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OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 82-1111
of	:	<u>FEBRUARY 9, 1983</u>
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THE HONORABLE VICTOR VEYSEY, DIRECTOR, DEPARTMENT OF INDUSTRIAL RELATIONS, has requested an opinion on the following question:

Are pro-tempore workers' compensation referees appointed under Labor Code section 123.7 immune from liability under the California Tort Claims Act for their discretionary acts within the scope of employment to the same extent as permanent referees of the Workers' Compensation Appeals Board?

CONCLUSION

Pro-tempore workers' compensation referees appointed under Labor Code section 123.7 are immune from liability under the California Tort Claims Act for their discretionary acts within the scope of employment to the same extent as permanent referees of the Workers' Compensation Appeals Board.

ANALYSIS

The Workers' Compensation Appeals Board (formerly, the Industrial Accident Commission), established by the Legislature pursuant to its constitutional grant of plenary power to create and enforce a comprehensive system of workers' compensation (Cal. Const., art. XIV, § 4), is vested with the authority to adjudicate claims for compensation brought by employees against employers due to injuries arising from employment. (§§ 3200-6002¹; 61 Ops.Cal.Atty.Gen. 46 (1978).) In order to facilitate the accomplishment of its judicial powers (§ 111), the board may direct and order a referee to try the issues in any proceeding before it, whether of fact or of law, and to make a finding, order, decision, or award based thereon. (§§ 5309, 5310, 5313, 130.) The board may confirm, adopt, modify or set aside the findings, order, decision, or award of a referee, or enter its own based upon the record. (§ 5315; cf. *Conf. of Referees v. State Personnel Board* (1968) 262 Cal.App.2d 131, 133.) It is sufficient for purposes of this analysis to observe that a workers' compensation referee is engaged either in the exercise of judicial (*Perry Farms, Inc. v. Agricultural Labor Relations Board* (1978) 86 Cal.App.3d 448, 460; 61 Ops.Cal.Atty.Gen., *supra*, 49-50) or quasi-judicial (cf. *Conf. of Referees v. State Personnel Board*, *supra*; 62 Ops.Cal.Atty.Gen. 788, 790 n. 5 (1979)) power.

In addition to the employment of permanent referees (§§ 123, 123.5), section 123.7 provides:

"The appeals board may, by rule or regulation, establish procedures whereby attorneys who are either certified specialists in workers' compensation by the California State Bar, or are eligible for this certification, may be appointed by the presiding workers' compensation referee of each board office to serve as a pro tempore workers' compensation referee in a particular case, upon the stipulation of the employee or his or her representative, and the employer or the insurance carrier. Service in this capacity by an attorney shall be voluntary and without pay. It is the intent of the Legislature that the use of pro tempore workers' compensation referees pursuant to this section shall not result in a reduction of the number of permanent civil service employees or the number of authorized full-time equivalent positions.

The present inquiry is whether pro-tempore referees appointed under section 123.7 are immune from liability under the California Tort Claims Act for their discretionary acts within the scope of employment to the same extent as permanent referees.

Government Code section 820.2 provides:

"Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

An "employee" for purposes of this section includes an officer, employee, or servant, whether or not compensated, but does not include an independent contractor. (Gov. Code, § 810.2.) Under common law, and Government Code section 820.2, a public officer acting in his judicial (*City of Santa Clara v. County of Santa Clara* (1969) 1 Cal.App.3d 493, 498; *Paddleford v. Biscay* (1971) 22 Cal.App.3d 139, 143) or quasi-judicial (*Taylor v. Mitzel* (1978) 82 Cal.App.3d 665, 670-671) capacity is immune from liability for acts performed within his judicial jurisdiction.

No exception or distinction with respect to this general rule arises by virtue of the fact that an individual, such as a pro-tempore referee, is not compensated. (Gov. Code, § 810.2; and cf. *Key Ins. Exchange v. Washington* (1970) 7 Cal.App.3d 209, 212 - payment of wages not necessary to status as employee.) Nor are we concerned with any technical distinction, which may be significant in other contexts (cf. 64 Ops.Cal.Atty.Gen. 728, 741-742 (1981)), between a public officer and a public employee. (*Saltares v. Kristovich* (1970) 6 Cal.App.3d 504, 515.)

Specifically excluded from the definition of "employee" is an independent contractor. In *Stilson v. Moulton-Niguel Water Dist.* (1971) 21 Cal.App.3d 928, 935-937, the court focused upon the distinction:

"A major consideration in determining an agency relationship exists is whether an employer retains a right of control over one whom he employs not only as to the result of work done but also as to the mode of accomplishing the work. (*McDonald v. Shell Oil Co.*, 44 Cal.2d 785, 788; *Green v. Soule*, 145 Cal. 96, 99.) Conversely, lack of control over the method and details of work tends to show an independent contractual relation rather than one of agency. (*Green v. Soule, supra*; *Rogers v. Whitson*, 228 Cal.App.2d 662, 671-672.)

".....

"The factors to be considered in determining which relationship exists are numerous. As noted above, the most important factor of an agency or employee relationship is the *right* to control the manner and means of

accomplishing the result desired. (*City of Los Angeles v. Vaughn*, 55 Cal.2d 198, 201; *Green v. Soule, supra*, 145 Cal. 96, 99; *Housewright v. Pacific Far East Line, Inc., supra*, 229 Cal.App.2d 259, 266; *Hardin v. Elvitsky, supra*, 232 Cal.App.2d 357.) 'If the employer has the right to exercise complete control, an employer-employee relationship exists, whether or not that potential control is exercised with respect to all details.' (*City of Los Angeles v. Vaughn, supra*.) In this connection, the right to discharge an employee at will, without cause, is strong evidence of an employer's control. (*City of Los Angeles v. Vaughn, supra*; *Housewright v. Pacific Far East Line, Inc., supra*.) Other factors to be considered are: (a) whether services performed are a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required; (d) who supplies the instrumentalities, tools and the place of work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether the work is a part of the regular business of the principal and (h) whether or not the parties believe they are creating the relationship of employer- employee. (*Empire Star Mines Co. v. Cal. Emp. Com.*, 28 Cal.2d 33, 43-44; *Housewright v. Pacific Far East Line, Inc., supra*; *Sparks v. L. D. Folsom Co.*, 217 Cal.App.2d 279, 284-285; Rest.2d Agency, § 220.)"

While the question as to the nature of a relationship is one of fact (*id.*, at 936), we perceive no essential distinction between a permanent and a pro-tempore referee with respect to their fundamental relationship to the board. Regulations issued by the board with regard to supervision, control, duties and authority of a pro-tempore referee are found in title 8, California Administrative Code sections 10349 to 10352. Section 10350 provides in part:

"A presiding workers' compensation judge may appoint and assign a pro tempore workers' compensation judge to conduct a regular hearing on any issue in any proceeding before the Workers' Compensation Appeals Board and to make and file a finding, opinion, order, decision or award based thereon.

".....

"Pro tempore workers' compensation judges will have all the authority and powers of workers' compensation judges as set forth in the Labor Code and Rules of Practice and Procedure of the Workers' Compensation Appeals Board including inquiry into adequacy of and approval of compromise and

release agreements and stipulated findings including the authority to issue appropriate findings, awards and orders. Pro tempore workers' compensation judges shall be bound by the rules of Practice and Procedure of the Workers' Compensation Appeals Board (including Articles 6, 7 and 8)."

Section 10351 provides in part:

"A pro tempore workers' compensation judge shall in any case filed have the same power as a workers' compensation judge to conduct conference hearings, including conference pre-trials, rating pre-trials and standby calendars; to inquire into the adequacy of and to approve compromise and release agreements; to approve stipulated findings and to issue appropriate awards based on such stipulations; to frame stipulations and issues and make interim and interlocutory orders at the conference hearing."

Section 10352 provides:

"Any final order, decision or award filed by a pro tempore workers' compensation judge shall be subject to the reconsideration process as set forth in Labor Code Sections 5900 through 5911."

Thus a pro-tempore referee is subject to the same degree of supervision and control, is vested with the same power, authority, judgment, and discretion, and exercises the same sovereign power of the state as a permanent referee. It is concluded, therefore, that pro-tempore referees appointed under section 123.7 are immune from liability for their discretionary acts within the scope of employment to the same extent as permanent referees.
