1976 S.C. Op. Atty. Gen. 423 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4552, 1976 WL 23168

Office of the Attorney General

State of South Carolina
Opinion No. 4552
December 22, 1976

***1** South Carolina Department of Corrections prisoners employed by outside employers in voluntary, paid, work-release programs pursuant to § 55–321.1 are subject to the workmen's compensation law in the same manner as the outside employer's other employees, payable by that employer's insurance carrier.

TO: Commissioner William D. Leeke
South Carolina Department of Corrections

STATUTES, ETC.:

§ 55–321.1(b) Code of Laws of South Carolina, 1962, as amended; §§ 72–108.1, 72.11.1 and 72.4, Code of Laws of South Carolina, as amended;

1A Larson's Law of Workmen's Compensation, Prisoners, § 43–31 (1973 ed.);

Remoun, claimant v. Craig Constr. Co., employer and Employers Insurance of Wausau, carrier, S.C. Ind. Comm. Docket #49,631, Order August 17, 1976.

DISCUSSION:

§ 55–321.1(b)

The work release program authorized by § 55–321.1(b) is a program of 'paid employment' by outside employers which is voluntary on the part of the prisoner. The statute states that for those prisoners so employed, 'the rates of pay and other conditions of employment will not be less than those paid and provided for work of similar nature in the locality in which the work is to be performed.' (emphasis added).

The Department of Corrections (Department) advises that work-release inmates are hired by the employer and not assigned by the Department, although the Department often provides placement assistance. The Department further advises that more than 5,100 inmates have participated in the program since enactment of the enabling law, and that presently more than 500 inmates participate.

The Department, and its carrier, State Workmen's Compensation Fund (State Fund), advise that prior to the Order in the Remoun case, discussed below, claims for job-related injuries by work-release prisoners had been routinely handled by the outside employers and their carriers in the same manner as claims by other employees.

§§ 72–11.1 and 72–108.1

The Industrial Commission case of Remoun v. Craig Constr. Co., Employer and Employers Insurance of Wausau, Carrier, Order August 17, 1976, resulted from a claim filed by a work release participant. The hearing commissioner granted the employer and carrier's motion that they be released as to liability and held that the State Fund was liable.

Based on §§ 72–11.1 and 72–108.1, the commissioner held that the workmen's compensation law applied to inmates only under §§ 72–11.1. The latter section provides workmen's compensation benefits for any inmate injured . . .
. . . in the performance of his work in connection with the maintenance of the institution, any department vocational training program, or with any industry maintained therein, or with any highway or public works activity outside the institution . . .

Payments for injuries as authorized by the above-referenced section are to be paid by the State Fund. (§ 72–11.2).

***2** The average weekly wage for inmates covered by § 72–11.1 is deemed to be forty ($40.00) dollars per week, as compared to the maximum average weekly wage of two hundred twenty one and $^{15}/_{100}$ ($221.15) dollars now applicable to other employees whose actual wages reach or exceed that figure. To hold that an average weekly wage of $40.00 applies to work-release employees for purposes of calculating disability benefits appears to conflict with the above-cited requirement in the work release statute that such employees are to receive 'rates of pay and other conditions of employment' not less than those paid to other employees.

Section 72.11.1, enacted in 1971, is similar to the 1966 Council of State Government Draft on Inmates of Public Institutions. See Larson § 47.31 at N. 88. Absent such a statute, the general rule regarding inmates injured while engaged in prison industries is to deny compensation, even when some type of monetary reward is paid for their services. Larson § 47.31 at N. 78. The reason most often given in the cases cited regarding prison industries or public works activity is that a prisoner cannot and does not make a contract of hire for these services and thus cannot be 'employed' within the meaning of the workmen's compensation law. Ibid at N. 83.

It appears, therefore, that § 72–11.1 was enacted to provide coverage to inmates for injuries arising out of and in the course of prison work assignments described in that section and was not intended, contrary to the Commissioner's ruling in Remoun, to encompass situations of voluntary, paid employment by outside employers. It should be emphasized that with respect to activities at the work release site, the employer-employee relationship exists between the outside employer and the prisoner, not between the Department of Corrections and the prisoner. This distinction is of importance, inasmuch as the employer-employee relationship is a jurisdictional prerequisite in a workmen's compensation claim. Chavis v. Watkins, 256 S.C. 180 (1971).

Furthermore, it seems unlikely that the General Assembly intended for the State Fund, a State agency created by statute (See § 72–451, et seq.), to cover work-release inmates. In contrast to the activities described in § 72.11.1, the State Fund's insured, the Department, exercises no supervision or control over work-release employees at their work site. This supervision and control is exercised at the work site by the outside employer, in the same manner as over the employer's non-prisoner's employees.

Another part of the workmen's compensation law to which reference must be made is § 72–108.1, which states that the law does not apply to prisoners. A similar provision appeared in the original law. This section presents an apparent conflict with § 55–321.1 and with § 72.11.1. These provisions relate generally to the same subject matter however, and should be construed together and reconciled, if possible, as as to render all operative. See Lewis v. Gaddy, 254 S.C. 66 (1970),

***3** This Office is of the opinion that § 72–108.1, as well as $55–321.1 and § 72.11.1, can be so construed. Such a construction would provide that the law does not apply to inmates unless the inmate is either injured in some prison industry or other activity described in § 72.11.1 (payable by the State Fund), or injured in outside paid employment pursuant to the $55–321.1(b) work release program (payable by the outside employer's carrier).

CONCLUSION:

The opinion of this Office is, therefore, that South Carolina Department of Corrections prisoners employed by outside employers in voluntary, paid, work-release programs pursuant to § 55–321.1 are subject to the workmen's compensation law in the same manner as the outside employer's other employees, payable by that employer's insurance carrier.

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