under these facts, pointed out that if the rule were otherwise, it would give a single employee of an independent contractor a right to compensation, but would give no compensation if he were an employee of a person, not an independent contractor, employing less than three workmen.

The foregoing discussion, of course, relates solely to the protection of employees of an independent contractor or sub-contractor. But what of the coverage of the independent contractor himself? An independent contractor is not an "employee" within the contemplation of the Act, and is not, therefore, covered by its provisions.⁴⁴

Ohio has adopted the common-law test of "control" as the means of determining whether the relationship is one of employee

⁴² 111 Ohio St. 791, 146 N. E. 306 (1924).

⁴³ 108 Ohio St. 369, 1 Ohio L. Abs. 868 (1923).

⁴⁴ *Firestone v. Industrial Commission*, 144 Ohio St. 398, 59 N. E. 2d 147 (1945); *Gillum v. Industrial Commission*, 141 Ohio St. 373, 48 N. E. 2d 234 (1943); *Behner v. Industrial Commission*, 154 Ohio St. 433, 96 N. E. 2d 403 (1951); *Furlong v. First Presbyterian Church of Walnut Hills*, 30 Ohio N. P. (N. S.) 561 (1933).

or that of independent contractor. Thus, the chief test in determining whether one is an employee or an independent contractor is the right to control the manner or means of performing the work.⁴⁵ Obviously, the question of whether or not "control" has been retained in sufficient degree is a question of fact to be decided in each case as it arises.⁴⁶ The control reserved must be as to the manner and means of doing the work and not merely as to the final result in order to negative the relationship of independent contractor.⁴⁷

IV. *Effect of Interstate Commerce and Extraterritorial Employment:*

(a) *Effect of Interstate Commerce on Coverage:*

It is now well established that the Federal Employer's Liability Act⁴⁸ supersedes and excludes the application of state laws, constitutional, statutory and common-law, including state workmen's compensation acts, which might apply to the liability of an interstate carrier for injury to its interstate commerce em-

⁴⁵ *Bobik v. Industrial Commission*, 146 Ohio St. 187, 64 N. E. 2d 829 (1946); *Behner v. Industrial Commission*, 154 Ohio St. 433, 96 N. E. 2d 403 (1951); *Gillum v. Industrial Commission*, 141 Ohio St. 373, 48 N. E. 2d 234 (1943); *Firestone v. Industrial Commission*, 144 Ohio St. 398, 59 N. E. 2d 147 (1945); *Industrial Commission v. Laird*, 126 Ohio St. 617, 186 N. E. 718 (1933); *Fisher Body Co. v. Wade*, 45 Ohio App. 263, 187 N. E. 78 (1933); *Sands v. Industrial Commission*, 16 Ohio L. Abs. 570 (1933); *Clifton v. Industrial Commission*, 52 Ohio L. Abs. 144 (1945).

⁴⁶ See cases cited, notes 44 and 45 *supra*.

⁴⁷ *Gillum v. Industrial Commission*, 141 Ohio St. 373, 382, 48 N. E. 2d 234 (1943), quoting from 27 Am. Jur. 488, Section 7:

"As a practical proposition, every contract for work to be done reserves to the employer a certain degree of control, at least to enable him to see that the contract is performed according to specifications. The employer may exercise a limited control over the work rendering the employee a mere servant for a relation of master and servant is not inferable from a reservation of powers which do not deprive the contractor of his right to do the work according to his own initiative, so long as he does it in accordance with the contract. The control of the work reserved in the employer which effects a master-servant relationship is control of the means and manner of performance of the work as well as of the result; an independent contractor relationship exists when the person doing the work is subject to the will of the employer only as to the result, but not as to the means or manner of accomplishment. Thus, a person employed to perform certain work is not necessarily a mere servant because the contract provides that the work shall be subject to the approval or satisfaction of the employer. Such a provision by the employer of the right to control the person employed as to the details or method of doing the work, but is only a provision that the employer may see that the contract is carried out according to the plans."

⁴⁸ 45 U. S. C. §§ 51 *et seq.*

ployees.⁴⁹ And except where the workmen's compensation acts expressly exclude from the application of the law employees of carriers engaged in interstate commerce, the general rule is also well settled that the state workmen's compensation acts are applicable to the claim of an injured employee who was not engaged in interstate commerce at the time of injury, although the carrier is engaged generally in interstate commerce. This area was not preempted by the Congress of the United States, and, therefore, the individual states have the power to legislate in this field, including providing coverage under workmen's compensation acts for employees of companies engaged in interstate commerce but whose injuries result from purely intrastate activities.

In the *Minnesota Rate Cases*⁵⁰ the United States Supreme Court said:

"The power of Congress to regulate commerce among the several states is supreme and plenary under the Constitution. The reservation to the state to legislate on questions affecting interstate commerce is only of such authority as is consistent with and not opposed to the grant of Congress, a grant which extends to every instrumentality or agency by which interstate commerce may be carried on. No state may impose a direct burden on interstate commerce; but within certain limitations there remains to the states, until Congress acts, a wide range for the exercise of the power appropriate to territorial jurisdiction although interstate commerce may be affected."

It remains then to observe what Ohio has done with respect to its right to act in this field. Section 1465-98, Ohio General Code,⁵¹ provides that coverage under the workmen's compensa-

⁴⁹ Anno: 80 A. L. R. 1418.

⁵⁰ 230 U. S. 352, 33 S. Ct. 729 (1916).

⁵¹ Ohio General Code, Sec. 1465-98:

"The provisions of this act shall apply to employers and employees engaged in intrastate and also in interstate and foreign commerce, for whom the rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this Act by filing written acceptances, which, when filed and approved by the board, shall subject the acceptors irrevocably to the provisions of this Act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which the premiums herein provided have been paid. Payment of premiums shall be on the basis of the payroll of the workmen who accept as aforesaid."

tion act shall extend to all employers and employees engaged in intrastate and interstate commerce except where a rule of liability or method of compensation has been provided by the Congress of the United States. The intrastate character of the work performed must be clearly separable from interstate activities. Since the confines of the area in which this statute may operate are rather loosely defined, undoubtedly intentionally so, an analysis of the cases decided hereunder will disclose how this vague concept has been translated into a particularity of detail.

In *Spohn v. Industrial Commission*,⁵² a resident of Ohio entered into a contract of employment with a Michigan corporation to act as an "over the road driver" between Michigan and Ohio. Claimant was injured in Ohio, where all of the operations of the company were purely interstate in character. In denying compensation the court held that: "the purpose of the Ohio workmen's compensation law is to protect Ohio workmen, but this does not mean that the purpose of the law is to protect Ohio citizens or residents. Both residence and citizenship are immaterial."⁵³ The court pointed out that while Congress had not pre-empted the field, it did not consider a workman employed in interstate commerce only, under a contract made outside of the State of Ohio with a non-resident employer, an "Ohio workman" within the contemplation of the Ohio Workmen's Compensation Act. The court's decision was based upon two factors: (1) that the work performed was purely interstate in character, and (2) that the contract of employment was entered into in another state. With respect to the second point, the court said:⁵⁴

"We are not here dealing with the rights of a workman injured in Ohio while engaged in intrastate employment. In this case, we are dealing with the rights of a workman whose employment was transitory and confined exclusively to interstate commerce . . . We see at once that where the work to be done is confined to a single state, but is to be performed in interstate commerce, *the lex loci contractus becomes an important consideration in determining whether plaintiff, a resident of Ohio and injured in Ohio, has a right to participate in the State Insurance Fund.*"⁵⁵

⁵² 138 Ohio St. 42, 32 N. E. 2d 554 (1941).

⁵³ Id. at 49.

⁵⁴ Id. at 47-8.

⁵⁵ Emphasis is the writer's.

But the *lex loci contractus* was largely minimized in the case of *Holly v. Industrial Commission*.⁵⁶ There the decedent was a resident of Pennsylvania and had entered into a contract of employment with a Pennsylvania corporation to work as a truck driver, transporting freight in Ohio in both intrastate and interstate commerce. *The injury causing death occurred while he was engaged purely in an interstate commerce activity in Ohio.* The Ohio Supreme Court permitted the grant of compensation, and distinguished this case from the *Spohn* case on two grounds: first, that here the employer had actually qualified and was paying premiums under the Ohio workmen's compensation Act, whereas in the *Spohn* case the employer had not; and, as the court in the *Spohn* case pointed out, since the employer there was engaged solely in interstate commerce it was, therefore, not amenable to the Act. Moreover, the court held that it could not force *Spohn's* employer to comply with the Act, since this would be an undue burden on interstate commerce. The second distinguishing ground was that *Holly* was engaged in both interstate and intrastate commerce in Ohio, indiscriminately as his employer directed, while *Spohn* was engaged solely in interstate commerce. The fact, however, that *Holly* was injured while engaged solely in interstate commerce, the court held, did not affect his right of recovery, since the employee was at other times engaged in intrastate commerce. In this respect, the court said:⁵⁷

" . . . the fact that the services being performed by the employee at the time of his injury were interstate in character is not controlling . . . Under the definitive language of Sections 1465-60 and 1465-61, Ohio General Code, an employee injured in the course of his employment is protected and covered regardless of the nature of his employment—whether interstate or intrastate in character—if his employer is within the provisions of the workmen's compensation law."⁵⁸

It is significant to note the shift of emphasis from the *lex loci contractus* of the *Spohn* case to the compliance of the employer in the *Holly* case. Although the latter factor does appear in the *Spohn* case, it does not appear to be the point of emphasis in the court's decision.

In *Hall v. Industrial Commission*,⁵⁹ the claimant was em-

⁵⁶ 142 Ohio St. 79, 50 N. E. 2d 152 (1943).

⁵⁷ *Id.* at 82.

⁵⁸ Emphasis is the writer's.

⁵⁹ 131 Ohio St. 416, 3 N. E. 2d 367 (1936).

ployed as a porter by an Ohio corporation to perform services on a bus line. The contract was entered into in Ohio, but the operation of the bus line was solely in interstate commerce. The claimant was injured outside the State of Ohio and while engaged solely in an interstate activity. Compensation was allowed on the grounds of the effect of the *lex loci contractus* and the fact that Congress had not pre-empted the field, thus permitting the operation of Section 1465-98. The employer had been amenable to the Act in Ohio and had complied therewith. The *Spohn* case, decided after the *Hall* case, was distinguished primarily on the ground of the *lex loci contractus*.

The foregoing cases all concerned themselves with the effect of interstate commerce where the crossing of state boundaries were concerned. But what of the Ohio employee, working in Ohio on equipment solely within the state and not across state borders? Section 1465-98⁶⁰ provides for coverage only where the work is intrastate in character and is "clearly separable and distinguishable from interstate commerce." The question arose in *Klar v. Erie R. R. Company*,⁶¹ where the plaintiff was engaged in working on a freight car which, after being used for an interstate shipment of coal and thereafter unloaded, was on a side-track awaiting disposition. The court held that the freight car, while not in use, was in intrastate rather than interstate commerce. Compensation was, therefore, awarded by the industrial commission. The plaintiff, however, was unsuccessful in attempting a separate recovery from the defendant in this case on grounds which are not relevant to the problem here discussed.

In general, the tests for ascertaining when employment is interstate in character are set forth in *Moore v. Industrial Commission*.⁶² One can, of course, conceive of countless situations in

⁶⁰ Note 51 *supra*.

⁶¹ 118 Ohio St. 612 (1928).

⁶² 49 Ohio App. 386, 197 N. E. 403 (1934). At pp. 390-1: "Whether the plaintiff was engaged in interstate commerce at the time of his injury is to be determined by the following rules:

- 1). The test of employment in interstate commerce, which determines the application of the Federal Employer's Liability Act, is whether the employee at the time of the injury was engaged in interstate commerce, or in any work so closely related to it as to be practically a part of it.
- 2). The tracks, bridges, roadbed and equipment of a carrier in actual use in interstate commerce have a definite interstate character as instruments of such commerce and give such character to those employed on them. (*Continued on following page.*)

which the facts would raise doubts as to whether the character of the work performed was intrastate or interstate. Such situations will have to be decided by the courts on their facts as they arise.⁶³

(b) *Extraterritorial Employment:*

Unlike the cases involving interstate commerce, extraterritorial employment involves work purely intrastate in character, but acts performed in other states by residents of Ohio. The *Holly* case⁶⁴ made it quite clear that residents of another state are contemplated within the coverage of the Ohio Act where the injury occurs in Ohio, and where the employer has complied with the Ohio Act. But what of Ohio residents injured in purely intrastate activities performed in another state?

In *Industrial Commission v. Gardinio*,⁶⁵ a resident of Ohio entered into a contract in Ohio with an Ohio corporation to perform services in Pennsylvania, where the employer was engaged in the construction of a bridge. Claimant was injured in Pennsylvania and filed his claim with the Ohio commission. In denying compensation the court said:⁶⁶

"Surely the mere fact that the contract was entered into in Ohio for services, none of which were to be performed within this state, but in other states and countries, should not bring the employee within the Ohio workmen's compensation law unless the language of the statutes clearly

- 3). Equipment withdrawn from interstate commerce for repair does not give an interstate character to the work of repairing it, if the repair is a definite withdrawal from service and placement in new relations and not merely a temporary interruption of such service.
- 4). An employee is within the Federal Employer's Liability Act if the employment in which he is engaged at the time of his injury is an incident to interstate commerce, even though it may be likewise an incident to interstate commerce.
- 5). An employee engaged in clearing tracks on a right of way of a railroad company to facilitate the movement of interstate commerce is engaged in interstate commerce.
- 6). As the power of Congress is restricted to the regulation of interstate commerce, the question of whether the Federal Employer's Liability Act, which regulates the liability of carriers engaged in interstate commerce, is applicable, is a federal question, and the decisions of the Federal Courts are controlling."

⁶³ For a variety of fact situations in which the question has arisen, see *Annos*: 80 A. L. R. 1418; 133 A. L. R. 956; 148 A. L. R. 873.

⁶⁴ *Supra* note 56. See also discussion in body of article.

⁶⁵ 119 Ohio St. 539, 166 N. E. 758 (1929).

⁶⁶ *Id.* at 543.

so provides. The mere fact that the contract was made in this state is not controlling."⁶⁷

However, a different result was reached in *Prendergast v. Industrial Commission*,⁶⁸ where an engineer was employed by an Ohio company to work in several of its out of state offices. He received directions from the company's home office and was in constant communication with them. While the basic facts of this case are substantially identical to that of the *Gardinio* case, the court took a somewhat different view of the situation. In allowing compensation to Prendergast, the court distinguished this case from the *Gardinio* case on the ground that the facts were different; that is to say, the State of Ohio had an interest in Prendergast which was lacking in *Gardinio*, because "all of the cost plus the profits on the goods sold by Prendergast flowed back to Ohio to the benefit of his employer and to the economic advantage of the state,"⁶⁹ whereas this was not true of *Gardinio's* services. Therefore, reasoned the court, Ohio had an interest in Prendergast's economic welfare. "In other words," said the court, "an employee injured outside the state may recover under the Ohio act if the employing industry and his relation thereto are localized in Ohio."⁷⁰

But the localization of interests in the *Gardinio* case were no different from that of Prendergast. The profits accruing to *Gardinio's* employer, an Ohio corporation, were no different from those accruing to Prendergast's employer, and the court did not state the fact to be that *Gardinio's* employer had no other employees in Ohio who might benefit by the work performed in Pennsylvania. Perhaps the court intended to recede somewhat from the harsh result of the *Gardinio* case. If this be so, the ground upon which its decision is pitched in the *Prendergast* case would seem to have no validity since the workmen's compensation act was not enacted for direct economic benefits to an employer nor to the state's general economic welfare, but rather for the protection of injured workmen.⁷¹

⁶⁷ Compare this application of *lex loci contractus* with that in the Hall and Spohn cases, *supra*, notes 59 and 52.

⁶⁸ 136 Ohio St. 535, 27 N. E. 2d 235 (1940).

⁶⁹ *Id.* at 543.

⁷⁰ *Ibid.*

⁷¹ A summation of the factors upon which courts have relied in determining problems relating to extraterritorial employment appears in 50 HARVARD L. REV. 1119, 1171: (*Continued on following page.*)

V. Injuries Incurred in Maritime or Admiralty Activities:

In *Southern Pacific Co. v. Jensen*,⁷² the United States Supreme Court ruled that the New York Workmen's Compensation Law, which substituted a new remedy in lieu of that at common law, was, as applied to an injury to a longshoreman, while unloading in New York an ocean-going steamship plying between ports in different states, invalid as conflicting with Article 2, Section 2 of the United States Constitution, providing that the judicial power of the United States should extend to all cases of admiralty and maritime jurisdiction; and conflicted also with Article 1, Section 8, giving Congress power to make all laws necessary to carry into execution the powers vested in the Federal Government, and with Judicial Code Sections 24 and 256, giving the Federal District Courts exclusive judicial cognizance of all civil causes in admiralty, saving to suitors in all cases the right of the common-law remedies given. The court took the position that Congress had the paramount power to fix and determine the maritime law which should prevail throughout the country.⁷³

Subsequently, and undoubtedly because of the decision in the *Jensen* case, the Federal Judiciary Act, giving the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it" was amended by adding a clause which read, "and to claimants the rights and remedies under the workmen's compensation law of any state." It was thus pre-

"The decisions of courts frequently turn upon the relative importance given to certain factors in a specific case, such as (1) the place of contract of employment, supposedly carrying with it, as part of the contract, the law of the state in which the contract was made; (2) the specific provisions of the workmen's compensation act of the state of the employer with reference to its extraterritorial operation; (3) the state in which the employee's name and pay are included in payroll reports submitted by the employer; (4) the place of the accident; (5) the residence or domicile of the employee; (6) the place of the employee's activities or performance of the work assigned; (7) the right of recovery outside the state of employment; (8) the relation of the employer's activities or performance of assigned work to the employer's place of business, or situs of the industry; and (9) the place or state having supreme governmental interest in the employee, as affecting his social, business and political life."

⁷² 244 U. S. 205, 61 L. Ed. 1086, 37 S. Ct. 524 (1917).

⁷³ The Supreme Court then reaffirmed its position, in *Clyde S. S. Co. v. Walker*, 244 U. S. 255, 61 L. Ed. 1116, 37 S. Ct. 545 (1917).

sumed that it was then constitutional to apply the state workmen's compensation laws to matters of maritime jurisdiction.⁷⁴

The Supreme Court then, in *Knickerbocker Ice Co. v. Stewart*,⁷⁵ was called upon to determine whether the amendment to the Judicial Code was a lawful enactment by Congress respecting jurisdiction in maritime matters. By a divided court, it was held that Congress, in passing the amendment permitting the application of the state workmen's compensation acts to admiralty affairs, had exceeded its constitutional powers to legislate concerning rights and liabilities within the maritime jurisdiction, the majority of the court holding that the act virtually destroyed the harmony and uniformity which the Constitution contemplated and established, concerning admiralty jurisdiction.⁷⁶

So far, then, as the operation of the Ohio Workmen's Compensation Act is concerned, it may, obviously, apply only to non-maritime employment. The question of whether particular employment falls within the ambit of the Ohio act or is purely maritime in character must be a question of fact in each case. Only two cases appear to have been decided in Ohio on this subject, and compensation was denied in both as being employment of a maritime character only.⁷⁷ It is not inconceivable that work performed on navigable waters may still not be purely maritime

⁷⁴ *Cimmino v. John T. Clark & Son*, 184 App. Div. 745, 172 N. Y. Supp. 478 (1918); *Ruddy v. Morse Dry Dock & Repair Co.*, 107 Misc. 199, 176 N. Y. Supp. 731 (1919).

⁷⁵ 253 U. S. 149, 64 L. Ed. 834, 40 S. Ct. 438 (1920).

⁷⁶ The dissenting opinion of Justice Holmes, concurred in by Justices Pitney, Brandeis and Clark, would give effect to the intention of Congress by upholding the act as within the constitutional power of Congress and questioned the soundness of the reasoning of the majority that this clause violated the provision of the Constitution that the judicial power of United States Courts should extend to all cases of admiralty jurisdiction, because the act in question had the effect of making operative different rules in different states. It was noted that the constitutional provision in question merely defined the scope of the judicial powers of United States Courts and, aside from the matter of jurisdiction, it appeared to have no reference to the powers of Congress.

A similar, subsequent amendment, of June, 1922, was likewise held unconstitutional in *Farrel v. Waterman S. S. Co.*, 286 Fed. 284 (1923); and the principle of the *Knickerbocker Ice Co.* case was reaffirmed by the Supreme Court in *Messel v. Foundation Co.*, 274 U. S. 427, 71 L. Ed. 1135, 47 S. Ct. 695 (1927).

⁷⁷ *Tyler v. Industrial Commission*, 25 Ohio App. 444, 5 O. L. Abs. 262 (1927) (fisherman killed when returning on waters of Lake Erie while assisting in lifting nets out of the water); *American Shipbuilding Co. v. Aros*, 128 Ohio St. 258, 191 N. E. 2d (1934).

in character and, ergo, compensable, but such a fact situation has not yet been the subject of successful litigation in the Ohio courts.

VI. *Minors:*

Minors are now expressly included within coverage of the act,⁷⁸ and are deemed sui juris for the purposes thereof.⁷⁹ Moreover, coverage of minors is not affected by the fact that the minor has been illegally employed.⁸⁰

VII. *Policemen and Firemen:*

Section 1465-61, paragraph 1, Ohio General Code,⁸¹ provides that policemen and firemen who are eligible to participate in a pension fund established by municipal authority for their benefit shall be excluded from coverage under the act, unless the amount received from the pension fund is less than would have been received in the absence of such a pension fund, in which case the regular state compensation shall be awarded. The statute appears to be quite clear in its coverage and meaning and would seem to require no interpretation. However, several anomalous situations have arisen which have required a judicial interpretation of the statute.

In *Industrial Commission v. Flynn*,⁸² a fireman was killed in an accident on his way to combat a fire. The City of Toledo had a firemen's pension fund created under an ordinance of that city. Regulations governing the fund provided that in order to be eligible to participate, the particular fireman must be "permanently disabled, so as to render necessary his retirement from all service in said fire division." Since injuries of such severity are of comparatively rare occurrence, firemen of that city, as a class, do not participate in the pension fund. As the court pointed out: "A fireman in Toledo might sustain serious burns or broken bones which would make him incapable of doing any kind of work for a long period of time, and yet if he were not permanently disabled in such degree as to cause his retirement from the Toledo fire department he could not draw one penny from the pension fund."⁸³ The commission contended that since

⁷⁸ Ohio General Code, Sec. 1465-61.

⁷⁹ Ohio General Code, Sec. 1465-93.

⁸⁰ *Ibid.*

⁸¹ *Supra* note 7.

⁸² 129 Ohio St. 220, 194 N. E. 420 (1935).

⁸³ *Id.* at 225.

plaintiff was "eligible" to participate in the pension fund and was, therefore, not an "employee" under the meaning of Section 1465-61, General Code, and not entitled to workmen's compensation; that in order to qualify him as an "employee" under that section it must be first shown that he received a lesser amount from the pension fund than from the State Insurance Fund.

The court, however, rejected the commission's contention and awarded compensation. In so doing, the court said:⁸⁴

"Much depends upon the meaning to be accorded the word 'eligible' as used in Section 1465-61. If we say that injured firemen in the City of Toledo are eligible to participate in the firemen's pension fund of that city because under certain extraordinary conditions they may receive an allowance therefrom, the argument of counsel for the Industrial Commission that Captain Flynn was not an employee under Section 1465-61 should be followed. *However, if we give the word a broader and more comprehensive meaning in harmony with the intent and spirit of the workmen's compensation act, the right of the injured firemen as a class actually to participate in a pension fund should be made to test their eligibility to do so.* It is the clear purpose of Section 1465-61 in its present form dating from July, 1931 to provide for injured firemen out of the State Insurance Fund to the extent they are not provided for out of any pension fund. So, under this section, if an injured fireman is paid less from a pension fund than he would get as an injured employee receiving compensation wholly from the State Insurance Fund, the difference is paid from the State Insurance Fund.

*"In other words, the rights of injured firemen generally to share in a pension fund, and not the right of a particular injured fireman to do so, should constitute the test in determining their status."*⁸⁵

The decision is quite liberal, but cannot be criticized on that ground, since it accords with the general intent of the act.⁸⁶

⁸⁴ *Ibid.*

⁸⁵ Emphasis is the writer's.

⁸⁶ In an earlier case, *Industrial Commission v. Cramer*, 15 Ohio L. Abs. 408 (1933), the Court of Appeals of Mahoning County ruled, on an identical set of facts, that since the fireman had died rather than having been merely injured, his beneficiary could not recover compensation from the State Insurance Fund, since death of his decedent precluded participation in the pension fund. The court held that under Section 1465-68, dependents of an injured employee can recover or participate in the Workmen's Compensation Fund only when the injured employee was entitled to participate. Since the killed fireman was not eligible to participate, his widow, likewise, could not.

This decision has, of course, now been overruled by the *Flynn* case.

In *State ex rel. Cline v. Miller*,⁸⁷ it was held that a police pension could not be paid to a widow after she had received a maximum award from the industrial commission for the death of her husband. The court held that Section 1465-61, Ohio General Code, does not require the trustees of the fund to grant a pension or provide that a pension shall be paid in addition to a maximum award from the Workmen's Compensation Fund. The only provision of the statute is that if a pension to a policeman or fireman amounts to less than he would have gotten under the workmen's compensation act, the State Insurance Fund shall pay the difference.

VIII. *Needy Persons Put to Work by Local Government:*

In *Industrial Commission v. McWhorter*,⁸⁸ compensation for injury was sought by a person put to work by a municipality as part of its relief program. In granting compensation, the court noted that the work done by the claimant was the same as other workmen in the employ of the city, under the same supervision. The decision is based upon the thesis that it is socially imperative to maintain the dignity of those unfortunate persons who were and are required to apply for relief,⁸⁹ even though the court largely conceded that it could not find the claimant an "employee" within the technical provisions of the Act. The following excerpts from the Court's opinion are enlightening:

"Emphasis is laid upon the fact that claimant was an object of the city's bounty, a ward, a charge. It is contended that the relationship between the workman and the city was due to circumstances and not the result of free, mutual contract. It is stated there is no distinction between those who receive work relief and those who receive direct relief.

. . .

"... it may be stated that to treat relief workers as public wards would weaken the incentive to accept work when it is offered. The purpose of the law is to keep men occupied in gainful occupations so that they may not become idle paupers. . . .

"It seems to this court more in harmony with the spirit of work-relief legislation to hold the claimant to be an employee than to hold him to be a pauper or a ward. A sound public policy prompts the efforts of the state to preserve the

⁸⁷ 134 Ohio St. 445, 17 N. E. 2d 749 (1938).

⁸⁸ 129 Ohio St. 40, 193 N. E. 620 (1934).

⁸⁹ For decisions of the courts of other states based upon a similar reasoning, see *Annos*: 88 A. L. R. 711; 96 A. L. R. 1154; 127 A. L. R. 1483.

self-reliance of its citizens, even if at extra expense. It is important to preserve the character as to preserve the life of its citizens. . . . The evolution of public welfare has been from public 'charity' toward social justice. Courts should facilitate such development by an enlightened and liberal interpretation of all welfare laws."

Following the decision in the *McWhorter* case, the Ohio Legislature passed the enactment commonly known as the "Public Work-Relief Employees' Compensation Act."⁹⁰ Section 3496-2 provides that all sections of the Ohio General Code relating to the Workmen's Compensation Act shall apply to the "Public Work-Relief Compensation Act," except as otherwise provided. The sole exceptions relate to the nature of the remedies provided, but not as to the basic nature of the compensation awarded.

IX. *Persons Impressed Into Service to Aid in Making Arrests:*

Frequently a person is impressed into service to assist in arresting a criminal offender. The test of whether an injury incurred in performing such services is compensable under the act is two-fold: (1) there must be an emergency in existence at the time of the impressment into service, and (2) the officer must be one who has the legal capacity to create the employer-employee relationship.

In *Industrial Commission v. Turek*,⁹¹ a traffic policeman requested the claimant, at 4:00 o'clock P. M., to assist him later that night in apprehending a supposed thief. In so doing, the claimant was injured. Compensation was denied on the ground that no emergency existed at the time of the request for assistance, the impressment having taken place many hours prior to the apprehension of the thief. However, in *Mitchell v. Industrial Commission*,⁹² a deputy sheriff impressed the claimant into service with the words, "in the name of the law, you are a deputy sheriff." In attempting to apprehend the alleged "dangerous character," the claimant was injured. Workmen's compensation was granted to the claimant. The court pointed out that by virtue of the provisions of Section 2833, Ohio General Code, a deputy sheriff has the authority, in a case of emergency,

⁹⁰ Ohio General Code, Secs. 3496-1 to 3496-16, inclusive. (Effective May 17, 1931.)

⁹¹ 129 Ohio St. 545, 196 N. E. 382 (1935).

⁹² 57 Ohio App. 319, 13 N. E. 2d 736 (1936).

to call persons to his aid in making an arrest. This question was not discussed in the *Turek* case, which this court distinguished on the ground that here the claimant was impressed in service in an emergency.

In *Stoeckel v. Industrial Commission*,⁹³ compensation was denied to the claimant, who was injured in attempting to apprehend a fugitive in response to the call of a police officer of a municipality to "stop that man." This case was distinguished from the *Mitchell* case on the ground that the policeman, unlike the deputy sheriff in the *Mitchell* case, had no authority to make any person an "employee" of the municipality.

X. *Employees Engaged in Farming:*

Since Sections 1465-60 and 1465-61, Ohio General Code, are extremely broad in their language,⁹⁴ and do not specifically exclude farm laborers and their employers, they are, presumably, included within the coverage of the act. The question, however, does not appear to have been litigated in Ohio. Farm laborers do not fall within the coverage of the great majority of the workmen's compensation acts of other states,⁹⁵ and their exclusion from coverage under those acts has been upheld as constitutional on the ground that such exclusion does not constitute an arbitrary and unreasonable classification.⁹⁶

XI. *Domestic Employees:*

Domestic employees are expressly excluded from coverage under the act by Section 1465-61.⁹⁷

⁹³ 77 Ohio App. 159, 66 N. E. 2d 776 (1945).

⁹⁴ Ohio General Code, Sec. 1465-60 includes within its compass "all private employers."

⁹⁵ See Anno: 7 A. L. R. 1296.

⁹⁶ *Western Indemnity Co. v. Pillsbury*, 170 Col. 686, 151 Pac. 398 (1915); *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa 245, 154 N. W. 1037 (1915); *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308 (1911); *Mackin v. Detroit-Timken Axle Co.*, 187 Mich. 8, 153 N. W. 49 (1915); *Mathison v. Minneapolis Street R. Co.*, 126 Minn. 286, 148 N. W. 71 (1914); *Sayles v. Foley*, 38 R. I. 484, 96 Atl. 340 (1916); *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S. W. 556 (1916), *aff'd*, 249 U. S. 152, 63 L. Ed. 527, 39 S. Ct. 227 (1919).

⁹⁷ *Supra* note 7.