180 Md. 579, 26 A.2d 390

Court of Appeals of Maryland.
MATTES
v.
MAYOR AND CITY COUNCIL OF BALTIMORE.
No. 23.

May 26, 1942.

Appeal from Baltimore City Court; Joseph N. Ulman, Judge.

Proceeding under the Workmen's Compensation Act by Joseph J. Mattes, claimant, opposed by the Mayor and City Council of Baltimore, employer. The State Industrial Accident Commission disallowed the claim and claimant appealed to the Baltimore City Court. From a judgment affirming the disallowance, claimant appeals.

Affirmed.

MARBURY, J., dissenting.

West Headnotes

[1] **Workers' Compensation 413 ⚿107**
413k107 Most Cited Cases
The description commonly given to a compensation claimant's position is not decisive of whether his work is of the extrahazardous nature for which compensation is provided, and the actuality rather than the appellation is the sound basis for the State Industrial Accident Commission's action in determining whether the workman met with mishap in the course of an enumerated employment. Code 1939, art. 101, §§ 1 et seq., 33.

[2] **Workers' Compensation 413 ⚿1935**
413k1935 Most Cited Cases
In compensation proceeding, evidence was insufficient to overcome presumption of correctness of State Industrial Accident Commission's finding that claimant's employment as janitor was not of the "extrahazardous" nature for which compensation is provided. Code 1939, art. 101, §§ 1 et seq., 70.

[3] **Workers' Compensation 413 ⚿111**
413k111 Most Cited Cases
Since the statutory enumeration of employments to be classed as extrahazardous did not include the employment of janitor, if an injury to a man so employed can be treated as compensable, it must be because of connection with other work that is included. Code 1939, art. 101, § 33.

[4] **Workers' Compensation 413 ⚿149**
413k149 Most Cited Cases
The work done at an airport, because of its similarity to the enumerated extra hazardous employment of operation of vehicles propelled by gasoline, was within statutory clause including, as subject to Workmen's Compensation Act, "all extrahazardous employments not specifically enumerated". Code 1939, art. 101, § 33(41, 46).

[5] **Workers' Compensation 413 ⚿110**
413k110 Most Cited Cases

Workers' Compensation 413 ⚿163
413k163 Most Cited Cases
The Workmen's Compensation Act is applicable to extrahazardous work in which a city engages, but that a city engages in some work that is extrahazardous along with work that is not so, is not sufficient to bring all employees in either work within the benefits of the act. Code 1939, art. 101, §§ 1 et seq., 46; Acts 1941, c. 433.

[6] **Workers' Compensation 413 ⚿108**
413k108 Most Cited Cases
To be included within statute providing compensation for work of an "extrahazardous" nature, the injured workman must have been employed incidentally to the promotion or prosecution of the hazardous work. Code 1939,

art. 101, §§ 1 et seq., 33.

[7] **Workers' Compensation 413 ⇦111**
413k111 Most Cited Cases
Where employee cleaned up the premises, and carried off waste at an airport, employee's work was not connected with promotion of the hazardous work of the airport, and hence employee was not entitled to compensation under statute providing compensation for work of an "extrahazardous" nature. Code 1939, art. 101, §§ 1 et seq., 33.

***580 **391** Albert A. Levin, of Baltimore (Joseph Rosenthal, of Baltimore, on the brief), for appellant.
Hector J. Ciotti, Asst. City Sol., of Baltimore (F. Murray Benson, City Sol., of Baltimore, on the brief), for appellees.

Before BOND, C. J., and SLOAN, DELAPLAINE, COLLINS, FORSYTHE, and MARBURY, JJ.

BOND, Chief Judge.
Mattes, injured while working for the City at the Logan Field Airport, has been denied compensation under the Workmen's Compensation Act, Code, Art. 101, on the ground that his work was not of the extrahazardous nature for which compensation is provided. On that ground the State Industrial Accident Commission disallowed his claim, and on the appeal below the court, after hearing the evidence, directed a verdict for the City and affirmed the disallowance. The appeal has followed.

This workman was employed, according to the evidence, 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 wasts baskets, 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 classed by the City Service Commission as a laborer, and was so listed at the Central Pay Roll Bureau of the City. In the first report of injury and the claim for compensation he was described as a laborer. There was no classification of janitor at the airport for any employees, but the officials considered that Mattes was a laborer doing janitor's work.

***581** His testimony was that while 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.

[1] [2] [3] The description commonly given the man's position is not decisive, for names may be used loosely. 'The actuality, rather than the appellation, is the sound basis for the Commission's action in determining whether an employé met with mishap in the course of an enumerated employment.' Gleisner v. Gross & Herbener, 170 App.Div. 37, 155 N.Y.S. 946, 948. But the work in this instance appears to have been similar to that of an ordinary janitor in an office building, except, possibly, when he was called upon casually to fill tanks for highway department trucks, and, possibly, when he helped another workman to push planes into the hangar. Predominantly he was a janitor, and he was working as a janitor when he was hurt. Boteler v. Gardiner-Buick Co., 164 Md. 478, 479, 165 A. 661. And there is nothing in the evidence to overcome the presumption of correctness in the Commission's finding that this was non-hazardous work. Code 1939, Art. 101, sec. 70. The enumeration of employments to be classed as extra-hazardous, in section 33 of the Act, does not include the employment of a janitor as one of

them, and if an injury to a man so employed should be treated as compensable it must be by reason of connection with other work that is included.

[4] [5] There is no section specifically applying the Act to the conduct of an airport, but we may assume for the purposes of the case that the work done there, because of its similarity to the employment enumerated in paragraph 41, 'The operation of * * * vehicles propelled by gasoline,' is within the comprehensive clause, section 33, paragraph 46, including 'all extra-hazardous employments not specifically enumerated.' Beasman & Co. v. Butler, 133 Md. 382, 386, 105 A. 409; ***582**Wheeler v. Rhoten, 144 Md. 10, 123 A. 572. The whole of article 101 is applicable to extra-hazardous work in which the City engages. Code of 1939, Art. 101, sec. 46; Act 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.

[6] 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 ****392** 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. 'If injury result from the nature, conditions, obligations, or incidents of an employment designated as hazardous by law, the employee thus sustaining the injury is within its scope. * * * It is sufficient if the accident, without having for its cause the serious and willful misconduct of the servant, arises directly out of circumstances which the servant had to encounter because of his special exposure to risks that, although external, were incidental to his employment.' Boteler v. Gardiner-Buick Co., 164 Md. 478, 481, and 482, 165 A. 611, 612. 'The propriety of the court's action in granting the defendant's first prayer withdrawing the case from the jury necessarily depends upon * * * whether the occupation in which [he] was engaged when he was injured was txtra hazardous. * * * the real question involved, which was not whether the entire business***583** of maintaining that park was extrahazardous but whether the particular work which the decedent was called upon to perform was extrahazardous'. Harris v. Baltimore, 151 Md. 11, 14, 15, 133 A. 888, 889. 'The nature of the employment must be determined by the nature of the work or occupation and where the work or occupation of the employee may be partly hazardous and partly nonhazardous, an injured employee would be regarded as being engaged in an extrahazardous employment if the injury he received were suffered in connection with the extrahazardous employment of the employee. * * * Since the work of an orderly in a hospital is neither expressly named as an extrahazardous work, nor included by fair implication in any of the categories of affected employments, the court may not supply the omitted class by an arbitrary construction, but must enforce the statute according to its terms.' Baltimore v. Trunk, 172 Md. 35, 190 A. 756, 758. 'The school was an educational institution, and the work of a janitress there employed is not brought by legislative mandate within the purview of the law or found by reasonable inference to be within any of the employments specified by the Act'. Baltimore v.

Schwind, 175 Md. 60, 67, 199 A. 853, 857. 'Another problem presents itself,' says 2 Schneider, Workmen's Compensation Act, Perm.Ed., sec. 396, 'when the employer carries on a hazardous employment but has employees engaged in non-hazardous work. These employees are covered by the act if the non-hazardous work they were performing when injured was incidental to the operation of the hazardous employment.' And see Larsen v. Paine Drug Co., 218 N.Y. 252, 256, 112 N.E. 725.

The work which Mattes 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 waste. Under a similar statute a watchman whose duties were merely to clean the office and keep other employees out of a tool house was held not compensable, although the business ***584** was classed as hazardous. Kehoe v. Consol. Telegraph & Elec. Subway Co., 176 App.Div. 84, 162 N.Y.S. 481. A salesman of dresses for a manufacturing establishment classed as hazardous was not compensable. Lyon v. Windsor, 173 App.Div. 377, 159 N.Y.S. 162. And the work of a deliveryman on foot was held not incidental to a hazardous business of preparation of meats. Newman v. Newman, 218 N.Y. 325, 113 N.E. 332. And see Singer Sewing Machine Co. v. Industrial Commission, 296 Ill. 511, 129 N.E. 771; Beatrice Creamery Co. v. State Industrial Accident Commission, 174 Okl. 101, 49 P.2d 1094.

[7] Mattes' employment, therefore, seems not to have been the hazardous one with which the statute deals, and these considerations lead to an affirmance of the judgment below.

Judgment affirmed with costs.

MARBURY, J., dissenting.
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