

you as a part of the permanent records of your department, except one copy of the charter which the law provides shall be filed by you with the Secretary of State. The law further provides that such filing with the Secretary of State shall be within ten days after the requirements of said section 9660-2 have been complied with by The Home Building and Savings Company, and that your approval shall be endorsed on the copy so filed. You will find on the copies of the charter, form of approval for your signature.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5027.

WORKMEN'S COMPENSATION FUND—ADVANCED COSTS
IN PENDING CASES PAYABLE FROM FUND—IF
RECOVERED CREDITED TO FUND—SALARIES AND
EXPENSES IN PREPARING REHEARING RECORDS NOT
PAYABLE FROM FUND.

SYLLABUS:

1. *When the Industrial Commission of Ohio is required to advance costs in connection with a case pending in court for the preparation of a proper bill of exceptions to be used in error proceedings in the Court of Appeals or for the printing of records to be filed in the Supreme Court, such money may be advanced from the state insurance fund and if any such costs are recovered by way of judgment they should then be credited to that fund.*

2. *The Industrial Commission of Ohio is not authorized to pay from the state insurance fund the salaries and expenses incurred in the preparation of rehearing records.*

COLUMBUS, OHIO, December 21, 1935.

The Industrial Commission of Ohio, Columbus, Ohio.

DEAR SIRs:—This will acknowledge receipt of your request for my opinion which reads as follows:

“Certain expenses are incurred incidental to the defense of appeals provided under Section 1465-90, such as expenses for the printing of the record in the Supreme Court and the preparation of bills of exceptions in the Court of Appeals. Inasmuch as these expenses are incidental to the particular claim pending on appeal it has

been suggested that such bills which are chargeable as court costs be paid out of the State Insurance Fund, and charged against the risk of the employer in the particular claim in which the expenses were incurred.

Assuming that the claim is still pending on appeal and that the claim has never been recognized and no compensation has been paid some question has been raised as to the legality of paying the above mentioned bills from the State Insurance Fund.

The Commission would be pleased to have your opinion as to the legality of paying bills for printing records and for preparing bills of exceptions and other charges for court stenographic services from the State Insurance Fund.

Your opinion is also desired as to the legality of paying stenographic expenses in preparing the rehearing record, as provided in General Code Section 1465-90, from the State Insurance Fund.

If the aforementioned bills cannot legally be paid prior to the time the claim has been finally recognized and allowed, could such bills be paid from the State Insurance Fund after the claim has been allowed on appeal."

An answer to your inquiry requires a construction of Article II, Section 35 of the Constitution of Ohio and of Section 1465-90, General Code.

Article II, Section 35 of the Constitution of Ohio provides in part as follows:

"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 to be created by compulsory contribution thereto by employers, and administered by the state, *determining the terms and conditions upon which payment shall be made therefrom. * * **" (Italics mine.)

Section 1465-90, General Code, which authorizes legal proceedings against the Industrial Commission by way of causes of action in the Common Pleas Courts, Courts of Appeals and Supreme Court, provides in part as follows:

"* * *

The cost of any legal proceedings, authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party;
* * *

The Supreme Court of Ohio has recognized this section authorizing attorney fees to be paid from the state insurance fund in such cases in the recent case of *Adkins vs. Staker et al.*, 130 O. S. 198 (Ohio Bar, November 25th, 1935), and said when discussing fees and referring to that section that:

"It provides that *laws may be passed* establishing a state fund and administered by the state; that the Legislature may determine '*the terms and conditions upon which payment shall be made therefrom*'."

And again when referring to attorney fees, the Court said:

"The legislature has seen fit to lodge that power in a judicial officer, having in mind the constitutional mandate empowering it to determine '*the terms and conditions upon which payment shall be made*' from the fund."

The Court also said:

"The trial court in its entry also found that when the defendants entered into the contingent contract with the plaintiff they did not advise the claimant that, in such cases, the law had provided for an attorney fee out of the insurance fund; * * *"

If attorney fees are to be paid out of the state insurance fund, then it must necessarily follow that other costs incurred in a case must be paid therefrom.

The difficulty in your question arises in this, to wit: that the Industrial Commission having been unsuccessful in the trial court orders a bill of exceptions from the official court stenographer, or has a bill of exceptions prepared, for the purpose of error proceedings. Section 1551, General Code, provides for the preparation of transcripts of testimony. Section 1552, General Code, provides as follows:

"The compensation of shorthand reporters for making such transcripts and copies shall be not more than twelve cents per folio of one hundred words, to be fixed by the common pleas judges of the subdivision. *Such compensation shall be paid forthwith by the party for whose benefit a transcript is made.* * * *"(Italics ours.)

Bills of exceptions are largely made up of the transcript of the testimony to which is added the formal parts, such as the charge of the Court, the verdict of the jury and the certificate of the Court, all, however, being

incidental to the transcript of testimony when it is being used for the purpose of error proceedings. It, therefore, becomes necessary for the Industrial Commission, when preparing bills of exceptions for proceedings in error, to pay "forthwith" to the official stenographer preparing the same, the compensation provided for by the above quoted section.

Of course, it is well recognized that the expenses incurred in the preparation of bills of exceptions are charged and taxed as part of the costs of the litigation. If they were not to be paid until after final review, they would then, necessarily, be paid from the state insurance fund the same as the attorney fees. However, they have to be advanced before final determination and although the Industrial Commission at the time such bills of exceptions are ordered is charged with the costs of the case, there is a possibility that the judgment may be reversed and the costs not taxed against it. If it is proper to pay costs from the fund, then when such costs must be paid by way of advancement it would be perfectly proper and legal to advance them from the state insurance fund since that is nothing more than an advancement of court costs which are chargeable to the fund under the provisions of Section 1465-90, *supra*.

If the Industrial Commission is finally successful and the costs are taxed against the party adverse to the Commission and such costs can be collected from such adverse party, then they should be credited to the fund from which they had been paid.

You also inquire relative to paying for the printing of records filed in cases in the Supreme Court. Section 12254, General Code, provides as follows:

"When a petition in error is filed in the supreme court, so much of the record to be reviewed as will show the error complained of shall be printed, and ten copies thereof filed with the papers. The plaintiff in error may have the printing done, or he may deposit with the clerk sufficient money to pay its costs. If, for sixty days after filing the petition, he fails to file such printed copies or make such deposit, the petition shall be dismissed unless, on good cause shown, the court extends the time for or dispenses with such printing. The fair expense of the printing shall be taxed as part of the costs."

This section contemplates that when a case is in court, the plaintiff in error must file a printed record showing the errors complained of and that the costs of printing such record must be paid for in advance, and the section further provides that such expense shall be taxed as part of the costs in the case. Therefore, when the Industrial Commission pays for the printing of a record, it is merely advancing money on a proper charge and which is

properly paid out of the fund from which the Legislature contemplated such costs should be paid. If, for any reason, there is a recovery of costs then the same should be credited back to that fund.

You also wish to know whether or not you have any authority to pay from the state insurance fund the stenographic salaries and expenses incurred in the preparation of rehearing records provided for in said Section 1465-90, General Code.

The Legislature has nowhere made any provision for the payment of salaries and expenses incurred in the making of rehearing records as part of the costs of litigation. Since many of these records do not ever reach the courts the expense of preparing them could not be considered a proper charge as part of the costs in a case, and therefore such salaries and expenses could not be paid from the state insurance fund.

The question as to whether or not the costs so paid should be charged against the risk of the employer of the employee filing the suit is an actuarial matter rather than a legal matter, and as long as the burdens placed upon the state insurance fund are uniformly spread over the various classifications according to actuarial methods a question of law would not be involved.

It is therefore my opinion that (1) when the Industrial Commission of Ohio is required to advance costs in connection with a case pending in court for the preparation of a proper bill of exceptions to be used in error proceedings in the Court of Appeals or for the printing of records to be filed in the Supreme Court, such money may be advanced from the state insurance fund and if any such costs are recovered by way of judgment they should then be credited to that fund, and (2) the Industrial Commission is not authorized to pay from the state insurance fund the salaries and expenses incurred in the preparation of rehearing records.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5028.

CRIMINAL LAW—DEFENDANT MAY REQUIRE PREPARATION OF TRANSCRIPT AND COURT'S CHARGES, WITHOUT ADVANCING COST THEREOF.

SYLLABUS:

A defendant in a criminal case may require the court stenographer to prepare a transcript of the testimony, as well as the charges of the court, without advancing the cost of preparing such transcript. The cost of such transcript is a proper item of the costs of such trial.