Record - - No. 15

AMELIA M. HARRIS

VS.

MAYOR AND CITY COUNCIL OF BALTIMORE AND THE PARK BOARD OF BALTIMORE CITY.

BRISCOE & JONES,

For Appellant.

PHILIP B. PERLMAN,

WILLIAM O. LOVITT,

PAUL F. DUE,

For Appellees.

IN THE

Court of Appeals

OF MARYLAND.

APPEAL FROM THE SUPERIOR COURT OF BALTIMORE CITY.

APPEAL TO THE JANUARY TERM, 1926, OF THE COURT OF APPEALS OF MARYLAND.

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AMELIA M. HARRIS vs. MAYOR AND CITY COUNCIL OF BALTIMORE and THE PARK BOARD OF BALTIMORE CITY.	IN THE *Court of Appeals* OF MARYLAND APRIL TERM, 1926. GENERAL DOCKET No. 15.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This is an appeal from judgment for the defendants confirming order of the State Industrial Accident Commission, disallowing appellant's claim.

On the 29th of June, 1925, while John E. Harris was walking along or across one of the roads of Druid Hill Park, near the Mansion House, in conformity with his duties as a Park employee, an automobile driven by one Harry Sigel, a third party, ran into said Harris, so injuring him that he died on the 3rd of July, 1925.

On the 20th of July, 1925, Amelia M. Harris, widow of the decedent, filed claim for compensation, alleging that his average weekly wage was $23.10 and that she, without children, was dependent upon him for support. The City Solicitor's office, representing the employers, asked for hearing on the issues set forth on page 5 of the Record; trial thereon was had on the 11th of September, 1925, and the Commission found for the Claimant, on the first two issues, but disallowed the claim on the third issue, accord-

ing to order passed on the 31st of October, 1925.

Appeal from the Commission to the Superior Court of Baltimore City was filed on the 2nd of November, 1925, and trial was had before Court and Jury on the 18th of January, 1926, resulting in a directed verdict for the defendants upon the three instructions found on Record, pages 10 and 11, and judgment thereon, from which this appeal is taken.

The decedent, 73 years of age at the time of the accident, was working as a night watchman for the Board of Park Commissioners, by virtue of their "full power to employ and compensate all persons * * * in maintaining and supporting such parks" (Section 97, Charter of Baltimore City, Revised Edition, 1915), being particularly employed by virtue of Section 98 of said Charter, which gave him "while on duty the same power that police have as conservators of the peace." (Record, page 10). He wore a gray uniform, carried a kind of espantoon and could arrest for violation of the law in the Park, but he was not in the exercise of any police powers when the fatal accident occurred. Decedent, like other night watchmen, was on duty 12 hours out of every 24 for 7 days a week and worked either night or day upon an "interchangeable" or "shift" plan. He was employed exclusively and directly by the Park Board, as other men are hired to look after the Parks, such as "carpenters, workmen, stablemen and all types of workmen in the Park." (Record, page 8). The City policemen are a force entirely separate from the Park employees. It does not appear that the decedent, as a night watchman or employee of the Park Board either gave bond, took an oath of office or received an appointment or commission to any

office, so that he must have been merely hired to start work at such wage as was agreed upon.

ARGUMENT.

1. Workmen for wages.
   (a) The Compensation Act.
   (b) Officer.
2. Extra hazardous work.

1. (a) The Compensation Act. To support our contention that the decedent was a workman, employed for wages, as used in Section 35, Article 101, Bagby's Code, we refer to the purpose of the Compensation Act, as set forth in the recital clause of Chapter 800, Acts 1914, wherein provision is made for "workmen" and "persons" to whom compensation is payable, that the heavy burden of providing care and support to the injured and their dependents may be more fairly distributed; Section 32 provides generally for "employees"; Section 65, subsection 2 defines an "employer" as one employing "workmen" and sub-section 3 defines an "employee" as a *person* who is engaged * * * in the service of an employer" (italics ours), but especially excepts farm laborers and many others; Section 63, unqualifiedly says that the Act must not be strictly construed and that its general purpose shall be effectuated.

Bearing in mind the broad definitions above and the failure of the Legislatures to place any limitation or restriction, in any way effecting the decedent, were he employed by a private individual or corporation, we will consider next what the Legislatures have done for Municipal, County and State employees. We find that Section

35 has been amended several times, so as to give to governmental employees the same compensation rights as other workmen in private enterprises enjoy, with the lone exceptions as to the "equal or better" provision for municipal employees; there being no claim of "equal or better" by the appellees and, municipal employees being on an equal footing with private employees, we, therefore, urge that there is only one conclusion insofar as the Act is concerned and that is that decedent is covered by the Act.

The significance of the expression "workmen are employed for wages" found in Section 35, may appear somewhat vague, when we search for the legislative intent, but if this expression is more than mere surplusage or reiteration in the section, we contend that it could signify no real limitation, for the reason that "workmen" and "wages" appear so frequently in the Act that the general meaning and purpose are simply continued by the use of that phrase. Literally and from its phraseological position, the expression would seem to refer to the work in which the municipality is engaged rather than the employee or workman; in any event, the words "workmen" and "wages" would not seem a severe restriction to a park employee or night watchman, serving twelve hours out of twenty-four for seven days a week.

Crabbs English Synonyms, 10th Edition (1857), defines "wages" as "allowance, stipend, salary, hire, pay," "signifies that which is paid for labor," and "a stated sum paid according to certain stipulations."

Funk & Wagnall's New Standard Dictionary (1916), defines "wages" 1. "payment for services rendered,

especially the pay for artizans or laborers;" 2. "the remuneration received by labor in its broadest sense, as distinguished from that received by capital." The same dictionary defines "workman," 1. "a man employed in manual labor, mechanic, artizan;" 2. "a man engaged in any labor, as in literature or art, worker."

The case of Victory Sparkler Company vs. Francks, 147 Md. 368, is a recent illustration of how this Court has liberally construed the Act from time to time.

The case of Harris vs. Harris, No. 71, October Term, 1925, Daily Record, February 20, 1926, involved the definition of an expression in the Act, the Court saying: "We must of course avoid restricting the words of the Statute by explanations adopted in particular cases."

(b) Officer. Although the words "officer" and "official," even by implication, do not appear in our Act, it is expected that the appellee will claim, with emphasis, that the decedent was an officer or public official and, therefore, not excluded, but not covered by the Act. The decedent was a park employee or workman, hired under the blanket provision of the Statute, allowing the Park Board to engage the necessary men to operate the parks, thus creating a contractual relation without any appointment. Incidentally those serving as night watchmen are given the power to arrest; being in or adjacent to thickly settled sections, this power to arrest appears a wise provision, but insufficient of itself, we contend, to convert the park workmen into public officials of the City.

Would the language of the Act, not to mention its purpose, be subserved if we clothe a workman with the pow-

ers to arrest when necessary, and thereby take away from him or his widow all rights to benefits under the Act? How can we distinguish between the different park employees, all hired and receiving wages from the same Board, some maybe serving as watchmen, without power to arrest, others with power to arrest, alternating from time to time, as the exigencies of the Park Board require and lastly, just when would some "magic" make him a public official and just when a plain employee? Every citizen has the right to arrest, under certain circumstances; the Sparrows Point Police and the B. & O. Police are reputed to be splendidly equipped constabularies, but it appears safe to say that, in the number of arrests made during a given period, they greatly exceed a large number of the city policemen, yet, it has never been contended that they were public officials, in order to deprive them of rights to compensation. It is also understood that the State Police, connected with the office of the Commissioner of Motor Vehicles have been receiving compensation.

It is understood too, that City police are getting "equal or better" and, therefore, not entitled to compensation as specifically provided in the Act. We believe the Legislature could have had no one else in mind but firemen and policemen when the "equal or better" provision was inserted in Section 35. To show that the State is not adverse to an officer, even of high rank, getting the benefits of compensation, we can point to the same section, which was added to include officers and enlisted men of our National Guard and nowhere is the line of demarcation between officers and enlisted men more sharply drawn than in military circles. It will be noted that the National Guard are not included within the Act as an

exception thereto, but rather as an explanation of its meaning for the statute reads that they "shall be deemed workmen of the State for wages within the *meaning* of the preceding sentence." (italics ours).

It now comes to our attention that in the cases of Fwiskowski, No. 82,852 and Fauer, No. 91,566, the Commission has recently decided that prisoners in the Baltimore City Jail are covered by the Act so that we would face an anomalous situation if the policemen, who arrested the prisoners, were not entitled to at least the same benefits under the Act.

The broad term "officer" or "park policemen" is generally applied to the men who patrol the City parks, but they are certainly quite different from the regular officers of the Police Department who are appointed to office after passing an examination entitling them to a commission of various grades and ranks with certain pay provided therefor, all specifically set out in the Statutes. Acts 1920, Chapter 3.

There appears never to have been any question as to an official of a private corporation being entitled to compensation under any of the Acts, since the case of Beckman vs. Oelerich, 160 N. Y. Supplement, 791 (1916), decided that a shareholder and vice-president of a corporation was nevertheless an employee.

In the case of Walker vs. City of Port Huron, 185 N. W. page 754, decided by the Supreme Court of Michigan in 1921, the claimant was hired by the Commissioner of Parks of the City of Port Huron for a "police job" or "special officer" in Pine Grove Park and took the Con-

stitutional oath of office, his work appearing to have been exactly similar to that of the decedent in the case at bar; having been injured in line of duty, he claimed compensation under the Workmen's Compensation Act, which according to the compiled laws of Michigan, Section 5429, page 530, in defining "employee," excepts "any official of * * * any city" and provides further that policemen in cities having charter provisions prescribing like benefits may waive the provisions of the Compensation Act. In confirming the award of the Commission to the claimant, the Court held that special officers are not provided for by charter or ordinances, and that the claimant was an employee under the Compensation Act.

The case of City of Superior vs. Industrial Commission of Wisconsin, 152 N. W. 151, Supreme Court of Wisconsin, held in 1915 that the widow of a caretaker of a park who was killed while working for the city, having been engaged by the administrative offices in charge of the public parks, under an ordinance providing power and authority to the Board of Park Commissioners "to employ suitable help for that purpose," was entitled to compensation.

The Supreme Court of North Dakota, Fahler vs. City of Minot, 194 N. W. 695 (1923) was construing Section 2, Chapter 162, 1919 Laws of North Dakota, which defines employee as "every person engaged in a hazardous employment under any appointment or contract of hire," in a case where the claimant was a police officer who had been killed while on duty, and used this language, "it will be noted * * * from that portion of the law devoted to the definition of terms that there is an evident tendency toward generalization in definition rather than restric-

tion. For instance 'employment' is defined to include employment by the State * * * and private employments, thus apparently leaving no room to infer that *any employment* was to be excluded * * *. Similarly 'employee' is defined as every person engaged in a hazardous employment under any *appointment, contract of hire,* etc., thus signifying by the use of the word appointment that one may even sustain the relation of employee in the absence of any contractual relation existing between him and his employer." The award was granted.

Another interesting case is found in McDonald vs. City of New Haven, 109 Atlantic 176, 10 A. L. R. 193 and 201 (1920). Here a fireman, regularly appointed under the charter of New Haven, was killed in line of duty. The Act defines employee as "any person who has entered into or works under any contract of service or apprenticeship with an employer," the Court saying, "The Act, in terms, requires a contract relationship of employer and employee. * * *If the given Act is broader or narrower than what a sound public policy requires, the remedy lies with the Legislature. * * * It is to be observed that the statutory definition of the word 'employee' as used in the Compensation Act is narrower in its scope than the general lexical definition." Compensation denied upon the ground that no contractual relationship existed.

The Supreme Court of Pennsylvania in 1919, through the case of McCarl vs. Houston, 263 Pa. St. Repts. 1, 106A-104, construed the Compensation Act of that State, which "includes all natural persons who perform services for another for a valuable consideration," as entitling the widow of a police officer killed in line of duty to compensation. It is submitted that this decision meets

the issue squarely under an Act quite similar to our own.

In the case of Engels Copper Mining Company vs. Industrial Accident Commission, 185 Pacific 182, 8 A. L. R. 187, Supreme Court of California (1919), the decedent was employed by a mine operator "to do the work of a regular police officer in keeping order." He was also an unpaid deputy sheriff. While in the performance of acts which he was directed by his employer to do, which same acts happened to be his official duty to perform, he was shot to death. The Workmen's Compensation Act, Section 8, defines employee as including "all elected and appointed paid public officers" but excludes "any person holding an appointment as * * * deputy sheriff * * * (who) receives no compensation * * *" In granting compensation to the widow, the Court said, "Where a deputy performs acts which while official in their nature are advantageous to the employer and directed by him, not incidentally merely but as part of the duties prescribed and contemplated in the contract of employment then such deputy is acting in the course of his private employment within the meaning of the provisions of the Workmen's Compensation Act. Upon this view of the statute petitioner cannot escape liability to compensate the widow for the death of Smith (decedent) on the plea that in performing the duties incident to his employment he was also fulfilling a duty to the County * * *"

There is also a line of cases similar to that of Sharp vs. Erie Railroad Company, 184 N. Y. 100 (1906) where a damage suit arose out of the killing of a trespasser upon the railroad property by an employee who was also a deputy sheriff, the Court holding, "A railroad company

employing a servant who happens to be a public officer acquires no immunity from such employment."

Additional References:

Baltimore City vs. Lyman, 92 Md. 591.
Lake vs. Bridgeport, 102 Conn. 337 (1925).
Comstock vs. Bivens, 239 Pacific (Cal.) 869 (1925).
Curran vs. Deltan Co., 203 N. W. (Mich.) 470 (1925).
Miladey vs. City of Grand Rapids, 203 N. W. (Mich.) 651 (1925).
Kiel vs. Ind. Com. of Wis., 158 N. W. (Wis.) 68 (1916).
City of Duluth vs. District Court, 158 N. W. (Minn.) 790 (1916).
Segale vs. St. P. C. Ry., 180 N. W. (Minn.) 777 (1921).
Vol. 8, Words and Phrases, page 7369.

Should this Court entertain the opinion that the decedent was a public official, we again say his case is covered by the Act, for the simple reason that it is not excluded. The Act itself lists many employees not covered, but in spite of the large group of City employees, known as policemen, not one word is found to exclude them.

The question as to whether regular police are covered has never been before this Court, but we submit that the weight of authority throughout the States which have no statutory restriction is in favor of allowing compensation. We will first discuss the opinion of his honor, Judge Worthington, in the appeal of Mayor and Aldermen,

to the Circuit Court of Frederick County, from The State Industrial Accident Commission, in the case of John H. Adams, No. 73 Trials, February Term, 1923. The facts appear exactly similar to the case at Bar, except for the important variance that Adams was a regular policeman of Frederick City, whose Charter provides that the office of policeman shall be subject to confirmation by a vote of the Aldermen; that the officer shall take an oath of office and give official bond for the faithful performance of the duties required of him, by virtue of his office, so that should this Court hold that Harris was a similar official as Adams in so far as the Act is concerned, we find ourselves practically in the position of appealing from Judge Worthington's decision.

The first part of Judge Worthington's opinion deals with the history of Workmen's Compensation as being an outgrowth of the master and servant doctrine, indicating that the compensation laws only intended to benefit those who were generally known as "servants." We believe that our Act was written to help every "person" covered by its broad language and to avoid all possibility of misconstruction, the Act defines its own terms and the legislators, as if still fearful of narrow interpretation, provided for a liberal construction thereof. We pass over that part of the opinion which declares a regular policeman to be a public officer and come to the next phase of the opinion as to extra hazardous work, the Court declaring that work to be extra hazardous under the Act, must be "of the same general nature" as those employments listed in sub-sections 1-43 inclusive of Section 32, but sub-section 44 of Section 32 says that the Act applies "to *all* extra hazardous employments * * * and to *all work* of an extra hazardous nature" (italics

ours); here in the statute we find no such restriction as the Court lays down right in the "teeth" of the liberal construction clause, which our Court of Appeals has never failed to recognize even though the Act itself may be in derogation of our State's sovereignty. Finally the above opinion emphasizes the use of the word "whenever" in Section 35, as limiting compensation to those employments or work specified in the sub-sections 1-43, whereas sub-section 44 shows no partiality to any class of work so long as it is extra hazardous. It does not appear difficult to understand why the Legislature uses the word "whenever" since the Government and practically every business or industry has a large group of employees engaged in work which is obviously not extra hazardous and the city and State have a number of clerks and others in various types of work, which are not extra hazardous; we therefore contend that the word "whenever" is merely intended to exclude those office employees of the State and City governments, who are not engaged in extra hazardous work.

2. Extra hazardous work. The Commission held that the work of the decedent, Harris, was extra hazardous while the City's instruction No. 3 ruled in the negative; we contend that the work was almost indisputably extra hazardous and refer to the aforesaid opinion of Judge Worthington.

"Ordinarily the duties of a watchman would seem to be such as would not expose him to serious danger of injury but if he is injured while in the performance of his duty, compensation is recoverable, as in the case of any other workman." 6 A. L. R., page 578, Annotation (1920).

CONCLUSION.

For the many reasons above set forth, but in the main, because the late John E. Harris was not specifically excluded from the benefits of the Act, we urge that the judgment in this case should be reversed with proper costs.

Respectfully submitted,

BRISCOE AND JONES,

Attorneys for Appellant.

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APPELLEES' BRIEF.

John E. Harris, a park policeman, in the employ of the Mayor and City Council of Baltimore and the Board of Park Commissioners of Baltimore, and assigned to duty in Druid Hill Park, was killed in the course of his duty by being run down by an automobile driven by one Harry Siegel. His widow, Amelia M. Harris, claimed compensation under the Workmen's Compensation Law (Article 101, Annotated Code, 1924). The State Industrial Accident Commission denied compensation, and the Superior Court of Baltimore City sustained the Commission. From the latter judgment she appeals.

THE ISSUES.

The propositions of law presented by the Record are extremely narrow and they are raised by the second and third prayers of the appellees. The second prayer in-

structed the jury that the appellees were not engaged in "extra hazardous work" within the meaning of Article 101. The third prayer was to the effect that the decedent was not a "workman employed for wages" within the meaning of Section 35 of the Article. In granting the third prayer, the Court below adopted the appellees' contention that the decedent being by statute a conservator of the peace, in whom a portion of the State's sovereignty had been vested, was an officer and not a "workman employed for wages" as described in the Act. The proposition presented by the second prayer speaks for itself and depends upon a construction of the statute.

The facts in the Record presenting and bearing on these propositions are:

The deceased was employed by the Board of Park Commissioners as a park policeman pursuant to Sections 97 and particularly 98 of Article 4, Public Local Laws (Baltimore City Charter) and by those sections was made a "conservator of the peace" (R., p. 10). Such policemen are equipped with gray uniforms and espantoons; their duties being the same within the park jurisdiction as the city policemen. They arrest for violation of law in the parks; they are on duty twelve hours a day and, depending on circumstances, are changed from day to night duty (R., pp. 8-10). The deceased was run down by an automobile, driven by Harry Sigel, while on duty in Druid Hill Park, and was at the time dressed in his gray uniform of a park policeman (R., pp. 6, 7, 8).

ARGUMENT.

I.

THE DECEDENT WAS BY STATUTE MADE A "CONSERVATOR OF THE PEACE" CHARGED WITH THE ENFORCEMENT OF THE LAWS OF THE STATE AND CONSEQUENTLY WAS AN "OFFICER" AND NOT A "WORKMAN EMPLOYED FOR WAGES" AND THEREFORE NOT SUBJECT TO SECTION 35, ARTICLE 101 OF THE CODE.

A. The decedent was designated by statute a Conservator of the Peace: It was stipulated by counsel (R., p. 10) that the decedent was employed pursuant to Section 97 and particularly Section 98 of Article 4, P. L. L. (Baltimore City Charter). Those sections provide:

> "98. The night watchman employed by the Board of Park Commissioners shall have, while on duty, the same powers that police in said City have as conservators of the peace."
>
> "97. The said Board of Park Commissioners shall have full power to employ and compensate all persons whom, in its judgment it may deem proper, in *maintaining* and supporting such parks, etc., * * *."

Accordingly, within the jurisdiction of Druid Hill Park, the decedent, as a park policeman, was by statute made a "conservator of the peace" exercising the "same power that police in said city have as conservators of the peace." And by the statute law, Section 744, Article 4, Public Local Laws, the Baltimore City police as conservators of the peace—and consequently the decedent, within Druid Hill Park—are obliged:

> "At all times of the day and night within the boundaries of the City of Baltimore as well as on the water as on land, preserve the public peace, pre-

> vent crimes and arrest offenders, protect the rights of persons and property * * * and enforce all laws and ordinances of the Mayor and City Council of Baltimore * * *."

This statute law is but a re-enactment of the duties of conservators of peace at common law. Blackstone (Sharswood's Edition), Vol. 1, margin, page 350.

The exercise of those powers, statutory and common law made the decedent, as a conservator of the peace, a law officer, engaged in enforcing the police statutes of the State, and thus exercised a part of the State's sovereignty. Consequently he was not a "workman employed for wages" within the meaning of Section 35, Article 101, which provides, and which is the only section applicable in this case:

> "Whenever the State, County, City or Municipality shall engage *in any extra hazardous work*, within the meaning of this Act, whether for pecuniary gain or otherwise, *in which workmen are employed for wages*, the Act shall be applicable thereto * * *."

B. *Conservators of the Peace, before and since the enactment of the Compensation laws are held to be "officers," not "workmen" or "employees."*

Decisions prior to Compensation Acts holding policemen "officers": Long prior to the enactment of Workmen's Compensation Acts the Courts invariably held that policemen were not "workmen" or "employees," but "officers" of the law and that their duties were governmental.

> "The contention of the defendant in error is that no liability exists on the part of a city like Lincoln

for injuries occasioned by the negligent acts of members of its Fire Department. This exemption is based upon the ground that:

'In performing their duties, firemen act in obedience to a legislative command, and, although appointed and paid by the city, they are to be *regarded rather as officers charged with a public duty than as servants of the city.* * * * Among the officers who are not servants of the city, and for whose negligence it will not be chargeable the author then enumerates policemen, health officers and firemen." Gillespie vs. Lincoln, 16 L. R. A. 349.

"The power intrusted to a corporation in such cases is intrusted to it as one of the political divisions of the State, and it is conferred, not for the benefit of the municipality, but as a means of the exercise of the sovereign power for the benefit of all the citizens. The officers who exercise this power are not the agents or servants of the municipality, but are public officers, agents or servants of the public at large." Mechem on Public Officers.

Throop on Public Officers, Section 10, says:

"That a policeman and a police officer are public officers."

"A policeman of a city is a public officer holding his office as a trust from the State, and not as a matter of contract between himself and the city."

23 A. & E. Ency. of Law 326.

See also

Ex parte Preston (Tex.), 161 S. W. 115.

In Commissioners vs. Goldsborough, 90 Md. 207, this Court said:

> "Civil officers are governmental agents. They are natural persons in whom a part of the State's sovereignty is vested and reposed, to be exercised by the individuals so entitled with it for the public good. The power to act for the State is confided to the persons appointed to act * * *."

Justice Taney distinguished "officer" from "employe" as follows in U. S. vs. Maurice, 2 Brocke 103:

> "* * * but if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by the Government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office or the person who performs the duties from an officer."

And in Gillmor vs. Salt Lake City, 12 L. R. A. (N. S.) 537:

> "* * * the detection and arrest of defendants, preservation of the public peace, the enforcement of the laws and other powers and duties with which police officers are entrusted are derived from the law of the State and not from the municipality such powers they act in reality and in a wider sense as State officers. They are public laws, though of a local and limited operation, and in their enforcement police officers act in a public capacity and not as municipal agents or servants."

See also

Boehm vs. Baltimore, 61 Md. 259.
Baltimore vs. O'Neill, 63 Md. 336.

Decisions Since Workmen's Compensation Acts: The precise question whether under Section 35 a "conservator of the peace" is a "workman employed for wages" has never been before this Court. The Attorneys-General, however, have written three opinions on the subject. The first by General Armstrong (Vol. 7, page 388), wherein he held that policemen were covered. The second and third opinions were written by General Robinson (Vol. 9, pages 229-230), in both of which he held that policemen are officers and not "workmen" or "employes" subject to the Act.

In part, General Robinson's opinion says:

> "In the note to McDonald vs. New Haven, 10 A. R. L. 193, decided March 5, 1920, the statement is made that in most cases firemen and policemen are held not to be 'employees,' 'laborers' or 'workmen' within the meaning of the different Acts. Certainly the great weight of authority in this country is in support of this statement. Policemen are regarded more as officials than as employees. * * * "

In the Sixth Circuit, Judge Worthington, in the Circuit Court for Frederick County, on November 23, 1922, in Mayor vs. Adams, held policemen of the City of Frederick to be "officials" and not "workmen employed for wages."

Again:

> "A policeman of the City of Bridgeport is an arm of the law; he holds an office as a trust from the State; he is a preserver of the public peace; he is not the hired servant of a master; no contract relation exists between him and a city by which he is bound to its service; he can lay down his duty at any time

according to his pleasure without exposing him to an action of damages for breach of contract." Farrell vs. Bridgeport, 45 Conn. 191.

"And it is from this point of view that a policeman or a fireman is deemed to be a public officer, in that as an officer of the city he is the arm of the State in the performance of a governmental duty, as distinguished from one who is, by some contract with the city, not involving the performance of a governmental duty delefated to the city by the State." McDonald vs. New Haven, 109 Al. Rept. 178.

To the same effect is Rooney vs. City of Omaha, 117 N. W. 166. All of the cases are collected in Schneider's Workmen's Compensation Law, Vol. 1, Section 35, page 149, and the summary of those cases shows that most jurisdictions treat policemen as "officers," not as "employees" or "workmen."

The Illinois Act excludes "officials" from the Compensation Act. The question before the Court was whether a policeman was an "official." Says the Court:

"Section 12 of Article 6 of the Incorporation Act provides that "policemen shall be conservators of the peace," (the same as the decedent in the present case,) 'authorized to arrest or cause to be arrested * * *.' These all are duties which can only be performed by officers and they fix the status of a policeman as an official of the city or village in which he is appointed and sworn to perform such duties." Chicago vs. Industrial Comm., 291 Ill. 23.

And in Deveney's Case, 223 Mass., 270:

"The Legislature at the date of enactment must be presumed to have known that, under previous and

unrepealed legislation, the city in common with other municipalities had an established fire department with a fixed and permanent tenure of service for its members who had been expressly recognized as being in a class by themselves, and that this Court in Fisher vs. Boston, 104 Mass. 87, had held them to be public officers, for whose negligence when acting in the discharge of their duties the city is not responsible. Shelton vs. Sears, 187 Mass. 455; Woods vs. Woburn, 220 Mass. 416. *If when extending the compensation act it also was the purpose to include all persons of whatever rank serving in the various municipal departments, plain and unambiguous terms should have been used showing the change and enlargement.* A 'laborer' ordinarily is a person without particular training who is employed at manual labor under a contract terminable at will, while 'workmen' and 'mechanics' broadly embrace those who are skilled users of tools." Oliver vs. Macon Hardware Co., 98 Ga. 249; Ellis vs. U. S., 206 U. S. 246; Breakwater Co. vs. U. S., 183 Fed. Report 112, 114. Compare State vs. Ottowa, 84 Kan. 100. And the framers of the statute undoubtedly intended that the words 'laborers, workmen and mechanics,' should be taken in their ordinary lexical sense, which excludes the trained and disciplined force comprising the defendant's fire department."

To the same effect are the following cases from twelve States:

Mono County vs. Comm., 175 Cal. 765, 167 Pac. 377.

Sibley vs. State, 89 Conn. 682.

Griswold vs. Wichita, 99 Kan. 502.

Ryan vs. New York City, 228 N. Y. 16.

City of Chicago vs. Commission, 291 Ill. 23.

Rooney vs. City of Omaha, 177 N. W. 166 (Neb.).

Mann vs. City of Lynchburg, 106 S. E. 371 (Va.).
Marlow vs. City of Savannah, 110 S. E. 923 (Ga.).
Shelmadine vs. City of Elkhart, 129 N. E. 878 (Ind.).
Bowden vs. Cumberland Co., 123 Atl. 166 (Me.).
Hall vs. Shreveport, 157 La. 589.
Devney's Case, 223 Mass. 270.

(C.) *Contrary Decisions:* There are, of course, certain cases holding that policemen are embraced within the terms of certain Workmen's Compensation Acts. Those cases, however, upon examination will be found to have been decided on express language or clear intention that policemen were intended to be covered. For instance, in *McCarl vs. Houston* (Pa.), 106 Atl. 104, the Pennsylvania Act specifically covered "all natural persons who perform services, etc."

Segall vs. St. Paul, 180 N. W. 777. The Minnesota Court held the Act embraced policemen because it "defined employes and workmen as every person in the service of the city under any appointment or contract, * * * but not elected or appointed to regular terms of office."

Fehler vs. Minot, 194 N. W. 695. A North Dakota Court held that policemen were officers, but that the Act included officers.

Curran vs. Delton County, 203 N. W. 470 (Mich.). The question of whether a deputy sheriff was an officer was not raised, though the Court allowed compensation. The

same Court in LaBelle vs. Grosse Pointe Shores, 201 Mich. 371, held that a policeman who acted as a janitor and did village work was an employe, as the charter of the city did not create a police force or authorize policemen.

The Wisconsin Act specifically included policemen. "Policemen and firemen" shall be deemed employees. *West Salem vs. Industrial Commission,* 162 Wis. 57; Kiel vs. Commissioners, 163 Wis. 441.

In *Walker vs. Port Huron* (Wis.), 115 N. W. 754 (relied upon by appellants below), the claimant was not a policeman, but a caretaker engaged in mowing grass when injured.

So far as Baltimore City is concerned, it has always treated park policemen in a different category from "workmen," "laborers" or "mechanics." Hon. Edgar Allan Poe, while City Solicitor in 1909, ruled that park policemen were not subject to the eight-hour law of 1908 applying to "workmen, laborers or mechanics."

Accordingly, it is submitted that the decedent in this case was not a "workman employed for wages" within the meaning of the Act.

II.

THE DECEDENT WAS NOT ENGAGED IN EXTRA-HAZARDOUS WORK WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION ACT, AND CONSEQUENTLY NOT ENTITLED TO COMPENSATION.

Inasmuch as municipalities when "engaged in any extra-hazardous work within the meaning of this Article"

are subject to the consequences of the Act, the inquiry is what constitutes such work "within the meaning of this Article?" The answer is to be found in Section 32 of the Article, which provides:

> "Compensation provided for in this Article shall be payable for injuries sustained or death incurred by employes engaged in the following extra-hazardous employment."

Then follows 43 separate sub-sections naming and defining extra-hazardous employments. None of these employments has any resemblance—or by fair construction can be made to apply—to conservators of the peace. Consequently, if the appellant relies upon those designated employments she would have no case. But she relies upon Sub-Section 44 of Section 32, providing:

> "In addition to the employments set out in the preceding paragraphs, the Article is intended to apply to all extra-hazardous employments not specifically enumerated herein, and to all work of an extra-hazardous nature."

The appellees contend that this clause is intended only as a saving section to include extra-hazardous occupations *similar* to those particularly described.

Inasmuch as there is nothing in all the sub-sections of Section 32, which in any way relates to policemen, or by inference can be made to do so, we submit that in considering Sub-Section 44 with the balance of the sub-sections the doctrine of *noscitur a sociis* and the rule *ejusdem generis* should be applied. In other words, when Sub-Section 44 provides that in addition to the especially named extra-hazardous employments the Article is in-

tended to apply to "all extra-hazardous employments" and "all work of an extra-hazardous nature," it should be given the meaning of like kinds of extra-hazardous employments and not to be construed as embracing employments which are not in any way mentioned, or have no bearing on the particular mentioned employments. The exception to the rule as applied in American Ice Company vs. Fitzhugh, 128 Md. 387, is not, we submit, applicable to the present case.

Both in the beginning of Section 32, and in the general clause of Sub-Section 44, the term "employment" is used, viz: "extra-hazardous employments," and while Section 35 provides that "whenever the State, county, city or any municipality shall engage in any extra-hazardous *work*," the Legislature certainly intended to make no distinction between "work" and "employment." This is beyond question because Section 35 confines the "work" to that "within the meaning of this Act," to wit, "work" or "extra-hazardous employments within the meaning of this Act."

Moreover, it is submitted that the kind of "employment" or "work" intended to be covered by the legislature were industrial enterprises. This is clear because the preamble of the Act (through no part of the statute) recites:

> "Whereas, the State of Maryland recognizes that the prosecution of various industrial enterprises which must be relied upon to create and preserve the welfare and prosperity of the State involves a large number of workmen * * * and that under the rules of the common law and the provisions of the statutes now in force, an unequal burden, etc. * * * "

> And whereas the common law system governing the remedy of workman against employers for injuries received in extra-hazardous work is inconsistent with modern industrial conditions, etc."

Baltimore City in preserving the peace, order and quiet in Druid Hill Park by employing conservators of the peace was performing a governmental function and not engaged in an extra hazardous work within the meaning of the act. However, when the City in the course of its industrial work such as paving the streets, laying sewers, constructing subways, making excavations, constructing bridges or building that would be an industrial enterprise of the same general nature as extra hazardous employment and the act might apply. They are employments that may be carried on by private individuals but the preservation of order is a matter which is closely allied to the Government.

Of course, the Legislature could specifically include officials of the Government but until it has expressly done so general language should not be construed to bring officials within the act, as was said in 28 R. C. L., page 722:

> "While it is conceded by all that the compensation acts are to be given a liberal construction, some Courts have invoked the rule that general legislation is intended primarily for the subjects, and not for the sovereign. * * * Accordingly, the compensation act is held if inclusive of the State as employed to be in derogation of its sovereignty and should be construed strictly, and in such manner, if possible, as to preserve to the State its non-liability for injuries to those in its service."

Added weight to the position of the appellees on this

point is to be found in the fact that Attorney-General Ritchie on May 15, 1916, in an opinion to the State Industrial Accident Commission (Vol. 1, page 290) ruled that the Workmen's Compensation Law did not apply to members of the Maryland National Guard. The Legislature apparently adopted this construction, because in 1924 it amended Section 35 so as to specifically include the militia. Consequently, if the militia, which is but the constabulary of the State, was not included originally in Section 32, or by the clause in sub-section 44, then certainly policemen—another branch of the constabulary —can hardly be brought within the classification.

Accordingly, we assert on this branch of the case that conservators of the peace are not subject to the provisions of the Act regarding extra-hazardous employments.

CONCLUSION.

The appellees submit that the weight of authority is against including police officers in the term "workmen" or "employees" as used in the statute of this State or further that "police officers" are not embraced in the term 'hazardous employments" as used in the statute. Accordingly it is urged that the judgment of the lower Court be affirmed.

Respectfully submitted,

CHARLES C. WALLACE,

City Solicitor,

For Appellees.

TRANSCRIPT OF RECORD

FROM THE
SUPERIOR COURT OF BALTIMORE CITY

IN THE CASE OF
AMELIA M. HARRIS

VS.

MAYOR AND CITY COUNCIL OF BALTIMORE
AND
THE PARK BOARD OF BALTIMORE CITY

TO THE
COURT OF APPEALS OF MARYLAND.

BRISCOE & JONES,
Attorneys for Appellant.

PHILIP B. PERLMAN,

WILLIAM O. LOVITT,

PAUL F. DUE,
Attorneys for Appellees.

IN THE COURT OF APPEALS OF MARYLAND.

APPEAL FROM THE SUPERIOR COURT OF BALTIMORE CITY.

Action commenced in the Superior Court of Baltimore City on the 4th of December, 1925, by filing of the transcript of record from the State Industrial Accident Commission, in the case of

John E. Harris (Deceased), Employee.
Mrs. Amelia M. Harris, Claimant.
Mayor and City Council of Baltimore and The Park Board of Baltimore, Employer.

Self Insurer.

DOCKET ENTRIES.

Appeal from State Industrial Accident Commission filed.

4th of December, 1925—Transcript of Record filed.

18th of January, 1926—Jury sworn, et cetera.

19th of January, 1926—Verdict in favor of the Defendant, confirming the decision of the State Industrial Accident Commission.

21st of January, 1926—Judgment for Defendant for Costs.

Appeal from the order of the State Industrial Accident Commission, dated the 31st day of October, 1925, to the Superior Court of Baltimore City and election of Jury trial was filed on the 2nd of November, 1925, and service of copy of said appeal admitted the same day by said Commission.

The following claim was filed with the State Industrial

Accident Commission, under affidavit, on the 20th of July, 1925:

Amelia M. Harris hereby makes claim for compensation under Chapter 800, Acts of 1914. My claim arises out of the death of John E. Harris, who died on 3rd day of July, 1925, as a result of injury sustained on 29th of June, 1925, in the employ of Mayor and City Council of Baltimore City and Park Board of Baltimore City, of Baltimore, Md. The average weekly wage of the deceased was $23.10. I was wife of the deceased John E. Harris and I was dependent upon the deceased for support at the time of his death. I have the following children: none.

I was married to the deceased on 25th day of June, 1914, in the City and Town of Baltimore, State of Maryland.

Dated this 10th day of July, 1925.

AMELIA M. HARRIS,

Signature of Claimant.

CERTIFICATION OF INSURANCE.
FATAL.

Claim No. 88464.

Claimant—John E. Harris, Dec'd. Amelia M. Harris, Claimant and Widow.

Employer—Mayor & City Council of Balto. City (Park Board).

Claims Bureau:

According to the insurance records of the State Industrial Accident Commission, the above named employer was on the 29th day of June, 1925, insured in accordance with the provisions of the Workmen's Compensation Laws as follows:

Self Insurance.

INSURANCE DEPARTMENT, S. I. A. C.

E. McE. By S. B. F.

(Filed August 10, 1925.)

File No. 44791. August 8th, 1925.

State Industrial Accident Commission,
741 Equitable Building,
Baltimore, Maryland.

In Re: Claim No. 88464—John E. Harris, Deceased.
Park Board—State Industrial Accident Comm.
Attention: Miss R. O. Harrison.

Dear Miss Harrison:

Confirming my conversation with you this morning, the Mayor and City Council of Baltimore respectfully asks a hearing in the above entitled case to determine the following issues:

1. Whether or not the above claimant sustained an accidental injury, arising out of and in the course of his employment by the Mayor and City Council of Baltimore.

2. Whether or not the Mayor and City Council of Baltimore was engaged in any extra-hazardous work in maintaining its public parks.

3. Whether or not the deceased was a workman employed for wages, within the meaning of Article 101 of the Annotated Code of Maryland.

Awaiting your further advices, I am

Very truly yours,

(Signed) PAUL F. DUE,

Assistant City Solicitor.

Notice of hearing upon the above issues was forwarded to all parties interested therein.

The following testimony was taken at a hearing before the State Industrial Accident Commission, at 741 Equitable Building, Baltimore, held Friday, September 11, 1925.

Present: For the Claimant—Messrs. Briscoe and Jones.

For the Employer—Messrs. William O. Lovitt and Paul F. Due.

MRS. AMELIA M. HARRIS,

a witness of lawful age, produced in behalf of the Claimant, having been first duly sworn, according to law, was examined and testified as follows:

That she is the claimant and the widow of the late John E. Harris, who was employed by the Park Board and was injured in an automobile accident, which occurred on the 29th of June, 1925, and died on the following Saturday, he being 73 years old at the time he was hurt; she thinks the accident occurred around the Mansion House, in Druid Hill Park, and she saw him when he left home that morning, going to work. When he went to work that morning, he had on uniform pants, a blue serge coat and a straw hat; that she heard he had an accident and saw him that night and he died three or four days later; they had no children and she was entirely dependent upon him for support. No cross-examination.

HARRY SIGEL,

a witness of lawful age, produced in behalf of the claimant, having been first duly sworn, according to law, was examined and testified as follows:

That he resides at No. 2366 McCulloh Street, and is a merchant, running a store at the same address; that he was driving his own machine at the time the decedent was struck in Druid Hill Park, near the Mansion House; that he took the decedent to the hospital, where he died later on; that the accident happened in Druid Hill Park and at the time of the accident, the decedent was in uniform, as one of the park employees and walking with a cane and fell down right on the road-side and witness stopped his

car and hit him right in the middle of the back; that defendant was walking in the Park right across the road; that decedent had his gray uniform jacket on at the time of the accident; that the first time witness saw decedent, he was walking and crossed on the right side, walking in the road. Under cross-examination, witness testified as follows: That decedent was dressed in the uniform of a Park policeman.

ELI APPLESTEIN,

a witness of lawful age, produced in behalf of the claimant, having been first duly sworn, according to law, was examined and testified as follows:

That he resides at No. 6 North Bond Street and is a salesman, in the installment business, general merchandise; that he was with Mr. Sigel at the time of the accident, sitting on the front seat; that decedent was standing on the lawn and "when we got close to him, he walked over and started across the road in front of the machine. He was standing still when we were coming around"; as witness got close to decedent, he happened to walk over the road and kind of slipped and he fell and the machine hit him; that the accident happened on the west side of the Mansion House and the automobile was going west on the curve; the decedent was on the lawn, right where the little fountain is. Under cross examination by Mr. Due, witness testified that decedent was a Park police, in uniform at the time of the accident.

RUTH SIGEL,

a witness of lawful age, produced on behalf of the claimant, having been first duly sworn, testified as follows:

That she is the daughter of Mr. Siegel, who was just on the witness stand and was sitting on the back seat, in the automobile of her father, at the time the decedent was killed; the first time she saw the decedent, he was walking across the road, from the left to the right, from where

the fountain is to the other side of the road and after that the machine hit decedent and decedent was dressed in a uniform.

JAMES Y. KELLY,

a witness of lawful age, produced in behalf on the defendant, having been first duly sworn, according to law, was examined and testified as follows:

That he is secretary of the Park Board, where he has been employed, as secretary, a little over twenty-five years, and knew the decedent; that decedent was quipped, while on duty, with a uniform and a kind of espantoon; that decedent's uniform was the same as an everyday policeman, except the color of the uniform was gray instead of blue; that decedent's duties were the same as a City policeman within the Park jurisdiction; that witness does not know how the City police are equipped; that these Park police are on duty twelve hours a day, seven days a week and are employed for either night or day duty and are interchangeable, "shift the same man in night or day duty the same week or month, it depends on circumstances"; that the Park police arrest for violation of law in the parks. In answer to question: Do you know the authority of the Park Board for employing policemen? witness answered: "I know there are laws, I cannot quote them, but there is a clause that gives the Park Board the right to employ all necessary men to operate the parks and I believe there is another clause that specifically gives them authority to appoint night officers." Under cross-examination, witness testified as follows: That decedent was employed directly by the Park Board. Witness would not say decedent's position was distinct and separate from City policemen on the street, but City policemen are an entirely separate force and decedent was employed exclusively by the Park Board, so far as witness knows; that the Park Board is authorized to employ, by statute, all men necessary to look after the parks and that includes carpenters, workmen, stablemen and all types of workmen in the Park.

Stipulation by counsel for the employer:

It is admitted by counsel for the employer that the decedent was on duty at the time of the accident.

Claim No. 88464

COMPENSATION DISALLOWED

Employee: John E. Harris, Deceased.

Claimant: Amelia M. Harris, widow.

Employer: Mayor and City Council of Baltimore (Park Board.

Insurer: Self.

A hearing was held at the office of the Commission on September 11th, 1925, at the request of the employer to determine the following issues: (1) Whether or not the above claimant sustained an accidental injury arising out of and in the course of his employment by the Mayor & City Council of Baltimore. (2) Whether or not the Mayor & City Council of Baltimore was engaged in any extra-hazardous work in maintaining its public parks. (3) Whether or not the deceased was a workman employed for wages, within the meaning of Article 101 of the Annotated Code of Maryland. At said hearing all parties were present and heard and after due consideration of the testimony taken the Commission finds, on the first issue, that the claimant did sustain an accidental injury arising out of and in the course of his employment by the Mayor & City Council of Baltimore; on the second issue, that the Mayor & City Council of Baltimore was engaged in an extra-hazardous work in maintaining its public parks, and on the third issue finds for the employer.

It is, therefore, this 31st day of October, 1925, by the State Industrial Accident Commission, Ordered that the claim of Amelia M. Harris, widow of John E. Harris, deceased, filed in this case against the Mayor & City

Council of Baltimore, employer, be and the same is hereby disallowed.

(Signed) ROBERT H. CARR,
GEO. LOUIS EPPLER.

Certificate, under seal, of A. E. Brown, Secretary of the State Industrial Accident Commission, at Baltimore City, that the aforegoing is truly taken from the records and proceedings of said Commission, in the above entitled case, and subscribed on the 4th day of December, 1925.

Trial was had before his Honor, Judge Ulman and a jury, in the Superior Court of Baltimore City, on the 18th of January, 1926; the record from the State Industrial Accident Commission was read to the jury and no additional evidence offered.

STIPULATION OF COUNSEL.

It is agreed between counsel for both parties, in the above-entitled case, that the decedent was employed by the Park Board of Baltimore City, under the general authority given in Section 97 of the Charter of Baltimore City, revised edition, 1915, and particularly by virtue of Section 98 of said Charter.

The following prayers were thereupon offered by the defendant and argument thereon followed:

CITY'S PRAYER NO. 1.

The Court instructs the jury that the claimant has offered no evidence in this case legally sufficient to entitle her to recover as against the defendants, and the verdict of the jury must, therefore, be for the defendants.

CITY'S PRAYER NO. 2.

The Court rules as a matter of law that John E. Harris was not a workman employed for wages within the meaning of Section 35 of Article 101 of the Code of Public General Laws of Maryland at the time of the injury which caused his death, described in the evidence and in the papers in this case, and that the decision of the State Industrial Accident Commission was a correct construction of the law, and must therefore be affirmed.

CITY'S PRAYER NO. 3.

The Court rules as a matter of law that the Mayor and City Council of Baltimore and the Park Board in maintaining Druid Hill Park at the time the injury occurred which resulted in the death of John E. Harris, described in the evidence and the papers, were not engaged in extra-hazardous work within the meaning of Section 35 of Article 101 of the Code of Public General Laws of Maryland, and that the decision of the State Industrial Accident Commission was not a correct construction of the law, and must therefore be reversed.

The Court granted the first, second and third prayers of the defendant, to which action of the Court, in granting the said first, second and third prayers of the defendant, the plaintiff then and there excepted and prays the Court to sign this, her First Bill of Exception, which is accordingly done this day of February, 1926.

In the Superior Court of Baltimore City.

Amelia M. Harris

vs.

The Mayor and City Council of Baltimore and The Park Board of Baltimore City.

Mr. Clerk:

Kindly enter an appeal to the Court of Appeals of Maryland from the judgment in the above entitled case.

BRISCOE AND JONES,

Attorneys for Plaintiff.

It is agreed by the attorneys for the above parties that the above exception or Bill of Exception is correct.

BRISCOE & JONES,

Attorneys for Plaintiff.

WIRT A. DUVALL, JR.,

Acting City Solicitor,

Attorney for Defendants.

Appellant's cost, $15.25.

Appellee's cost, $6.40.

State of Maryland, City of Baltimore, Set:

I, STEPHEN C. LITTLE, Clerk of the Superior Court of Baltimore City, do hereby certify that the aforegoing is truly taken from the Record and Proceedings of the said Superior Court in the therein entitled case.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the Superior Court of Baltimore City aforesaid, this 15th day of February, 1926.

(Seal.)

STEPHEN C. LITTLE,

Clerk of the Superior Court of Baltimore City.