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PHYSICIANS' FEES—PAYABLE BY RULE OF INDUSTRIAL COMMISSION FOR AFFIDAVITS FURNISHED BY THEM WHICH CONTAIN INFORMATION TO BE USED AS A BASIS FOR ADJUDICATION OF CLAIMS—FEES CONSTITUTE DISBURSEMENTS LEGALLY AND PROPERLY PAYABLE OUT OF STATE TREASURY—NOT SUCH DISBURSEMENTS AS ARE LEGALLY AND PROPERLY PAYABLE OUT OF STATE TREASURY—NOT SUCH DISBURSEMENTS AS ARE LEGALLY AND PROPERLY PAYABLE AS COMPENSATION OR BENEFITS OUT OF STATE INSURANCE FUND—SECTIONS 1465-42, 1465-102 G. C.

SYLLABUS:

Fees payable by rule of the Industrial Commission to physicians for affidavits furnished by them upon request of the Commission and containing information to be used as a basis for adjudication of claims constitute disbursements which are legally and properly payable out of the state treasury, under the provisions of Sections 1465-42 and 1465-102 General Code, and are not such disbursements as are legally and properly payable as compensation or benefits out of the State Insurance Fund.

Columbus, Ohio, July 19, 1945

Industrial Commission of Ohio
Columbus, Ohio

Gentlemen :

This will acknowledge receipt of your request for my opinion, which reads as follows :

“The Industrial Commission of Ohio, through its Medical Section, prepared and disseminated on May 1st, 1945 the current edition of the Rules of Procedure and Fee Schedules, affecting the Medical Section. A copy of this recent publication is attached to this letter and request for an opinion.

You will observe that on page 22 of this pamphlet the following entry is set forth :

‘Affidavits furnished by physicians upon request of Commission containing information used as a basis for adjudication of the claim \$3.00.’

This is the first time that this item has been so included and was approved by the Commission after a conference with the medical associates.

Having agreed to this provision, the Commission would like to have your opinion as to how this item is to be paid, or, more particularly, from what fund or funds is this money to be paid. The procedure contemplates that a doctor will present a bill for having furnished such an affidavit and it will be approved by the Medical Examiner as all other medical bills are approved. It is thought by the writer that if the claim should be one over which the Commission may properly take jurisdiction and award compensation, then this bill for the affidavit might safely be approved by the Commission for payment as all other medical bills are paid and, in State Fund cases, the entire amount to be paid out of the State Fund and charged to the contributing employer’s Risk.

If, on the other hand, the claim be one over which the Commission cannot properly take jurisdiction or award compensation, then it is our thought that this item must be paid out of some other fund, perhaps the Administrative Fund. It is our thought that the constitutional provision and Sections 1465-89, 1465-44, 1465-56, might be controlling of this proposition or, at least helpful in arriving at the proper determination thereof.

Will you please advise us in a formal opinion as to these questions:

(1) Out of what fund or funds is such an item to be paid, if it may be paid legally?

(2) Is there any difference between the matter of payment in a case which is ultimately found compensable? If so, please advise out of which fund or funds this item should be properly paid."

Broadly speaking, the Industrial Commission of Ohio is authorized under the proper circumstances, to effectuate disbursements from two sources, namely:

(1) The State Treasury for necessary operational expenses authorized by law. Sections 1465-42 and 1465-102, General Code, and

(2) From the State Insurance Fund "for the purpose of providing compensation to workmen and their dependents." Section 35, Article II, Constitution of Ohio, Sections 1465-53 and 1465-68, General Code.

Inasmuch as Section 1465-44, General Code, confers upon the Industrial Commission authority to "adopt reasonable and proper rules * * * to establish the right to benefits of compensation from the State Insurance Fund, hereinafter provided for," and inasmuch as the rule referred to in your letter appears to be a reasonable and proper exercise of such authority, the burden of the inquiry posed by your letter involves the resolution of the legal question: Are disbursements for "affidavits furnished by physicians upon request of Commission containing information used as a basis for adjudication of the claim" such disbursements as are legally payable out of the State Treasury or out of the State Insurance Fund?

Are such disbursements legally payable out of the State Insurance Fund?

Bearing in mind that the Workmen's Compensation Act is purely a creature of statute and that the disposition of the State Insurance Fund is governed entirely by statutory regulations (*Larimore v. Perfect*, 45 O. App. 136), a brief review of the relevant provisions of the Act regulating the distribution of the Fund appears to be pertinent.

Article II, Section 35 of the Constitution of Ohio provides for the establishment of a State Insurance Fund, in the following language:

“For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen’s employment, laws may be passed establishing a state fund * * * administered by the state, determining the terms and conditions upon which payment shall be made therefrom.”

Pursuant to the above constitutional authority, the Legislature enacted Section 1465-53, General Code, which in its present form reads as follows:

“The industrial commission of Ohio shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide an adequate fund for the compensation provided for in this act, and to maintain a state insurance fund from year to year, * * *.”

Express provision in respect to the persons to whom payments from the State Insurance Fund are to be made is contained in Section 1465-68, General Code, which reads in part as follows:

“Every employee * * * who is injured, and the dependents of such as are killed in the course of employment * * * shall be entitled to receive, either directly from his employer as provided in section 1465-69, or from the state insurance fund, such compensation for loss sustained on account of such injury or death, and such medical, nurse and hospital services and medicines, and such amount of funeral expenses in case of death as provided by sections 1465-79 to 1465-87 inclusive.”

Sections 1465-79, 1465-80 and 1465-81 contain a formulation of the rates of compensation to be paid to injured employees in cases of temporary total disability, partial disability and permanent total disability, respectively, while Section 1465-82, General Code, relates to benefits to which the dependents of killed employees are entitled.

Section 1465-81, General Code, relates to (a) the apportionment of death benefits, and (b) the disposition of unpaid awards due to the sequence at the time of death, where death results from causes other than the injury.

Sections 1465-84 and 1465-85, General Code, provide a basis for the computation of average weekly wage in injury and death claims.

Section 1465-86, General Code, contains provisions establishing and limiting the continuing jurisdiction of the Industrial Commission, and Section 1465-87, General Code, provides for the commutation of payments of compensation or benefits to one or more lump sum payments in certain cases.

None of the aforementioned sections refers to "such medical, nurse and hospital services and medicines" as mentioned in Section 1465-68, General Code.

Section 1465-89, General Code, however, reads as follows:

"In addition to the compensation provided for herein, the industrial commission of Ohio shall disburse and pay from the state insurance fund, such amounts for medical, nurse and hospital services and medicine as it may deem proper, not, however, in any instance, to exceed the sum of two hundred dollars unless in unusual cases, wherein it is clearly shown that the actually necessary medical, nurse and hospital services and medicine exceed the amount of two hundred dollars, such commission shall have authority to pay such additional amounts upon unanimous approval by such commission, such finding of facts to be set forth upon the minutes; and, in case death ensues from the injury, reasonable funeral expenses shall be disbursed and paid from the fund in an amount not to exceed the sum of two hundred dollars, and such commission shall have full power to adopt rules and regulations with respect to furnishing medical, nurse and hospital service and medicine to *injured employes* entitled thereto, and for the payment therefor." (Emphasis added.)

The inquiry thus occurs: Are disbursements for "affidavits furnished by physicians upon request of Commission containing information used as a basis for adjudication of the claim" such disbursements for "medical, nurse and hospital services and medicines to *injured employees* entitled thereto" as are contemplated by the provisions of Section 1465-89, General Code? The statement of this query exemplifies its negative answer. The rule referred to in your letter involves no question of medical or surgical treatment, but contemplates the reduction of information possessed by physicians to affidavit form in order to effectuate an adjudica-

tion of a claim. Surely, such disbursement does not "compensate" a workman or his dependent for "loss sustained" within the meaning of Section 1465-68, General Code, nor is it a benefit conferred upon the workman or his dependent. Rather, it is a service made on behalf of the Industrial Commission to enable it to perform the statutory duty conferred upon it by Section 1465-90, General Code, which provides that "the Commission shall have full power and authority to hear and determine all questions within its jurisdiction, and its decisions thereon, shall be final * * *." My view in this respect is strengthened by the case of *Covert v. Industrial Commission*, 139 O. S. 401, where the syllabus reads as follows:

"The reimbursement of a workmen's compensation claimant for expenses actually incurred by him in making a trip to take a physical examination for the purpose of determining whether there was a continuing compensable injury or any basis for a claim entitling claimant to further compensation, does not constitute a payment of 'compensation or benefits,' within the meaning of Section 1465-86, General Code, which provides that no 'modification or change of any finding or award * * * shall be made' * * * after ten years from the last payment theretofore made of compensation or benefits awarded on account of injury or death."

The reflections of Matthias, J., who speaks for the Court in its opinion, shed some light on the instant inquiry, and beginning at page 404 read as follows:

"This case involves no question of medical or surgical treatment or the payment for such service. The trip in question was not for medical or surgical treatment, but only for a physical examination, and the record indicates such examination was directed not with a view to subsequent medical or surgical treatment but only for the purpose of ascertaining whether there was further compensable disability or any basis for consideration of a claim of entitlement to further compensation or benefits. Surely it would not be contended that where, upon the original filing of a claim for compensation, the commission directed a physical examination of the claimant to ascertain whether his disability was the result of the claimed injury and thereafter denied compensation upon the ground that the claimed disability was not compensable, but reimbursed the claimant upon the rendition of a statement of travel expenses incurred by him for the purpose of such examination such reimbursement constituted an award of compensation.

Compensation comprehends that which will compensate. The provision of Section 35, Article II, of the Constitution, authorize the passage of laws establishing a fund 'for the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease,' etc. It provides that 'such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease.'

It is urged that the repayment of the amount expended constituted 'benefits.' Our statute, Section 1465-85, General Code, provides that 'the average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.'

It is true that the word 'benefits' is rather broad in scope and meaning, but it implies clearly something which has been found to be due the claimant by reason of sickness or injury. Such is the common and ordinary meaning and application of the word benefits.'"

At page 406 of the Covert case, Matthias, J., refers with approval to the decision of the Supreme Court of Colorado in *Garden Farm Dairy v. Dorchak*, 102 Colo., 36, 76 Pac. (2d) 743, which he states held "that a mere examination, without treatment or furnishing of medical service, did not constitute payment of compensation, and stated the view that a holding to the contrary would force employers and insurance carriers to deny liability in all cases or otherwise they would open the way to the filing of claims without any limitation as to time."

See also *Pathe Exchange, Inc., v. Court of Common Pleas*, 3 N. J. Misc., 852, 129 A., 468, *Rahder v. Industrial Commission*, 105 Colo., 594, 100 P. (2d), 1043, both of which are cited with approval in the Covert case. Surely, if the reimbursement of the claimant himself for traveling expenses incurred in presenting himself for examination to a physician does not constitute compensation or benefits, as held in the Covert case, no greater force may be legally attached to payments made to a physician as a fee for such examination. I, therefore, am impelled to the conclusion that fees for "affidavits furnished by physicians upon request of Commission containing information used as a basis for adjudication of the claim" are not properly and legally payable out of the State Insurance Fund.

Are such disbursements legally payable out of the State Treasury under the provisions of Sections 1465-42 and 1465-102, General Code?

Section 1465-42, General Code, reads in part as follows :

“The board shall keep and maintain its main office in the city of Columbus, and such branch office or offices in other cities of the state as it shall deem proper, and shall provide suitable rooms, necessary office furniture, supplies, books, periodicals and maps for the same. All necessary expenses shall be audited and paid out of the state treasury.”

Section 1465-102, General Code, contains the following language :

“The board may make necessary expenditures to obtain statistical and other information to establish the classes provided for in section six hereof. The salaries and compensation of the members of the board, of the secretary and all actuaries, accountants, inspectors, examiners, experts, clerks, physicians, stenographers and other assistants, and all other expenses of the board herein authorized, including the premium to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers signed by two of the members of such board and presented to the auditor of state, who shall issue his warrant therefor as in other cases.”

After an examination of the clear and unequivocal language of these enactments, I find no difficulty in arriving at the conclusion that payments of fees for “affidavits furnished by physicians upon request of Commission containing information used as a basis for adjudication of the claim” are disbursements which are embraced within the purview of these sections, and are, therefore, such disbursements as are properly and legally payable out of the state treasury. Indeed, it is difficult to logically find any relevant distinction between the payment of such fees and the payment, for example, of the salary of a referee or that of a physician who is a member of the Commission’s Medical Department.

It, therefore, is my opinion, and you are hereby advised, that fees for “affidavits furnished by physicians upon request of the Commission containing information used as a basis for adjudication of the claim” are operational expenses payable out of the state treasury under the provisions of Sections 1465-42 and 1465-102, General Code, and that such fees do not constitute compensation or benefits which are legally payable out of the State Insurance Fund.

Respectfully,

HUGH S. JENKINS

Attorney General