

The *King* decision is no longer applicable where the injury occurred subsequent to June 30, 1968 because the statutory language that provided for payments from the second injury fund "according to the full rate provided in the schedule of benefits" was deleted by Act 227, P.A. 1968. Therefore, in respect to employees who are or become disabled because of an injury occurring on or after July 1, 1968, they shall receive differential benefits in accordance with the two-thirds limitation.

FRANK J. KELLEY,
Attorney General.

701112-3

PUBLIC HEALTH: Food and beverages.

FUNERAL DIRECTORS AND EMBALMERS: Service of food and beverages.

The department of public health is authorized to regulate the serving of food and beverages at funeral establishments; and, where a substantial hazard to public health is found to exist, the department of public health may prohibit the serving of food or beverages in any funeral establishment.

No. 4701

November 12, 1970.

Mr. George Van Kula, Chairman
Board of Examiners in Mortuary Science
1033 South Washington Avenue
Lansing, Michigan 48926

On behalf of the board you have requested my opinion as to whether Act 269, P.A. 1968, which deals with the licensing of food service establishments and vending machine locations, authorizes the department of public health to regulate or prohibit serving of food and beverage at funeral establishments. Your letter was apparently prompted by an action against the board brought by one of its licensees¹ challenging the constitutionality of a promulgated board rule prohibiting funeral establishments from serving food and beverages to the public in connection or in conjunction with any part of funeral service operations.²

In *Ware-Smith & Co. v. State Board of Mortuary Science, supra*, the Midland county circuit court signed a consent judgment which read in part as follows:

"...Article V of the Rules and Regulations promulgated by the Defendant Michigan State Board of Mortuary Science is invalid to the extent same prohibits the serving of beverages to the public in connection with funeral services..."

¹ *Ware-Smith & Co. v. State Board of Mortuary Science* (filed January 5, 1970, decided June 19, 1970), Midland County Circuit Court, file No. 2564.

² Article V of the board's rules, being R. 338.865 of the Michigan administrative code of 1954, as amended, reads in pertinent part as follows:

"In the interest of safeguarding public health, safety, welfare and sanitation, and to promote the ethical standards of funeral service, the serving of food and/or beverages to the public in connection, or in conjunction, with any part of funeral service operations in a funeral establishment is prohibited."

“ . . . the Defendant Michigan State Board of Mortuary Science shall be and is hereby permanently enjoined from enforcing Article V of the Rules and Regulations of the Defendant, Michigan State Board of Mortuary Science (R 338.865 Michigan Administrative Code, as amended) to the extent that said Rules and Regulations prohibit the Plaintiff from serving of beverages to the public in connection or in conjunction with any part of funeral service operations in a funeral establishment.”³

The board's letter raises the following questions:

1. Can the department of public health regulate the serving of food in funeral establishments?
2. Can the department of public health regulate or prohibit the serving of food or beverages in funeral establishments?
3. Can the department of public health prohibit the serving of food or beverages in funeral establishments?

QUESTION 1

Section 2 of Act 269, P.A. 1968, being M.C.L.A. § 325.802 and M.S.A. 1969 Rev. Vol. § 14.529(2), provides in pertinent part:

“After April 30, 1969 a person shall not operate any food service establishment, temporary food service establishment or vending machine location in this state without first having secured a license from the director as provided in this act”

Section 1(a) states, as used in the act:

“ ‘Food service establishment’ means any fixed or mobile restaurant, coffee shop, cafeteria, short order cafe, luncheonette, grill, tearoom, sandwich shop, soda fountain, tavern, bar, cocktail lounge, nightclub, drive-in, industrial feeding establishment, private organization serving the public, catering kitchen, delicatessen, commissary or similar place in which food or drink is prepared for direct consumption through service on the premises or elsewhere, and any other eating or drinking establishment *or operation where food is served or provided for the public*. The provisions of this act shall not apply to state and county fairs, meat and poultry slaughterhouses or processing plants, soft drink plants, food warehouses, grocery stores, bakeries, dairy plants, locker plants, canning and preserving plants, brining stations, roadside stands, flour mills, fish processors and markets, egg breaking plants, motels serving continental breakfasts, or other establishments where food manufacturing, processing or packing is carried out.” (emphasis supplied) M.C.L.A. § 325.801, M.S.A. 1969 Rev. Vol. § 14.529(1)

The answer to this question, of course, turns on whether a funeral establishment serving food and beverages is a “food service establishment” within the meaning of section 1 of Act 269, P.A. 1968, or more specifically, whether such a funeral establishment is an “operation where food is served or provided for the *public*.” (emphasis supplied)

³ See footnote 1.

Michigan's rules of statutory construction require:

"All words and phrases . . . (to) be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." M.C.L.A. § 8.3(a), M.S.A. 1969 Rev. Vol. § 2.212(1)

In *People v. Powell* (1937), 280 Mich. 699, 702, the Michigan Supreme Court considered the following statutory language:

" 'Any person, firm, association, or corporation who shall sell milk, cream, goat's milk or other milk from a wagon or other conveyance, depot or store or who shall sell or deliver milk, cream, goat's milk or other milk to a hotel, restaurant, boarding house or the public, shall first obtain a license from the commissioner of agriculture to sell such milk or cream.' "4

The defendant in that case, a milk producer, sold approximately six percent of his dairy milk output to friends and neighbors. He sold the balance to a dairy and to retail milk distributors. The question was whether by selling the six percent to friends and neighbors, the defendant sold milk to "the public" without first obtaining a license in violation of section 5316. In construing the word "public" the court adopted the following definitions:

"The words 'public' and 'private' are generally used in contradistinction to each other. 'Private' is defined by Webster (New International, 2d ed.) as 'belonging to, or concerning, an individual person, company, or interest.' 'Public' is defined as 'of or pertaining to the people; relating to, belonging to, or affecting, a nation, State, or community at large; — opposed to private.' Bouvier (Rawle's 3rd Rev.) defines 'private' as 'affecting or belonging to individuals, as distinct from the public generally;' and defines 'public' as 'the whole body politic, or all of the citizens of the State. The inhabitants of a particular place.'

"Of the word 'public,' *Corpus Juris* says:

" 'In one sense, the "public" is everybody; and accordingly "public" has been defined or employed as meaning the body of the people at large; the community at large, without reference to the geographical limits of any corporation like a city, town, or county; the people; the whole body politic; the whole body politic, [sic] or all the citizens of the State.

" 'In another sense the word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few. Accordingly, it has been defined or employed as meaning the inhabitants of a particular place; all the inhabitants of a particular place; the people of the neighborhood.' 50 C.J. pp. 844, 845." (pp. 702, 703)

⁴ Section 5316, 1 Comp. Laws 1929.

The court concluded:

"... The statute covers selling the milk to the 'public,' — that is, to all those who have occasion to purchase, within the limits of the defendant's capacity or ability to furnish it. See 6 Words & Phrases (1st Series), pp. 5771-5841; 4 Words & Phrases (2d Series), pp. 1-53. I think this statute was not intended to be so construed as to compel every farmer who sells a pint of milk to his neighbor to take out a license and be placed under public regulation." (emphasis supplied) (p. 707)

Those funeral establishments which welcome all those who have occasion to visit them, and which serve or make available food or beverages to them, do serve the public.

In answer to the first question, therefore, I conclude that Act 269, P.A. 1968, authorizes the department of public health to require those "food service establishments" listed in section 1(a), including funeral establishments serving food to visitors or persons attending funerals, to obtain licenses.

QUESTION 2

The answer to question 2 depends upon whether the term "food" as used in the phrase "and any other eating or drinking establishment or operation where food is served or provided for the public"⁵ includes beverages as well as solid food substances. Section 7 of Act 269, P.A. 1968, being M.C.L.A. § 325.807, M.S.A. 1969 Rev. Vol. § 14.529(7), provides in pertinent part:

"... Except as otherwise specifically defined or described in this act the provisions of the unabridged nongrading form of the 1962 edition of the 'United States public health service food service sanitation ordinance and code' and the provisions of the unabridged form of 'the vending of food and beverage — a sanitation ordinance and code — 1965 recommendations of the public health service' are adopted, except any reference in these ordinances and codes to adulteration, misbranding and advertising" (emphasis supplied)

Section A8 of the United States public health food service sanitation ordinance and code of 1962 reads as follows:

"The following definitions shall apply in the interpretation and the enforcement of this ordinance:

"* * *

"8. Food shall mean any raw, cooked, or processed edible substances, beverage or ingredient used or intended for use or for sale in whole or in part for human consumption."

The above definition of food applies, being incorporated by reference into Act 269, P.A. 1968, *supra*.

For the reasons stated in the answer to question 1, therefore, I conclude that the department of public health may regulate the serving

⁵ See section 1 of Act 269, P.A. 1968, *supra*.

of beverages in funeral establishments as well as all other section 1(a) "food service establishments."

QUESTION 3

Section 5 of Act 269, P.A. 1968, reads in pertinent part:

"...The director or a certified health department may require immediate discontinuance of operation of any food service establishment, temporary food service establishment, vending machine or vending machine location when in their opinion continued operation would create a substantial hazard to the public health." M.C.L.A. § 325.805, M.S.A. 1969 Rev. Vol. § 14.529(5)

Upon a finding of a substantial hazard to the public health under Act 269, P.A. 1968, *supra*, the department of public health may prohibit the serving of food, including beverages, in any funeral establishment.

FRANK J. KELLEY,
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701125.2

AIR POLLUTION: Powers of counties, townships, villages and cities to control by ordinance, discussed in relation to state air pollution control act; extent of delegation of state police power construed. Non-charter counties are without power to adopt a complete air pollution control ordinance.

No. 4696

November 25, 1970.

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You ask for my opinion on several questions in regard to the power and authority of a county to adopt an air pollution control ordinance which would apply to all municipalities in the county of Delta, including the townships, the general act village of Garden,¹ and the home rule cities of Escanaba and Gladstone. The latter have general power to adopt ordinances,² and the duty to provide for the public peace and health and the safety of persons and property.³ The village of Garden has authority under Act 3, P.A. 1895, as amended, usually referred to as the general law village act, to abate nuisances and preserve the public health,⁴ and to pass ordinances in relation thereto.⁵ The townships have authority to adopt ordinances and regulations to secure the public health, safety and general welfare.⁶

¹ Local Acts of Michigan, 1891, p. 1077.

² M.C.L.A. § 117.3; M.S.A. 1970 Cum. Supp. § 5.2073.

³ *Ibidem.*

⁴ M.C.L.A. § 67.1; M.S.A. 1961 Rev. Vol. § 5.1285.

⁵ *Ibidem.*

⁶ M.C.L.A. § 41.181; M.S.A. 1970 Cum. Supp. § 5.45(1).