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EMPLOYERS' LIABILTY INSURANCE—CERTAIN INSURANCE COMPANIES LICENSED TO DO BUSINESS IN OHIO * * * MAY LAWFULLY ISSUE POLICIES TO EMPLOYERS INSURING AGAINST DAMAGES TO EMPLOYES THROUGH OCCUPATIONAL DISEASES—OHIO WORKMEN'S COMPENSATION ACT—SECTION 1465-101 G. C. DOES NOT MAKE SUCH POLICIES VOID.

SYLLABUS:

Insurance companies authorized by their articles of incorporation or charter to write employers' liability insurance, which are licensed to do business in this state, may lawfully issue insurance policies insuring employers against liability for damages to employes arising out of occupational diseases which are not compensable under the Ohio Workmen's Compensation Act and which are caused by the negligence of such employer. Section 1465-101, General Code, does not make such policies of insurance void.

COLUMBUS, OHIO, June 1, 1939.

HON. JOHN A. LLOYD, *Superintendent of Insurance, State House Annex, Columbus, Ohio.*

DEAR SIR: I have your letter of recent date in which you request my opinion as follows:

> "In view of the decision of the Supreme Court of Ohio in the case of Triff, Admx., v. National Bronze and Aluminum Foundry Co., 135 Ohio State 191 (decided March 29, 1939), and the provisions of G. C. 1465-101, may an insurance company, authorized by this office to do insurance business in Ohio, and whose charter and license would permit it to write employers' liability insurance, write such insurance for Ohio employers to cover the liability for occupational diseases not covered by the workmen's compensation law?
>
> If authorized insurance companies may write such insurance, would such contracts be void, in view of the provisions of G. C. 1465-101?"

Prior to the decision of the Supreme Court in Triff vs. National Bronze and Aluminum Foundry Company, 135 O. S. 191, to which you refer in your letter, it had been held by the courts of this state for many years that an employe had no right of action against his employer, who had complied with the Workmen's Compensation Act, for damages caused by occupational diseases even though the Workmen's Compensation Act

did not provide any award for such damages. In the Triff case, supra, the following conclusions were reached as is disclosed in the second and third paragraphs of the syllabus which read as follows:

> "The right of action of an employee for the negligence of his employer directly resulting in a non-compensable occupational disease has not been taken away by Section 35, Article II of the Constitution of Ohio, or by Section 1465-70, General Code. (*Zajachuck* v. *Willard Storage Battery Co.*, 106 Ohio St., 538 and *Mabley & Carew Co.* v. Lee, 129 Ohio St., 69, overruled.)
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> Likewise an action for wrongful death may be maintained by the personal representative of a deceased employee who died from a non-compensable occupational disease proximately caused by the negligence of the employer."

Since the commencement of the Triff case, supra, Section 1465-68a has been amended so as to make silicosis compensable under certain circumstances which it is not necessary to set forth here. However, if these circumstances are not present, silicosis is not compensable and under the rule laid down in the Triff case, supra, the employer would be liable for damages arising out of non-compensable silicosis caused by his negligence. Section 1465-68a, General Code, provides in part as follows:

> "Every employee who is disabled because of the contraction of an occupational disease *as herein defined,* or the dependent of an employee whose death is caused by an occupational disease *as herein defined,* shall, on and after July 1, 1921, be entitled to the compensation provided by sections 1465-78 to 1465-82, inclusive and section 1465-89 of the General Code, subject to the modifications hereinafter mentioned; provided that no person shall be entitled to such compensation unless for ninety days next preceding the contraction of the disease the employee has been a resident of the state of Ohio or for ninety days next preceding the contraction of the disease has been employed by an employer required by the workmen's compensation law of Ohio to contribute to the occupational disease fund of Ohio for the benefit of such employee, or to compensate such employee directly under the provisions of section 1465-69 of the General Code.
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> The following diseases *shall be considered occupational diseases and compensable as such,* when contracted by an employee in the course of his employment in which such employee was engaged at any time within twelve months previous to the date of his disablement and due to the nature of any process described herein." (Italics the writer's.)

Then follows a schedule of several diseases and a description of the process through which the disease must be contracted.

This is the only section in the Workmen's Compensation Act which defines or designates what are occupational diseases. Because of this express designation, the Legislature must have intended to limit the term "occupational disease" as used in the Workmen's Compensation Act, to those which it listed and set forth in Section 1465-68a, supra. The maxim, expressio unius est exclusio alterius, is applicable and I am, therefore, of the opinion that the term "occupational disease" as used in the Workmen's Compensation Act, includes only such diseases as are set forth in Section 1465-68a, supra, and are compensable under the terms of the Act.

Section 1465-101, General Code, is quoted as follows:

> "All contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer against loss or liability for the payment of compensation to workmen or their dependents, for death, injury or occupational disease occasioned in the course of such workmen's employment, or which provide that the insurer shall pay such compensation, or which indemnify the employer against damages when the injury, disease or death arises from the failure to comply with any lawful requirement for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents, or by which it is agreed that the insurer shall pay any such damages. No license or authority to enter into any such agreements or issue any such policies of insurance shall be granted or issued by any public authority in this state. Provided that any corporation organized under the laws of this state to transact liability insurance as defined in paragraph 2 of section 9607-2 or as defined in paragraph 2 of section 9510 of the General Code may by amendment of its articles of incorporation or by original articles of incorporation, provide therein for the authority and purpose to make insurance in states, territories, districts and counties, other than the state of Ohio indemnifying employers against loss or liability for payment of compensation to workmen and employes and their dependents for death, injury or occupational disease occasioned in the course of employment and to insure and indemnify employers against loss, expense and liability by risk of bodily injury or death by accident, disability, sickness or disease suffered by workmen and employes for which the employer may be liable or has assumed liability."

In my opinion No. 467, rendered to you on the 25th day of April, 1939, I called your attention to the fact that Section 1465-101, supra,

is not regarded as a declaration of the policy of the public, but is considered as being designed merely to effect a state monopoly in this class of insurance. In this opinion I quoted from the decision of Ross, P. J. in American Mutual Liability Insurance Company vs. United States Electrical Tool Company, 55 O. App. 107 as follows:

> "The obvious purpose of this legislation is to create in Ohio a monopoly in the state to write the insurance involved. Can it be said that the Legislature of Ohio would definitely authorize corporations created by it to do outside of the state of Ohio a thing which the state considered to be against its public policy? If so, the effect of such a position is to say to an Ohio corporation, you may do outside of Ohio what we consider reprehensible—and we will incorporate you for such purpose.
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> To us it seems that such a position on the part of the state would be entirely illogical."

The meaning of the term "occupational disease" as used in Section 1465-101, supra, must be determined in the light of Section 1465-68a, supra, and as so determined, Section 1465-101, supra, does not make void contracts or agreements which indemnify or insure an employer against loss or liability for damages caused by non-compensable occupational diseases nor does such section forbid you to license insurance companies to enter into such contracts and agreements.

Any other conclusion would entail the absurd and unfair result that an employer would be liable to an action at law for non-compensable occupational diseases but could not protect himself by obtaining employers' liability insurance indemnifying him against liability therefor. The statutes should be construed in such a way as to reach a reasonable and sensible result unless the express language thereof requires a contrary construction.

I am, therefore, of the opinion that insurance companies which are otherwise authorized to do so may be properly licensed by you to issue employers' liability insurance policies insuring employers against liability to their employes for damages arising out of non-compensable occupational diseases caused by such employers' negligence and that such insurance companies may properly issue such policies of insurance to employers.

Respectfully,

THOMAS J. HERBERT,

Attorney General.