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Hazardous Employment Under the Workmen's Compensation Law - Mattes v. City of Baltimore

HAZARDOUS EMPLOYMENT UNDER THE WORKMEN'S COMPENSATION LAW

Mattes v. City of Baltimore[1]

Appellant was injured while working for the City at the Logan Field airport. He was employed to do janitor's work which included helping with the plumbing at times, washing windows, sweeping floors, cutting grass, loading trucks, cleaning offices and emptying wastebaskets, sometimes helping to get passengers to automobiles when the ground was wet, and anything else he was told to do by the general foreman. When the Highways Department was working at the new airport, he filled tanks; and, at times, he helped a fellow laborer push planes into the hangar. He was classified by the City Service Commission as a laborer, and was so listed at the Central Pay Roll Bureau of the City. There was no classification of janitor at the airport for any employees, but the officials considered the work that Appellant was doing to be janitor's work. The injury occurred while Appellant was at work emptying large waste containers into smaller baskets to be carried in a wheelbarrow to the back of the hangar to be burned. It became necessary for him to give an unusual pull to get a wire basket out, and in doing it he strained and injured his back. He applied to the State Industrial Accident Commission for workmen's compensation for his injury and was denied relief on the ground that his work was not of the extra-hazardous nature for which compensation is provided by the Maryland Workmen's Compensation Act.[2] This ruling was affirmed on appeal to the Baltimore City Court, and the latter holding was affirmed by the Court of Appeals.

The Court of Appeals ruled that Appellant's work was predominantly that of a janitor, and that he was working as a janitor when he was hurt; and that there was nothing in the evidence to overcome the correctness of the Commission's finding that this was non-hazardous work.[3] The Court reasoned that since the enumeration of employments in Section 33 of the Act[4] did not include the employment of janitor as one of them, the injury to a janitor could

[1] 180 Md. 579, 26 A. (2d) 390 (1942).

[2] Md. Code (1939) Art. 101.

[3] Citing Md. Code (1939) Art. 101, Sec. 70, which provides that on appeal "the decision of the Commission shall be *prima facie* correct and the burden of proof shall be upon the party attacking the same".

[4] Md. Code (1939) Art. 101.

be compensable only by reason of connection with other work that was compensable. Conceding for purposes of the case that the conduct of an airport could be deemed "hazardous" within the meaning of the comprehensive clause of Section 33[5] by analogy to the paragraph specifically covering "the operation of . . . vehicles propelled by gasoline", the Court concluded that the work Appellant was employed to do was "not connected with the promotion of the hazardous work of the airport. His work came after and behind it. He cleaned up the premises and carried off the waste."

This ruling of the Court culminates a line of cases, dealing with municipal employees, enumerating a very strict construction of the category of extra-hazardous employment meant to be covered by the Maryland Act other than the specific employments enumerated in Section 33. Under Section 46 of Code, Article 101, the "State, county, city, or any municipality" is covered by the article if engaged in any "extra-hazardous work in which workmen are employed for hire." In several rulings under Sections 46 and 33 in combination, decided with reference to employees of Baltimore City, the Court of Appeals has excluded from the operation of the Act: (1) park policeman;[6] (2) nurses in City hospitals;[7] (3) an orderly in a City hospital;[8] (4) a janitress in a public school;[9] and, in the instant case, (5) a janitor at the municipal airport.[10]

In the first of these decisions, namely the one involving the park policeman, the Court's opinion rested considerably on the fact that the words "workmen employed for hire" in Section 35 (now 46) of the Statute was restrictive language and meant something less than the term employee in Section 32 (now 33), the section enumerating the hazardous employments for private industry. The Court thus distinguished the case of *Todd v. Eastern Furniture Company*[11] which had held a night watchman in a private plant to be covered by the Act, saying:[12]

> "* * * Section 32 of article 101 of the C. P. G. L. of Md. extended the application of the statute to all 'em-

[5] Which makes the act applicable to "all extra-hazardous employments not specifically enumerated".
[6] Harris v. Baltimore, 151 Md. 11, 133 A. 888 (1926).
[7] Baltimore v. Smith, 168 Md. 458, 177 A. 903 (1934).
[8] Baltimore v. Trunk, 172 Md. 35, 190 A. 756 (1937).
[9] Baltimore v. Schwind, 175 Md. 60, 199 A. 853 (1938).
[10] Mattes v. Baltimore, 180 Md. 579, 26 A. (2d) 390 (1942).
[11] 147 Md. 352, 128 A. 42 (1924).
[12] Harris v. Baltimore, 151 Md. 11, 17, 133 A. 888 (1926).

ployees' engaged in extra-hazardous 'employments' for private employers, so that whether the service rendered by Todd could properly be classified as 'work', there was no possible doubt that it was an 'employment,' and for a private employer, and so within the express and literal language of the act. But in this case we are dealing with a section which imposed upon the State and certain governmental subdivisions thereof duties and obligations which would not have rested upon them at all but for that section (28 *Cyc.* 1257), in so far as those duties and obligations involved the exercise of their public governmental functions. We would not under those circumstances be justified in giving to the section a meaning broader than the lexical and usual significance of its language would convey, unless constrained to such a construction by the plain and obvious intent of the whole act. But we find no such intent. There was obvious reason why the municipality, in respect to certain work, should be within the act, because as to work of a private character, or certain public work such as the construction and repair of highways, and other works of public improvement, either by statute or the common law, they were under the same liability to their employees for their torts as private employers. In such cases both the municipality and its employees suffered from the same mischief which led to the passage of the act for the benefit and relief of private persons and their employees. But that was not true in respect to agents employed by the State or subdivision thereof to perform functions essentially public and governmental, because in such cases no such liability existed. And when the Legislature, in extending the scope of the act to persons in the employ of the State and its several political subdivisions, expressly limited its application to those cases in which 'workmen were employed for wages', it expressed no intent either in section 35 or the other sections of the act to have it apply to cases in which liability had never theretofore existed. If it had intended to embrace such agents as policemen, and all other persons engaged in extra-hazardous employments for municipalities, it would certainly have expressed that intention in clearer language than that which we have quoted. * * *"

If the subsequent holdings, above referred to, had rested themselves on the special language of Section 46 relative to governmental employees, there would be no great significance to their rulings except to keep municipal liability more strictly confined than that of private industry. However, the other four rulings, dealing with the nurse, the school janitress, the orderly, and the airport janitor, do not specially rely on the limited intention of the legislature with reference to municipal liability, but use language which would analogize that liability to that of other hazardous employment under Section 33, but finding no coverage on the facts of each case. The language of *Baltimore v. Smith,* holding a nurse not to be covered, is typical. Speaking of the enumerated employment under what is now Section 33, and interpreting the inclusion phrase of paragraph 46 of the section, the Court said:[13]

> "These particular works or employments may be roughly classified as falling within one of the following divisions of employment: First, the construction, repair or operation of public utilities and water borne vessels, and their accessory equipment, shops, plants, or shipyards, and warehouses or other places of storage, docks, or warehouses: second, construction work of various kinds and types, and its installation and operation: third, mining, lumbering, quarrying, and other methods of production of raw material, its preparation for use, and its manufacture for the purposes of trade, commerce, and consumption: fourth, packing, canning, and preparation of food supplies: fifth, operation of designated vehicles and machinery: and, sixth, manual, mechanical, and industrial arts. While this classification is general and approximate, it serves to illustrate the nature of the employments which the Legislature intended to be embraced by the act, and thereby to indicate, by the employments which are included, the type of employment which is excluded as not being hazardous. * * *
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> "A consideration of the particular paragraphs discloses that, with the exception of the later additions of a certain class of salesmen and of musicians and officers of the state police and guards in penal institutions (paragraphs 43, 45, section 32, and section 35 as amended (Code Pub. Gen. Laws, Supp. 1929, sec. 32,

[13] 168 Md. 458, 462, 177 A. 903 (1934).

> pars. 43, 45 and sec. 35)), these paragraphs refer to particular employments in which the employees are workmen, who, in a general sense, are men employed in manual or industrial labor as artificers, mechanics, artisans, operators of machinery, and laborers, and so the hazards of the employment or work within the meaning of the statute are those incident to the labor of the manual or industrial servant while working in his trade, craft, art, or occupation, as contra-distinguished from those employments in which the servants are engaged in clerical or professional work. In short, unless otherwise specifically provided, the act applies to employment in an industrial enterprise. * * *"

This language referred to with approval in the hospital orderly case,[14] would seem to be as applicable to private industry as to municipal employment and is restrictive rather than expansive of the meaning of paragraph 46 in covering unenumerated hazardous employments. The *Mattes* case would seem both on its facts and language to clinch this approach of strict construction, closing any outlets that might have been opened by loose language in earlier cases.

For example, language in *Baltimore v. Trunk*,[15] and *Baltimore v. Schwind*,[16] could easily have been construed to indicate that protection existed under the law whenever one was employed by a hazardous industry within the meaning of the law. In the *Trunk* case, the Court said:[17]

> "In the appeal at bar, the Charitable hospital, as such, was not an industrial enterprise nor specifically declared to be an extra-hazardous employment by the language of the law, and so an employee of the hospital, if injured within the scope and course of his employment, would not be entitled to compensation merely because he was an employee, as would be the case if the hospital were either an industrial enterprise or definitely included in the operation of the Compensation Law. * * *"[18]

The apparently broad effect of such language would seem to be destroyed by the holding and language of the

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[14] Baltimore v. Trunk, 172 Md. 35, 40, 190 A. 756 (1937).
[15] *Ibid.*
[16] 175 Md. 60, 67, 199 A. 853 (1938).
[17] 172 Md. 35, 41, 190 A. 756 (1937).
[18] Citing, Boteler v. Gardiner Buick Co., 164 Md. 478, 481, 165 A. 611 (1933).

Mattes case. After assuming that the general business of conducting an airport was hazardous, the Court said:[19]

> "* * * The whole of Article 101 is applicable to extra-hazardous work in which the city engages. Code, 1939, Art. 101, Sec. 46; Acts of 1941, Ch. 433. But the fact that the municipality engages in some work that is extra-hazardous, along with work that is not so, is not sufficient to bring all employees in either work within the benefits of the Act. *Harris v. Baltimore,* 151 Md. 11, 133 A. 888.
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> "Whether all workmen of a hazardous business, even those employed in non-hazardous work, are within a Workmen's Compensation Act is a question on which courts of other States have differed. See note, 83 A. L. R. 1018. But there are differences in the statutes applied. In some States the Acts contain specific clauses to include all workmen employed in a hazardous business. Matter of *Europe v. Addison Amusements,* 231 N. Y. 105, 131 N. E. 750; *Byas v. Hotel Bentley,* 157 La. 1030, 103 So. 303; *Illinois Publishing Co. v. Industrial Commission,* 299 Ill. 189, 132 N. E. 511. And there is no such provision in the Maryland law. To be included, it seems, the workman injured must have been employed incidentally to the promotion or prosecution of the hazardous work. This was the meaning of expressions in earlier decisions of this court. * * *"[20]

The earlier cases referred to were the ones discussed above except for the case of *Boteler v. Gardiner-Buick Co.*[21] In that case an outside salesman who was required to work an allotted portion of alternative days within the company's showrooms was injured while on duty in the showroom. The problem presented was whether the salesman was in fact an outside salesman within the meaning of the Act. The Court reinstated an award made by the Commission and reversed the judgment of the Superior Court of Baltimore City. The Court ruled that the greater part (about 70%) of the injured man's work was clearly that of an outside salesman; and his work in the salesroom

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[19] 180 Md. 579, 582.

[20] Referring to: Boteler v. Gardiner Buick Co., 164 Md. 478, 481, 482, 165 A. 611, 612 (1935); Harris v. Baltimore, 151 Md. 11, 14, 15, 133 A. 888, 889 (1926); Baltimore v. Trunk, 172 Md. 35, 190 A. 756, 758 (1937); and Baltimore v. Schwind, 175 Md. 60, 67, 199 A. 853, 857 (1938).

[21] *Supra* n. 20.

could be said to be supplementary to his work as an outside salesman because the peculiar nature of his occupation usually involved a series of negotiations taking place inside and outside of the place of employment. Once it is established that solicitation of sales outside of the master's establishment was the predominant, primary and substantial service required of the injured person, and since that occupation is clearly within the Act, the Court will refuse to break down the individual's services into those which are hazardous and those which are not hazardous.

It may be argued that the *Boteler* case shows a more liberal construction of the outside salesmen paragraph than does the *Mattes* case for the general provisions of Section 33 and hence that the approach of the Court in each of the two cases is difficult to reconcile. The difference of the Court in each case can better be understood in the light of the essential problem in each case, and it is submitted that the essential problem in each case was quite different. In the *Mattes* case the problem was whether the Act was broad enough to include the class of work engaged in by the injured, while in the *Boteler* case the problem was whether liability could be excused on the theory that some of the employee's duties were covered by the Act and some were not.[22] Thus in the *Mattes* case there arises a situation in which the traditional approach of the courts in strictly construing a statute in abrogation of the common law is brought into play since at common law there could be no liability on the part of the City. In the *Boteler* case there is an unmistakeable expression of legislative intent to include the major bulk of the employee's business activities within the Act in addition to the impracticability, at least on the facts of that case, of adopting a theory of dual employment, i. e. extra-hazardous and non-hazardous employment within the same employee's duties. These factors tend to explain the liberality of the approach in the *Boteler* case and their absence in addition to the previously mentioned reason tends to explain the stricter approach in the *Mattes* case.

The *Mattes* case is interesting as a continuation by the Court of the principle of breaking down a class of occupa-

[22] This same problem was also present in the *Mattes* case to a minor degree. It seems to have been suggested that Mattes' employment was essentially hazardous because he occasionally filled tanks for highway department trucks and helped push planes into the hangar and hence he was within the Act, his other activities being incidental to the ones mentioned. The Court rejected the argument by saying, "Predominantly he was a janitor, and he was working as a janitor when he was hurt."

tions in regard to a municipality into those which are covered by the Act and those which are not. In this sense the principle established in the *Harris* case[23] is very much alive, namely that the legislature must have meant less coverage in regard to government employees than those of private industry. Why this should be so is difficult to understand. Insofar as the principle rests on a subconscious application of rules of construction, it would seem to be unwarranted by the social theory behind compensation laws. At least the case demonstrates that the approach of the Court in applying the Act to municipal employees has become so firmly established that it can be cured only by legislative enactment. The case also demonstrates that the reluctance of the Court to break down an individual's employment into the part within the Act and that not within the Act is not to be applied to a class of occupations. This latter principle would seem to be applicable to private employment as well as to public employment. Yet it is to be hoped that the principle will not be applied to private industry because it has arisen solely because of a mistaken notion that within the framework of workmen's compensation laws, the government as an employer should occupy a different position than that of private industry.

[23] *Supra* n. 6.