OPINION
77-93

September 19, 1977 (OPINION)

Workmen's Compensation Bureau
Russel Building - Highway 83 North
Bismarck, ND 58505

Attention: Richard J. Gross, Counsel

Dear Mr. Gross:

You state that, as a result of the case of Lowe v. North Dakota Workmen's Compensation Bureau, 66 N.D. 246, 264 N.W. 837 (1936), the North Dakota Workmen's Compensation Bureau has been informing custom farm operators - such as custom combiners and custom hay movers and stackers - that they are not required to have workmen's compensation coverage due to the farm exemption provided for in Section 65-01-02 N.D.C.C. You then indicate that there appears to be a trend away from that position by Supreme Courts in adjacent states as well as the North Dakota Supreme Court. You also indicate, however, that the North Dakota Supreme Court has not specifically faced the issue since 1936.

Then you ask:

> Do custom farm operations such as custom combining and custom hay moving and stacking when carried on by individuals or entitles which do not own or operate a farm fall within the agricultural exemption of Section 65-01-02?

After the Lowe decision, the North Dakota Supreme Court again faced the interpretation of "agricultural labor." In Unemployment Compensation Division of the Workmen's Compensation Bureau v. Valker's Greenhouses, 296 N.W. 143, 70 N.D. 515 (1941), the North Dakota Supreme Court was dealing with the term in a different context, that of the Unemployment Compensation Act rather than the Workmen's Compensation Act. However, the court stated: "The sole question in this case is whether the persons employed by the defendant in connection with its greenhouse enterprise are employed in agricultural labor." (at 519)

The court answered:

> To regard the production of all fruits of the soil, no matter under what conditions they are produced, as being agricultural rather than industrial, would place upon the term agriculture a broader meaning than that intended by the legislature. It would imply a broader meaning than that given to the term in its common usage. We customarily think of agriculture even in its broadest sense as pertaining to a farm. (at 520)

The court further stated, citing a Pennsylvania Superior Court decision, that:

> "Agriculture, in the usual and commonly accepted sense of the term, does not include the operation of commercial greenhouses; nor is an employee in charge thereof an agricultural worker. The operation of such greenhouses is more akin to industry than to agriculture. . . The fact that plants and flowers raised therein are products of the soil is not controlling, but rather that this is done under artificial conditions in a commercial plant." (at 521)

In Valker's the court no longer held to the "nature of the work" test. Rather, it stated that "agriculture" pertains to a farm, and the fact that an operation may include working with "products of the soil" is not controlling.

Then, in 1952, in the case of Burkhardt v. State et al., 53 N.W.2d. 394, 400 the North Dakota Supreme Court concluded:

> Even if that employment was on a farm that does not make those engaged solely in that work farm laborers. The whole character of the employment shows that Burkhardt was not employed to perform ordinary farm work.

In Kipp v. Jalberg, 110 N.W.2d. 825, 827 (1961), the North Dakota Supreme Court stated:

> Employment for the purposes of dismantling a barn, salvaging the material, and constructing a garage upon farm premises for a farmer is not an agricultural service where a person is specially employed for the work. The plaintiff being specially employed to engage in this work is not engaged in an agricultural service under the exemption provisions of our Compensation Act.

The Burhardt and Kipp cases conclude that the fact that work is done upon a farm, even if it is exclusively done upon a farm, does not necessarily make the employment agricultural service.

The most recent statement of the North Dakota Supreme Court on this topic is that of Morel v. Thompson, 225 N.W.2d. 584 (1975). After citing several dictionary definitions of "agriculture," the court was still in doubt as to whether or not the production and processing of honey would be agricultural. It concluded, therefore, that the Workmen's Compensation Act was intended to extend its aid to every employee who can fairly be brought within it. The Act, the court said, must be liberally construed to cover as many employees as possible. Doubt must be resolved in favor of coverage.

Several cases in the Supreme Courts of adjacent states have specifically addressed the problem of custom farm operations. In Skreen v. Rauk, 27 N.W.2d. 869, 872 (1947), the Minnesota Supreme Court considered a custom threshing operation. It held:

> Here, the evidence shows that realtor engaged, according to his own testimony, in custom or commercial threshing for "many" years and in the course thereof he wore out one combine and at the time of the accident here involved was using the second one he had purchased for such business. . .An employee of a farmer

> engaged in threshing as a business, and not in doing his own threshing or in threshing for others casually or upon an exchange-work basis, is covered by the workmen's compensation act.

In Hawthorne v. Hawthorne, 167 N.W.2d. 564 (1969), the Nebraska Supreme Court also had an opportunity to examine a custom combining operation. The court stated:

> The defendant's business is distinguishable from the regular trade, business, profession, or vocation of farming or ranching, even though his equipment and services were contracted for or used only by customers who were themselves engaged in farming or ranching operation. . . . We take judicial notice of the fact that old-fashioned farming and ranching contemplated by the Legislature at the time of the adoption of the Workmen's Compensation Act has been extensively affected by mechanization, specialization, and scientific advancement. The growth and the size of farms and the constantly accelerating changes in methods and machines, together with spiraling costs, have spawned a multitude of commercial businesses which provide equipment and specialized services for farmers and ranchers. These developments have, in some cases, created a type and kind of regular commercial business, separate and distinct from farming and ranching. (at 567).

More recently, the Montana Supreme Court, in the case of State ex rel. Romero v. District Court, 513 P.2d. 265, 267 (Mont. 1973), held:

> We hold that custom combining is a hazardous business operation and as such the employer is required to carry Workmen's Compensation. . .Nothing in this work is associated with the custom combiner's own farm operation. The custom combiner is not employed in farming. He is harvesting a crop which he did not raise, nor own. The custom combiner was merely providing a service to the farmer who hired him.

In the case of Backsen v. Blauser, 95 Idaho 811, 520 P.2d. 858 (1974), the Idaho Supreme Court held that, in determining whether the agricultural exemption applied, reference must be made to the nature of the employer's business, not the activity engaged in at the time of injury. The employer's business in that case consisted of transporting farm goods, and was, therefore, not within the perview of the exemption. The court held:

> The test for determining whether the activity is one which is covered by the workmen's compensation law or is exempt therefrom, is not the immediate task the workman is doing at the time of the accident, but the occupation or pursuit of the employer considered as a whole.

Therefore, the North Dakota Supreme Court appears to have moved away from the concept of "the nature of the work" toward a definition of agriculture which is narrower in scope. It has also stated that the aid of the Workmen's Compensation Act out to extend to every employee who can fairly be brought within it. The exemption, therefore, has

been held to be narrower and the coverage of the Act broader than the Lowe decision indicated.

In addition, other Supreme Courts which have specifically faced the question have concluded that custom farm operations, such as custom combining and custom hay moving and stacking, depending upon, among other things, the nature of the employer's business, do not necessarily fall within the agricultural exemption.

The emphasis of these courts appears to be upon whether the custom operator is himself a farmer or simply provides a service to farmers. In the latter case, the agricultural exemption has been held not to apply.

You then ask:

> If they do not, would it make a significant difference if a farmer - that is, an owner and operator of a farm - carried on such an operation on a part-time basis? If so, what would constitute a part-time basis?

In its holding in the Hawthorne case, cited above, the Nebraska Supreme Court stated: "A farmer engaged in doing his own combining or in combining for others casually, or upon an exchange-work basis, does not come within the scope of this holding." (at 567)

The Minnesota Supreme Court, in the case of Tucker v. Newman, 14 N.W.2d. 767, 772 (1944), stated:

> It is conceivable that there may be instances where an employment activity. . .is on such a small scale and under such condition as to warrant a determination that it is merely incidental to farming and does not amount to a separate and distinct business apart from farming. . .Each case must be determined on its own facts. This, however, is not one of those situations. Having in mind the finding of the commission as to the whole character of respondent's employment, together with the fact that the extent of realtor's business was such as to constitute a separate and distinct industry, we conclude that it was not within the exemptions of the Workmen's Compensation Act so as to deprive respondent of its benefits.

And, in the Skreen case cited above, the Minnesota Supreme Court concluded:

> . . .An employee of a farmer engaged in threshing as a business, and not engaged in doing his own threshing or in threshing for others casually or on an exchange-work basis, is covered by the Workmen's Compensation Act. (at 872)

The Montana Supreme Court, in the Romero case also cited above, said that the test was not whether the work might, in general, be incidental to farming, but whether the particular activity engaged in by this particular employee's employer was farming. It further held:

> This court finds that the legislature in 1915, at the time of the passage of the Workmen's Compensation Act, intended to

> include in the exclusion. . .the normal activities and operation of the farm or ranch by the owner and his employees as well as exchange of work and labor in other casual farm related activities.

The concensus of the courts, therefore, appears to be that if a farmer does his own combining and engages in custom combining for others on occasion, that operation would fall within the exemption provided in Section 65-01-02.

The question, then, is one of degree. It is impossible to set forth specific percentages, but certainly if the majority of the custom operation is done for others for profit, this would constitute a "separate and distinct" business, a kind of regular "commercial business," not within the agricultural exemption.

"Occasionally" and "casually" are obviously less than a majority of the time. But more specific definition is difficult. Therefore, cases in which a farmer spends less than a majority of his or his employee's time in custom operations for others would necessarily have to be determined on an individual basis.

Finally, you ask:

> Assuming that it is your opinion that certain types of custom farm operators do not fall within the agricultural exemption, what type of notification must the Bureau give to such operators, if any, concerning what would be, in effect, a substantial change in the Bureau's position with regard to such custom farm operations? Would a period of six months be an adequate time for such notification?

In answering this question, reference must be made to the case of Kitto v. Minot Park District, 224 N.W.2d. 795 (1974). In that case, the North Dakota Supreme Court applied what has been termed "the Sunburst Doctrine." It stated:

> A change of such far-reaching application requires careful consideration of the manner in which it is to be applied to minimize confusion and injustice for those relying upon previous decisions of this court. (at 804)

In applying the Sunburst Doctrine, the court held that its decision would apply prospectively only to causes of action arising "fifteen days after adjournment of the Forty-fourth Legislative Assembly of the State of North Dakota." The court applied the Sunburst Doctrine so that individuals and entities would have adequate time to protect themselves.

The Bureau must do likewise. That is, it must allow an adequate time for custom farm operators to be notified and to secure coverage before such coverage becomes mandatory. A period of six months would be such an adequate time and would then provide that coverage would become mandatory as of April 1, 1978.

Notice should include wide media coverage of this change in policy as well as direct contact with all custom farm operators known to the

Bureau and with farm-oriented organizations throughout the state. Private insurance companies which may presently be carrying liability insurance on behalf of such custom farm operators should also be informed.

However, it is also necessary to point out that should an employee of a custom farm operator be injured in North Dakota prior to April 1, 1978, a court may determine that such custom farm operator was not exempt and was required to secure workmen's compensation coverage on his employees. This opinion is addressed simply to the "policy" of the North Dakota Workmen's Compensation Bureau in advising that no coverage is required. It, necessarily, can have no broader application than that.

Sincerely,

ALLEN I. OLSON

Attorney General