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SYLLABUS:

1. Former members of the Industrial Commission may not now render a decision (*nunc pro tunc*) for the Commission on pending appeals.

2. The present Industrial Commission members must render a decision on appeals pending before the Commission, and may do so from a review of the records and a play-back of the tapes made at the Industrial Commission hearings.

3. The appeals in question need not be heard *de novo*.

Columbus, Ohio, June 12, 1963

Hon. Elmer A. Keller
Chairman
The Industrial Commission of Ohio
Columbus 15, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Recently there has been a change in the membership of the Industrial Commission of Ohio by which a majority of the membership of the Commission has been changed.

“The former Commission members have heard approximately one hundred fifty cases on appeal. Their terms of office ended April 18, 1963, however, no decision was made by the Commission on these appeals. Since there are two new members of the three-member Commission, there is a question as to the legal status of these appeals.

“An opinion is respectfully requested as to whether or not:

“1. The former board members may now (*nunc pro tunc*) render a decision.

“2. Whether the present Commission members may render a decision on these appeals from a review of the records and a play-back of the tapes made at the hearings before the Commission, or

“3. Whether such appeals must be heard *de novo*.”

The issues involved here are (1) whether *nunc pro tunc* decisions can be rendered by former Industrial Commission members, and (2) what is the power, authority and duty of the present Industrial Commission members to render decisions under Sections 4121.01 to 4121.29 and 4123.01 to 4123.99, Revised Code, on appeals based on evidence and testimony presented at hearings before the Industrial Commission prior to a change in the majority of the personnel of the membership of the Industrial Commission, and irrespective of said personnel change. The pertinent statutes involved read in part as follows:

Section 4121.02, Revised Code

“The industrial commission shall be composed of three members to be appointed by the governor with the advice and consent of the senate. * * *”

Section 4121.06, Revised Code

“The industrial commission shall choose one of its members as chairman. A majority of the commission shall constitute a quorum to transact business. No vacancy shall impair the rights of the remaining members to exercise all of the powers of the commission, so long as a majority remains. Any investigation, inquiry, or hearing which the commission is authorized to hold or undertake may be held or undertaken by or before any one member of the commission, or by or before one of the deputies of the commission, and every order made by a member, or by a deputy, when approved and confirmed by a majority of the

members, and so shown on its record of proceedings, is the order of the commission.

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Section 4121.10, Revised Code

“* * * All of the proceedings of the commission shall be shown on its record, which shall be a public record, and all voting shall be had by calling the name of each member of the industrial commission by the secretary, and each member’s vote shall be recorded on the record of proceedings as cast. * * *”

Section 4121.131, Revised Code

“The industrial commission, in addition to powers, authority and duties vested in and imposed upon it by section 4121.13 of the Revised Code, shall * * * render final determinations of disputed claims as provided in sections 4123.516 (4123.51.6), 4123.517 (4123.51.7) and 4123.518 (4123.51.8) of the Revised Code, * * *”

Section 4123.518, Revised Code

“Before making or denying an award in the appeal of a disputed claim, * * * the industrial commission, * * * shall afford to the claimant, the employer and the administrator an opportunity to be heard upon reasonable notice and to present the testimony of witnesses and other evidence. * * *

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“The * * * commission * * * shall state concisely its decision and any award * * *.”

Concerning your first question “whether or not the former board members may now (*nunc pro tunc*) render a decision,” it was stated in the syllabus of *Hells v. Public Utilities Commission of Ohio, et al.*, 118 Ohio St., 434, that:

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“2. An order or judgment *nunc pro tunc* presupposes an order or judgment actually rendered at the proper time but not entered upon the journal or other record of a court or other tribunal.

“3. The power to enter a *nunc pro tunc* order is restricted to placing upon the record evidence of judicial action which has been actually taken, and can be exercised only to supply omissions in the exercise of functions that are clerical merely.

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In the appeals in question, no decision whatsoever has been rendered by the members of the Industrial Commission. None can be rendered *nunc pro tunc*. The decisions on the appeals in question must be rendered presently by the presently constituted Industrial Commission. The statutes consistently refer to the Commission as having the powers, authority and duties outlined. Since no decisions have yet been made by the Industrial Commission and since Section 4123.518, *supra*, requires that the Industrial Commission shall state concisely its decision, it follows that the Industrial Commission must make the decisions in question, and the former members may not make the decision for the Industrial Commission.

In regard to your second question, “Whether the present Commission members may render a decision on these appeals from a review of the records and a play-back of the tapes made at the hearings before the Commission,” I again restate the position that the present Industrial Commission members are the only ones who may, and they *must* render the decisions in question.

The issue then reduces itself into whether or not the present members of the Industrial Commission have the power, authority and duty to render the decisions from a review of the records and a play-back of the tapes made at the hearings.

Section 4121.10, *supra*, provides that all of the proceedings of the Industrial Commission shall be shown on its records. These records are available to the present members. There is no statutory requirement for the recording of the testimony of witnesses and other evidence presented at the hearings required by Section 4123.518, *supra*. Furthermore, there is no necessity of preparing a record of the agency’s proceedings for use in appeals as provided in Section 119.12, Revised Code, inasmuch as the actions of the Industrial Commission are specifically excluded from coverage under Sections 119.01 through 119.13, Revised Code, known as the Ohio Administrative Procedure Act. However, the wording of your request for my opinion fairly implies that the tape recordings made at the hearings are of the testimony given. These tapes are available to the present members of the Industrial Commission. Although not stated in your request for my opinion, it is a fact that all written

evidence adduced at the hearings is entered into the records of the Industrial Commission. Therefore, all of the evidence presented and all of the testimony given are available to the present members.

Due process or the concept of a fair hearing does not require that the actual taking of testimony be before the same officers as are to determine the matter involved. However there must be a hearing as required by Section 4123.518, *supra*, and as authorized by Section 4121.06, *supra*, and the evidence adduced and testimony given must be considered by the deciding members of the Industrial Commission.

In *Morgan v. United States*, (1936) 298 U.S. 468, the United States Supreme Court considered the question whether or not an officer (the Secretary of Agriculture) who signs an order must personally hear or read any of the evidence presented at the hearing or hear and consider the oral arguments made, or read or consider the briefs submitted. At page 481, Mr. Chief Justice Hughes, delivering the opinion of the Court, states:

“And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, *the officer or officers who make the determinations must consider and appraise the evidence which justifies them.* That duty may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred.”

(Emphasis added)

The officer or officers making the determinations need not, however, consider the evidence initially. A clarifying decision on this point was rendered in *McGraw Electric Co. v. United States*, (1954) 120 F. Supp. 354, aff'd 348, U. S. 804, in which the Supreme Court affirmed without opinion a decision that deciding officers need not be present at an argument. Division 3 of the I.C.C., made up of three members, heard oral argument, with one Commissioner absent. While the case was under submission, one of the two Commissioners died, and another Commissioner took his place. The one Commissioner who heard the argument dissented from the decision by the two Commissioners, neither of whom had heard the argument. The court held that “a full and fair hearing was granted” because the absent Commissioner said that he “would read the

transcript of oral argument” and because the Commissioner taking the place of the deceased Commissioner “had all of this material before him.”

Therefore, even though none of the present members of the Industrial Commission were present at the hearings, if the evidence adduced and testimony given are considered by a majority of the present members of the Industrial Commission, the requirements of the pertinent statutes and of due process and the concept of a fair hearing will have been met, and they may render decisions on the appeals based on that evidence and testimony.

In answer to your third question, “whether such appeals must be heard *de novo*,” in light of the answer to your second question, the answer is no.

Therefore, I am of the opinion and you are advised that:

1. Former members of the Industrial Commission may not now render a decision (*nunc pro tunc*) for the Commission on pending appeals.

2. The present Industrial Commission members must render a decision on appeals pending before the Commission, and may do so from a review of the records and a play-back of the tapes made at the Industrial Commission hearings.

3. The appeals in question need not be heard *de novo*.

Respectfully,
WILLIAM B. SAXBE
Attorney General