

injuries in the course of their employment, and if death results from such injuries then the dependents of these employes are also entitled to the benefits of the act. On the other hand, if the firemen are merely volunteers who are organized into a so-called fire department and are not in the service of the village under an appointment or contract of hire, they are not entitled to the benefits of the act. In other words, the mere appointment or designation of persons as volunteer firemen is not in itself sufficient to bring the appointee within the provisions of the workmen's compensation law. There must be some element of hire included with the appointment. This is emphasized by a study of the workmen's compensation act as a whole. In my opinion the word "appointment" was used in order to avoid any question based upon the manner of the selection of the employe. A person working for a private concern, in order to be an employe within the meaning of the act, must be in the service of such private employer under a "contract of hire". The term appointment is not used in connection therewith because a private employer usually engages employes by way of contract. There is a difference in public employment—some public employes are hired, and some obtain their positions by way of appointment, and, as stated above, I am of the opinion that the term appointment was included, in referring to public employes, to make it clear that the manner of the selection was immaterial. The fact that there must be an element of hire included in the selection is also emphasized by the provisions of the compensation act in connection with the creation of the fund. All employers (and this includes municipalities) must pay premiums based upon the payroll or wages paid to employes and, in my opinion, this emphasizes the fact that the Legislature intended compensation to be paid to employes who receive some compensation for their services, or in other words, who are upon the payroll and receiving money or its equivalent from an employer for services rendered to such employer.

Therefore it is my opinion that volunteer firemen of incorporated villages who are members of a lawfully constituted fire department of such village, and are serving as such under an appointment or contract of hire, are employes within the meaning of the workmen's compensation act and are entitled to the benefits of that act in case they sustain injuries in the course of such employment, and if death results from an injury received in the course of employment then their dependents are entitled to the benefits of the act.

Respectfully,  
 GILBERT BETTMAN,  
*Attorney General.*

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1537.

DISAPPROVAL, AUTHORITY FOR CANCELLATION OF LEASE TO OHIO  
 CANAL LAND BETWEEN NEWARK AND HEBRON, LICKING  
 COUNTY, OHIO.

COLUMBUS, OHIO, February 18, 1930.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication which reads as follows:

"The Department of Highways, by Robert N. Waid, Director, has applied to this department for a transfer of, and the right to occupy and use, for the relocation and reconstruction of a part of I. C. H. No. 359, approximately

6,800 lineal feet of the abandoned Ohio Canal between Newark and Hebron, Ohio.

The northerly half of this canal property is now under lease to The Ohio Power Company, as successors to The Columbus, Newark and Zanesville Electric Railway Company, taken over by them in connection with other assets of the Railway Company, and which burden we are sure they would be pleased to be relieved of.

As the Highway Department is very anxious to proceed with the preparation of final plans and awarding of contracts for the proposed improvement, will you kindly advise this department at the earliest possible date, whether or not we can cancel, with the consent of the lessee, that portion of said lease and grant to the Highway Department the right to occupy and use said portion of said canal property for highway purposes?"

From other information at hand it appears that the lease referred to in your communication is one executed to the Columbus, Newark & Zanesville Railway Company, January 5, 1923, by which there was leased and demised to said company for a term of twenty-five years the right to use and occupy Ohio canal lands between Newark and Hebron for railway right of way and pole line purposes. This lease was executed pursuant to the authority of Section 14203-23, General Code, as amended by an act of the General Assembly in the year 1919, 108 O. L., Part I, page 608; said Section being originally part of an act passed March 21, 1917 (107 O. L. 741) to abandon certain portions of the Ohio canal between Newark and the village of Hebron, Licking County, Ohio, and providing for leasing and selling the canal land included therein.

Said Section 14203-23, General Code, authorizes the Superintendent of Public Works, subject to the approval of the Governor and the Attorney General, to sell or lease said abandoned canal land "in strict conformity with the various provisions of the General Code relating to the selling and leasing of state canal lands (Section 13971, G. C.) except that the term of such leases shall not be for less than fifteen nor more than twenty-five years."

In Opinion No. 729, directed to your predecessor, Hon. B. T. Wisda, under date of August 12, 1929, it was held, following former opinions of this office touching this question, that the Superintendent of Public Works had no authority to cancel the lease here in question for the purpose of enabling the Ohio Power Company to take a new lease on the canal lands covered by said lease for pole line purposes only. Further upon this point, it is to be observed that there is no statutory authority which permits you to cancel this lease for the purpose of devoting these canal lands to another purpose.

In this connection, addressing myself to the question presented in your communication, it may be further noted that where the canal lands referred to in your communication are not encumbered by the lease now held by the Ohio Power Company, you would have no authority to turn these lands over to the Director of Highways for road purposes.

In the case of *State of Ohio ex rel. vs. Railway Company*, 37 O. S. 157, 174, which involved the question of the power and authority of the board of public works to enter into an agreement permitting the Railway Company to occupy and use certain canal lands of the state, it was held that said board of public works possessed no power to grant rights to others with respect to the occupancy and use of canal lands, otherwise than as such power was expressly granted by statutory provision. It is obvious that the same rule applies with respect to the power and authority of the Superintendent of Public Works in matters relating to the use to be made of the canal lands of the state.

In this connection it is to be noted that whenever the Legislature has seen fit to permit the use of abandoned canal lands for highway purposes, express provision has

been made to that end by statutory enactment. Thus, in the act of April 21, 1927, 112 O. L. 388, providing for the abandonment of that portion of the Miami and Erie Canal from a point five hundred feet north of the state dam near the corporation line of the city of Middletown, Butler County, Ohio, and Saint Bernard in Hamilton County, Ohio, the Director of Highways was expressly invested with the custody and control of such abandoned canal lands for state highway purposes. The same is true of the act of May 11, 1927, 112 O. L. 360, providing for the abandonment of a portion of the Miami and Erie Canal in Lucas County.

In this connection I likewise note an act passed by the Legislature under date of March 21, 1917, authorizing the county commissioners of Muskingum County to occupy and use for public highway purposes certain abandoned Ohio canal lands in said county. Other instances of this kind might be noted, but enough has been said to indicate that in the absence of statutory authority therefor, abandoned canal lands of the state under the jurisdiction and control of the Superintendent of Public Works cannot be used for highway purposes.

It follows from the considerations above noted that the question presented in your communication is required to be answered in the negative.

In concluding this opinion, it may be well to note that the decision and opinion of the court in the case of *Kirk, Superintendent of Public Works vs. Maumee Valley Electric Company*, 279 U. S., 797, is in no wise inconsistent with the conclusion here reached by me on the question presented in your communication. In the case cited, the Supreme Court of the United States held that effect was required to be given to the act of May 11, 1927, above referred to, providing for the abandonment of a portion of the Miami and Erie Canal in Lucas County for canal and hydraulic purposes and for the use of the canal for highway purposes, as against lessees holding leases of surplus water in the canal for hydraulic purposes under the authority of a previous act of the Legislature of this state.

As above noted, the act of May 11, 1927, expressly provided that the canal lands abandoned by said act should be devoted to highway uses and purposes under the supervision and control of the state highway director in the manner therein provided, and there is nothing in the decision or opinion of the court in the case of *Kirk vs. Maumee Valley Electric Company* which carries any suggestion that canal lands of the state under the jurisdiction and control of the Superintendent of Public Works can be turned over to another department of the state government for highway purposes in the absence of express legislative authority to that end.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

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1538.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR SALE OF CANAL  
LAND IN STARR TOWNSHIP, HOCKING COUNTY.

COLUMBUS, OHIO, February 19, 1930.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication submitting for my examination and approval a transcript of the proceedings of your office relating to the proposed sale and conveyance of a parcel of abandoned Hocking canal lands to one Norman Cooper, of Haydenville, Ohio, which parcel of land is