



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable D. C. Greer
State Highway Engineer
Austin, Texas

Dear Sir:

Opinion No. 0-4152

Re: Liability of the State Highway Department of Texas for personal injuries under the facts set forth.

Your letter of October 17, 1941, requesting an opinion of this department, recites the following:

"Recently, while working for a County Commissioner, one of our men was rather seriously hurt.

"The circumstances under which he was working were as follows:

"The County Commissioner asked our resident engineer if he could use the man for a few days to help him operate a county shovel and teach one of the County men to operate it, after which the injured man was to return to work for the Department. This employment with the County was to last only a few days.

"Upon instruction of our resident engineer the employee agreed to work for the County for the few days and in a conference among the employee, our job superintendent, our resident engineer, and the County Commissioner, it was agreed that the employee was to be dropped from the Department's pay roll where he was making \$150.00 per month and was to be paid by the County at the rate of \$1.00 per hour. After working some

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four or five days, he had actually been on the County pay roll fifty-one hours, he received this injury while repairing the shovel, which was doing work on a County project on a County road under the direction of the County Commissioner."

Under the foregoing facts, you wish to be advised whether or not there is any liability on the part of the Texas State Highway Department and whether you have authority to assume liability and pay benefits under the Compensation Act applicable to the State Highway Department.

By the Acts of 1937, 45th Legislature, Chapter 502, certain provisions of the Workmen's Compensation Law were adopted whereby the State Highway Department of Texas was authorized to become self-insuring, with compensation benefits payable to injured employees in accordance with the provisions of the Act. This Statute, containing Sections 1 through 20 is incorporated in Vernon's Annotated Civil Statutes as Article 6674s. Sub-section 2 of Section 2 thereof provides:

"'Employee' shall mean every person in the service of the State Highway Department under any appointment or expressed contract of hire, oral or written, whose name appears upon the pay roll of the State Highway Department, except officials appointed by the Governor with the advice and consent of the Senate, except clerical and office employees not required by their duties to travel or work away from their office, and except all positions for which itemized appropriations are made by the Legislature. No person in the service of the State Highway Department who is paid on a piecework basis, or on any basis other than by the hour, day, week, month, or year shall be considered an employee and entitled to compensation under the terms and provisions of this Act.
* * *."

Section 4 of said Act, provides:

"If an employee of the Department sustains an injury in the course of his employment, he shall be paid compensation by the Department, as hereinafter provided."

Section 7 of the Act provides that the term "injury in the course of his employment" shall be defined as in Section 1, Article 8309, Revised Civil Statutes of Texas, 1925, which definition, excepting certain injuries, provides that the term shall include all other injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premises or elsewhere.

From the facts above stated, it is clear that the injured party was not an employee within the provisions of the Act mentioned at the time of his injury. He was engaged in operating or repairing county equipment used on county projects or roads and being on the county pay roll at the time. He was not in the service of the State Highway Department at the time he was injured nor engaged in or about the furtherance of the affairs or business of the State Highway Department.

It is well settled by the authorities in this State that the location, designation, construction and maintenance of State highways by the State Highway Department is a governmental function. *Buchanan vs. State*, 89 S. W. (2d) 239; *Robbins vs. Limestone County*, 268 S. W. 315; *Heathman vs. Singletary*, (Tex. Com. App.) 12 S. W. (2d) 150; *Brooks vs. State*, 68 S. W. (2d) 534; *Martin vs. State*, 88 S. W. (2d) 131.

Also it is well settled that the State is not liable in damages for personal injuries received through the negligence or careless acts of its officials, agents or employees, unless it shall by legislative act assume such liability and consent to be so liable. *Brooks vs. State and Martin vs. State*, supra; *State vs. McKinney*, (Tex. Civ. App.) 76 S. W. (2d) 556; 59 C. J. pp. 194-196; Annotations in 13 A. L. R. pp. 1276-1281 and 42 A. L. R. pp. 1492, 1493.

The authorities cited in the last two paragraphs above set forth are on the general proposition of liability. Under the provisions of Article 6674a however the Legislature assumed liability for such Highway Department employees injured in accordance with the provisions of the Act. Under its provisions, neither the State Highway Department nor its officials, servants or agents have any authority to waive or disregard any portion thereof by assuming liability for injuries outside the scope of employment.

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It is, therefore, the opinion of this department that the State Highway Department is not liable nor does the Department have authority to assume liability and pay benefits under the provisions of Article 6674s, Vernon's Annotated Civil Statutes, under the facts set forth.

Yours very truly

ATTORNEY GENERAL OF TEXAS

JAN 16 1941
George R. Sellers

By

J. M. King
Wm. J. R. King
Assistant

VJRK:RS

