To recapitulate, it is my opinion that a city or town coming into existence subsequent to the last preceding United States decennial census, but in existence during the time in which monies for the next immediately forthcoming distribution from the cigarette tax fund were being collected and accumulated by the state, is entitled to share in the distributions of cigarette tax monies to the cities and towns of this state—the population of such city or town, for such purposes, being based upon a United States special census pending the taking of the next United States decennial census. It is my further opinion that a city or town existing at the time of the last preceding United States decennial census and which now has a population based on a subsequent United States special census continues to share in the distributions from the cigarette tax fund on the basis of its population as established by the last United States decennial census and not on the basis of a subsequent United States special census.

OFFICIAL OPINION NO. 16

May 26, 1965

Mr. Hobert P. Butler
Commissioner of Labor
1013 State Office Building
Indianapolis, Indiana 46204

Dear Mr. Butler:

The following is my answer to your letter requesting an Official Opinion concerning the Minimum Wage Law of 1965. Your exact questions are:

"... we would like your opinion as to whether canneries, as are customary in the processing of tomatoes and other crops, are exempt from the coverage of the law under Section 4 (m) relating to agricultural labor. A clarification as to the point where labor in regard to farm products ceases to be 'agricultural labor' and becomes labor included within the coverage of the Act, from the time an agricultural product is planted to the time it reaches the consumer would be helpful.
"Also, we would like your opinion as to whether the Department of Wage Claims can lend its authority and assistance to employees who are owed wages in consequence of this Act."


* * *

"'Employee' means any person employed or permitted to work or perform any service for remuneration or under any contract of hire, written or oral, express or implied by an Employer in any occupation, but shall not include any of the following: (Emphasis added.)

* * *

"(m) Persons engaged in agricultural labor. The term shall include only services performed (i) on a farm, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry and furbearing animals and wildlife; (ii) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement or maintenance of such farm and its tools and equipment, if the major part of such service is performed on a farm, and (iii) in connection with the production or harvesting of maple sugar or maple syrup or any commodity defined as an agricultural commodity in section 15 (g) of the Agricultural Marketing Act (F.C.A., tit. 12, §1141 j), as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes, and (iv) in handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity;"
but only if such service is performed as an incident to ordinary farming operation or, in the case of fruits and vegetables, as an incident to the preparation of such fruits and vegetables for market: Provided, however, That this shall not apply to services performed in connection with any agricultural or horticultural commodity after its delivery to a terminal market or processor for preparation or distribution for consumption.

“As used in this paragraph the term 'farm' includes stock, dairy, poultry, fruit, fur-bearing animals, and truck farms, nurseries, orchards, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities.” (Emphasis added.)

As does the Minimum Wage Law of 1965, the Workmen’s Compensation Act of 1929 excludes farm or agricultural employees from its operation. The pertinent part of the latter Act reads as follows:

“This act, shall not apply . . . to farm or agricultural employees, . . . nor to the employers of such persons. . . .” Acts 1929, ch. 172, § 9, as amended, Acts 1963, ch. 387, § 2, Burns IND. STAT. ANN., § 40-1209 (1964 Supp.).

Our courts have defined, described and established a test to determine when a person is a farm or agricultural employee for the purposes of the Workmen’s Compensation Act. The test used to make that determination for Workmen’s Compensation purposes will be applied to determine whether or not an employee is engaged in agricultural labor under the Minimum Wage Law because of the similarity in the two laws, except to the extent that the language of the latter law limits the application of the test. The identical test has been employed by the federal courts when interpreting the Fair Labor Standards Act. Wyatt v. Holtville Alfalfa Mills (S. D. Cal. 1952), 106 F. Supp. 624, 628, cited in H. J. Heinz Co. v. Chavez, 236 Ind. 400, at p. 407, 140 N.E.2d 500 (1957):

“... counsel for the plaintiffs make much of the fact that the defendant is a commercial industry.
There is little room for argument on that score. The test under the Act, however, is the nature of the employee's activities, and not the character of the employer's business. . . ."

The employment activities covered by "agricultural labor" are enumerated in § 3(m), supra, of the Minimum Wage Law. The phrase "farm or agricultural employees" is not defined in the Workmen's Compensation Act.

Section 3(m), supra, of the Minimum Wage Law provides that the employment activities therein stated are agricultural labor only if the service is performed as an incident to the ordinary farm operation or, in the case of fruits and vegetables for market.

The case of Hahn v. Grimm, 101 Ind. App. 74, 198 N.E. 93 (1935), is a workmen's compensation case in which an employee of a partnership which was engaged in the farm to farm harvesting crops. The farms were not owned nor operated by the partnership. It was held that the employee was not a farm or agricultural laborer. At page 78 of 101 Ind. App., the court stated:

"... One may be doing labor on a farm that has become necessary to be done because of farming operations, and yet not be 'a farm or agricultural employee'..."

The case of In re Boyer, 65 Ind. App. 408, 117 N.E. 507 (1917), another workmen's compensation case, sets standards which may be looked to when determining when an employment activity is an incident to ordinary farming operations. I quote from the case, beginning at page 411 of 65 Ind. App.:

"While the threshing of wheat may be a part of the work necessary to be done on the farm, the farmer himself rarely does it. On the contrary, he has it done by some one who is specially equipped with the machinery necessary to do this kind of work. Wheat threshing is a business or industrial pursuit in and of itself, entirely separate and independent of farming. We apprehend that it would not be contended that the employe of the miller employed in grinding the farmer's
wheat into flour, while so engaged, is doing farm or agricultural work. Yet, as affecting the question of what relation the labor of their employees sustains to that of the farm, or agriculture in general, we can see little if any difference between the thresher and the miller. They each have to do with getting the farm product ready for consumption. It is true the miller's work is a step further removed from the farm, but each is engaged in a business, separate from and independent of the farm, which requires machinery, equipment and labor peculiar to the business, and not ordinarily required on or incident to farm work. The only difference between the occupations which suggests itself to our minds as one that might be urged as affecting the question whether each of the two occupations is separate and independent of that of the farm, and whether the labor of their employees, while employed to assist in the operation of such respective businesses, is farm labor, is the fact that the thresher goes to the farm to thresh the farmer's wheat, while the farmer takes his wheat to the miller to get it ground into flour. If this difference in the place of doing the work can furnish a sufficient reason for characterizing the work of the thresher as farm work, and that of the miller as some other kind of work, then all the miller would have to do to become a farmer would be to place his mill on wheels and go to the farmer to grind his wheat, and the thresher will cease to be engaged in farm work as soon as he requires the farmer to bring his wheat to him for threshing. We do not think the separation and independence of a business or occupation from that of a farmer can be made to depend on such a distinction.

"If farmers generally owned threshing outfits and were in the habit of threshing their own grain, and the claimant had been employed by the farmer to assist in the work of threshing, and had been injured while doing such work, a more serious question would be presented. However, if a custom such as that indicated had prevailed among farmers at the time of the enactment of the law in question, the legislature might
1965 O. A. G.

have made an exception to the proviso, supra, which exempts all farm laborers, and those employing them, from the operation of said act.” (Emphasis added.)

In determining whether or not a person is an agricultural or farm employee under the Workmen’s Compensation Act, reference is made to the nature and character of the service that the employee was hired to perform and not to the character of the business in which the employer is engaged. In Dowery v. State of Indiana, 84 Ind. App. 37, 149 N.E. 922 (1925), it was held that an employee of the Indiana Girl's School engaged in farm work was a farm employee and not covered by the Workmen's Compensation Act. In Madeever v. Marlin, 92 Ind. App. 158, 174 N.E. 517 (1930), it was held that a windmill repairman, while repairing a windmill on a farm, was not a farm employee and was protected by the Workmen’s Compensation Act.

When applying this test to the Minimum Wage Law, it is not inconceivable that part of the services performed by an employee may be compensable under that Law and the other part of the services excluded from its operation.

In Smart et al., d/b/a Covington Packing Co. v. Hardesty, 238 Ind. 218, 149 N.E.2d 547 (1958), the employee devoted part of his time to agricultural work for which he received one rate of pay and rendered his other service as a laborer in a canning factory for which he received a different rate of pay. Both services were performed for one employer. At page 220 of 238 Ind. Reports, the Court stated:

“... In ascertaining whether or not a person is a farm or agricultural laborer the law is well settled that the issue must be determined from the character of the work the employee is required to perform, and not from the general occupation or business of the employer. H. J. Heinz Co. v. Chavez (1957), 236 Ind. 400, 140 N.E.2d 500; Evansville Veneer & Lumber Co. v. Mullen (1946), 116 Ind. App. 616, 65 N.E.2d 742. And while the whole character of the employment must be looked to, an employee may work in a dual capacity for the same employer and be covered by the Act while engaged in one capacity and excluded from its benefits while engaged in the other.”
OPINION 16

Employees of chicken farms are farm employees under the Workmen's Compensation Act. Fleckles v. Hill, 83 Ind. App. 715, 149 N.E. 915 (1925). Employees on poultry farms and the like are engaged in agricultural labor under the Minimum Wage Law, §3 (m) (i). In the Fleckles case, supra, it is stated at page 716 of 83 Ind. App. as follows:

"The term 'agriculture' is defined [in Webster's Dictionary] as the art or science of cultivating the soil, including the planting of seed, the harvesting of crops, and the raising, feeding and management of live stock or poultry."

In answer to your first question, a person who labors in a plant for the canning of fruit, vegetables and other farm commodities does not perform agricultural labor and is entitled to the benefits of the Minimum Wage Law of 1965.

In determining whether or not a person who performs service is included within §3 (m) (ii) (iii) and (iv) is performing agricultural labor, reference must be made to the cases individually to determine whether or not the service is performed as an incident to ordinary farming operations. And, no services performed are considered agricultural labor after the agricultural or horticultural commodity is delivered to a terminal market, or processor, for distribution or preparation for consumption.

The product has reached the terminal market when the farmer loses control over or has no direct financial interest in further movement of the commodity.

Judicial definitions of the term "terminal market" are found in 41 Words and Phrases, pages 594 and 595, as follows:

"A 'terminal market', within provision exempting agricultural labor from coverage under Unemployment Insurance Law, is a place of business to which products are shipped in a sorted, graded, packaged condition ready for immediate sale. Claim of Lazarus, 52 N.Y.S. 2d 682, 687, 268 App. Div. 547.

*   *   *

"Where employer, engaged in business of packing and distributing dried fruit, did not own or operate
any farms or orchards but purchased fruit outright from growers for processing at its packing plant, the employer was a 'terminal market' within provision of Social Security Act defining agricultural labor. Burger v. Social Sec. Bd., D.C. Cal., 66 F. Supp. 619, 625.

"Where farmers sold their potatoes to an employer and the farmers parted with their economic interest in the potatoes upon the potatoes entering the employer's warehouse, the warehouse was a 'terminal market' within provision of social security act defining agricultural labor. Ewing v. McLean, C.A. Idaho, 189 F. 2d 887, 893.

"A 'terminal market' which is not exempt under provision of the Unemployment Compensation Act exempting agricultural labor, is a place of business to which products are shipped in a sorted, graded, packaged condition, ready for immediate sale. Michigan Unemployment Compensation Commission v. Appeal Bd. of Mich. Unemployment Compensation Commis- sion, 50 N.W.2d 755, 756, 332 Mich. 194.

* * *

"Quoted word, in statutory provision precluding application of agricultural exemption from unemployment compensation law to a commodity after its delivery to terminal market for distribution for 'consumption,' does not have reference to ultimate consumption, the consumption contemplated by the Legislature being that which takes place at market from which commodity is set afloat in channels of commerce; and livestock auction market constituted such 'terminal market'. Paxton Livestock Co-op. Ass'n. v. Florida Indus. Commission, Fla. App., 104 So.2d 647, 650."

The point at which labor in regard to farm products ceases to be "agricultural labor" and becomes labor included within the Minimum Wage Law must be determined by the facts and circumstances surrounding each case.

In answer to your third question, the Department of Wage Claims, may render its authority and assistance to employees
who are owed wages in consequence of the Minimum Wage Law of 1965.

The word "wages" is defined by the Acts of 1939, ch. 95, § 1, as found in Burns (1952 Repl.), IND. STAT. ANN., § 40-124(b), as follows:

"(b) The term 'wages' means all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece or commission basis, or in any other method of calculating such amount."

Acts of 1939, ch. 95, § 4, as found in Burns (1952 Repl.), IND. STAT. ANN., § 40-127(a), reads as follows:

"(a) It shall be the duty of the commissioner of labor to enforce and to insure compliance with the provisions of this act to investigate any violations of any of the provisions of this act, and to institute or cause to be instituted actions for penalties and forfeitures provided hereunder. The commissioner of labor may hold hearings to satisfy himself as to the justice of any claim, and he shall cooperate with any employee in the enforcement of any claim against his employer in any case whenever, in his opinion, the claim is just and valid."

Acts of 1939, ch. 95, § 5, as amended by Acts of 1965, ch. 68, § 1, reads as follows:

"The commissioner of labor is hereby authorized to take assignments of wage claims of less than five hundred dollars ($500.00), rights of action for penalties, mechanics' and other liens of workers, without being bound by any of the technical rules with reference to the validity of such assignments; and shall have power and authority to prosecute actions for the collection of such claims of persons who, in the judgment of the commissioner, are entitled to the services of the commissioner and who, in his judgment, have claims which are valid and enforceable in the court. The commissioner shall have power to join various claimants in
one preferred claim or lien, and, in case of suit to join them in one cause of action."

It is clear from the above-cited statutes, that the Commissioner of Labor may accept an assignment of a valid claim for wages so long as the amount claimed is less than $500.00. See 1941 O. A. G., p. 101.

OFFICIAL OPINION NO. 17

May 28, 1965

Mr. William L. Fortune, Commissioner
Indiana Department of Revenue
202 State Office Building
Indianapolis, Indiana

Dear Mr. Fortune:

Your letter has been received, wherein you request an Official Opinion upon the following question:

"Will builders and contractors who have entered into fixed price contracts prior to the enactment of section 6 (k) under the premise that they were retail merchants continue as retail merchants until the expiration of these contracts or will they now be required to pay the tax when they make purchases of materials?"

The Indiana Gross Income Tax Act of 1933, ch. 50, was amended by the Acts of 1963 (Spec. Sess.), ch. 30. Said 1963 Amendment created new provisions which imposed Indiana's gross retail tax, commonly referred to as the sales and use tax. The sales tax provisions of the Gross Income Tax Act of 1933 imposed a sales tax upon all transactions of retail merchants constituting selling at retail. Under the provisions of the Acts of 1933, ch. 50, and the Acts of 1963, ch. 30, builders and contractors were considered as retail merchants who transfer ownership of tangible personal property, and the sales tax, under the provisions of said Acts, was imposed upon the contractor's transferee (the purchaser).

In 1965, the Indiana Legislature, during its session, enacted Chapter 232, of the Acts of 1965, which amended the gross