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ATTORNEY GENERAL OPINION NO. 86- 149

Frank C. Beyerl
Greenwood County Attorney
408 N. Main
Eureka, Kansas 67045

Re: Labor and Industries -- Workmen's Compensation --
Performance of Community Service

Synopsis: K.S.A. 1985 Supp. 44-508, as amended by L. 1986, ch. 189, §1, broadens the definition of "employer," and "workman, employee or worker" for purposes of community service work. This amendment to the Workmen's Compensation Act allows offenders sentenced or assigned to community service work to be covered by workers' compensation, during the time they are performing community service work, if the entity(ies) receiving or assigning such work so elect(s). In that K.S.A. 1985 Supp. 44-508, as amended, specifically includes persons performing community service work within the definition of "workman, employee or worker," we withdraw Attorney General Opinion No. 82-213, which concluded such a person is not a workman, employee or worker under the terms of the Workmen's Compensation Act prior to the amendment. Cited herein: K.S.A. 44-501 et seq.; K.S.A. 1985 Supp. 44-508, as amended by L. 1986, ch. 189, §1; Supplemental Note on House Bill No. 2891.

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Dear Mr. Beyer1:

As county attorney for Greenwood County, you request our opinion on a question involving the meaning of a recent amendment to K.S.A. 1985 Supp. 44-508. Specifically, you inquire as to whether the county will be liable for injuries which a juvenile or convicted DUI defendant incurs while performing community service work ordered by a judge. Your question concerns the definition of "employer" and "employee" as defined by the Kansas Workmen's Compensation Act, K.S.A. 44-501 et seq.

In 1982, Attorney General Opinion No. 82-213 concluded that an offender sentenced to community service is not a workman, employee or worker, as those terms are defined by K.S.A. 44-508(b) of the Workmen's Compensation Act, and is therefore not covered by the terms of the Act. This conclusion was based on numerous court decisions holding that for the provisions of K.S.A. 44-501 et seq. to apply, there must be an employer-employee relationship in existence. See Dorst v. City of Chanute, 185 Kan. 593 (1959), and cases cited therein at 597.

In 1982, K.S.A. 44-508(b) defined workman, employee or worker as follows:

"'Workman' or 'employee' or 'worker' means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include but not be limited to:

" . . . persons in the service of the state, or any department, agency or authority of the state, any city, school district, or other political subdivision or municipality or public corporation and any instrumentality thereof, under any contract of service, express or implied," (Emphasis added.)

Opinion No. 82-213 noted that the above definition looks to the existence of a "contract of service" between the employer and employee, which must exist before the other provisions of the Act come into play. Dorst v. City of Chanute, supra; Gaston v. San Ore Construction Co., 206 Kan. 254 (1970). The opinion found that any agreement made by a

convicted violator is with the court or prosecuting attorney and not the entity which receives the benefit of the service. Thus, the recipient of community service makes no agreement with the offender as to compensation, length of time to be served, deadline for completion or consequences of failure to perform assigned tasks of community service work. Likewise, in performing such work, an offender receives no compensation, but rather fulfills a condition of his or her sentence from the district or municipal court. Accordingly, Opinion No. 82-213 concluded that since no "contract of service" exists between the person performing community service work and the entity receiving community service work, the person performing the service is not a workman, employee or worker under K.S.A. 44-508(b), and is thus not covered by the terms of the Workmen's Compensation Act.

In 1986, the Kansas legislature changed the definition of "employer" and "workman, employee or worker" under the Workmen's Compensation Act, by amending K.S.A. 1985 Supp. 44-508(a) and (b). L. 1986, ch. 189, §1 now reads as follows:

"As used in the workmen's compensation act:

"(a) 'Employer' includes . . . (3) for the purposes of community service work, the entity for which the community service work is being performed and the governmental agency which assigned the community service work, if any, if either such entity or such governmental agency has filed a written statement of election with the director to accept the provisions under the workmen's compensation act for persons performing community service work and in such case such entity and such governmental agency shall be deemed to be the joint employer of the person performing the community service work and both shall have the rights, liabilities and immunities provided under the workmen's compensation act for an employer with regard to the community service work, except that the liability for providing benefits shall be imposed only on the party which filed such election with the director, or on both if both parties have filed such election with the director; for purposes of community service work,

'governmental agency' shall not include any court or any officer or employee thereof and any case where there is deemed to be a 'joint employer' shall not be construed to be a case of dual or multiple employment.

"(b) 'Workman' or 'employee' or 'worker' means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include but not be limited to: . . . persons performing community service work, but only to the extent and during such periods as they are performing community service work and if an election has been filed an election to extend coverage to such persons." (Emphasis added.)

As noted previously, Attorney General Opinion No. 82-213 concluded that offenders sentenced to community service work were not employees of the county, and were therefore not covered by the Workmen's Compensation Act. Taking into consideration the 1986 amendment to K.S.A. 1985 Supp. 44-508, you inquire whether the statute was specifically changed to cover individuals performing community service work.

While Kansas courts have yet to interpret K.S.A. 1985 Supp. 44-508, as amended, in our opinion the clear purpose of the amendment is to allow offenders sentenced or assigned to community service work to be covered by workers' compensation during the time they are performing work.

Section 1, subsection (a) broadens the definition of employer, as used in the Workmen's Compensation Act, to include the entity for which community service work is being performed and the governmental agency which assigned the community service work, if either has filed for an election to be covered under workers' compensation. In addition, the new language provides that both the entity receiving community service work and the entity assigning community service work shall be joint employers under the statute, if either has filed for the workers' compensation election. Further, both entities have the rights, liabilities and immunities provided under the Act for an employer with regard to community service work, except that liability for providing workers' compensation benefits shall be imposed only on the party that so elects. If both

parties file an election, both will be charged with liability. Finally, the court and its employees or officers will not be considered a governmental agency for purposes of community service work.

Section 1, subsection (b) likewise broadens the definition of "workman, employee or worker." The new language specifically states that under the Workmen's Compensation Act, the term employee can mean persons performing community service work. The amendment imposes limitations that a person assigned to community service is only an employee while he or she is performing the service. Further, the employer, as defined in section 1, subsection (a), must have filed an election to extend workers' compensation coverage to such person before he or she can become an employee under the Act.

In addition to the plain language of the statute, we refer to the Supplemental Note on 1986 House Bill No. 2891 to determine legislative intent. The note provides:

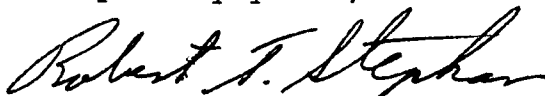
"H.B. 2891 amends the Workers' Compensation Law to allow offenders sentenced or assigned to community service work to be covered, during the time they are performing work, by workers compensation if either or both the entity(ies) receiving the benefit of the community service work or the state agency assigning the community service work has elected to come under the provisions of the Workers' Compensation Act."

The note also indicates that spokespersons from the state AFL/CIO and the division of Workers' Compensation testified in support of extending coverage to include offenders sentenced to community service.

Based on our analysis of the plain language of K.S.A. 1985 Supp. 44-508, as amended by L. 1986, ch. 189, §1, plus a reading of the supplemental note on 1986 House Bill No. 2891, it is our opinion that the statute was specifically changed in 1986 to cover individuals performing community service work. In that K.S.A. 1985 Supp. 44-508, as amended, specifically includes persons performing community service work within the definition of "workman, employee or worker," we withdraw Attorney General Opinion No. 82-213, which concluded such a person is not a workman, employee or worker under the terms of the Workmen's Compensation Act prior to its amendment.

In summary, K.S.A. 1985 Supp. 44-508, as amended by L. 1986, ch. 189, §1, broadens the definition of "employer," and "workman, employee or worker" for purposes of community service work. This amendment to the Workmen's Compensation Act allows offenders sentenced or assigned to community service work to be covered by workers' compensation, during the time they are performing community service work, if the entity(ies) receiving or assigning such work so elect(s). This opinion withdraws Attorney General Opinion No. 82-213, which is inconsistent with this conclusion.

Very truly yours,



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RTS:JLM:BPA:crw