

1503

1. A WORK-RELIEF EMPLOYEE WHO HAS BEEN PERMANENTLY AND TOTALY DISABLED AS THE RESULT OF INJURY OR DISEASE SUSTAINED IN THE COURSE OF HIS EMPLOYMENT AND WHO IS RECEIVING COMPENSATION—
2. WHEN IT HAS BEEN DETERMINED THAT A CLAIMANT IS ENTITLED TO COMPENSATION—CHAPTER 4127., R.C. 4123.412-4123.418., R.C.

SYLLABUS :

1. A work-relief employee who has been permanently and totally disabled as the result of injury or disease sustained in the course of his employment and who is receiving compensation pursuant to Chapter 4127., Revised Code, in amounts less than \$40.25 a week, is entitled under the provisions of Sections 4123.412 through 4123.418, Revised Code, to a weekly amount equal to the difference between \$40.25 and the weekly amount he receives under said Chapter 4127.

2. When it has been determined that a claimant is entitled to compensation under Sections 4123.412 through 4123.418, Revised Code, and such claimant files a waiver as to such compensation, and requests that payment not be made, the industrial commission, in reliance on such waiver, may withhold all or any part of the payment, as requested.

Columbus, Ohio, June 24, 1960

Hon. J. Maynard Dickerson, Chairman
The Industrial Commission of Ohio, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"Chapter 4127, Revised Code, provides for a fund to be known as the Public Work-Relief Employee's Compensation Fund and for the payment of compensation therefrom to injured work-relief employees. Compensation payable in accordance with that chapter is limited to the maximum weekly sum of \$18.75.

"Provision is made by Section 4123.412, *et seq.*, Revised Code, for supplemental payments from the Disabled Workmen's Relief Fund for the benefit of persons who are permanently and totally disabled as the result of injury or disease sustained in the course of their employment and who are receiving workmen's compensation payments in an amount less than \$40.25 a week.

"Your opinion is requested as to whether work-relief employees who are permanently and totally disabled and who are receiving compensation pursuant to Chapter 4127., Revised Code, are included within the provisions of Section 4123.412, *et seq.*, Revised Code, and are entitled thereby to receive an additional payment from the Disabled Workmen's Relief Fund to increase the total weekly payment to the minimum sum of \$40.25?"

I also have your second request for opinion, reading:

"Under date of January 4, 1960, I requested your opinion on a question which involved, in part, an interpretation of Sections 4123.412, 4123.413 and 4123.414, Revised Code. I now wish to present another question, and I shall appreciate your consolidating this request with my former one or issuing a separate opinion.

"The exact problem which I now wish to present for your consideration is this: Where a permanently and totally disabled claimant who is receiving compensation for such disability and who is now entitled to an additional payment pursuant to Section 4123.412 *et seq.*, Revised Code, files a waiver of such additional payment and requests that this payment not be made, may the Industrial Commission, in reliance upon such waiver, lawfully withhold all or any part of the payment which the Commission is directed to pay from the Disabled Workmen's Relief Fund?"

Your first question involves a consideration of Sections 4123.412 through 4123.418, Revised Code. Section 4123.412, Revised Code, reads in part:

“For the relief of persons who are *permanently and totally disabled* as the result of injury or disease *sustained in the course of their employment* and who are *receiving workmen’s compensation* which is payable to them by virtue of and under the laws of this state *in amounts less than forty dollars and twenty-five cents a week*. There is hereby created a separate fund to be known as the disabled workmen’s relief fund. * * *.”

(Emphasis added)

Section 4123.413, Revised Code, reads :

“In order to participate in said fund a participant must be receiving workmen’s compensation in amounts less than forty dollars and twenty-five cents a week payable by virtue of and under the laws of this state and be permanently and totally disabled.”

Section 4123.414, Revised Code, reads in part :

“Each participant shall be entitled to receive payments without application from said fund of a weekly amount equal to the difference between forty dollars and twenty-five cents and such lesser sum as he shall be receiving under the workmen’s compensation laws for permanent and total disability ; provided that in determining such difference a participant shall be considered as receiving the amount of such participant’s compensation which shall have been commuted under the provisions of section 4123.64 of the Revised Code. * * *”

Section 4123.415, Revised Code, pertains to the method of payment. Section 4123.416, Revised Code, relates to the lists of employees to be furnished to the industrial commission by employers and states :

“* * * Any person claiming the right to participate in said fund may file his application therefor with the industrial commission and shall be accorded a hearing thereon.”

Section 4123.417, Revised Code, reads in part :

“In the investigation and determination of the right of persons to participate in said fund, the industrial commission shall have and exercise all the powers which it possesses under the workmen’s compensation act. Its powers and jurisdiction over each case shall be continuing, but there shall be no appeal from its decisions to any other body or tribunal. * * *”

Section 4123.418, Revised Code, provides for the employment of necessary help by the industrial commission.

In order to participate in the disabled workmen's relief fund, a claimant must be (1) permanently and totally disabled as the result of injury received in the course of employment, (2) must be receiving workmen's compensation, and (3) such compensation must be less than \$40.25 per week. Thus it becomes necessary to inquire whether the persons to whom you refer in your letter, to wit: "work-relief employees who are permanently and totally disabled and who are receiving compensation pursuant to Chapter 4127., Revised Code," meet the three qualifications set out above.

Regarding the first qualification, your questions are concerned with persons *who are permanently and totally disabled* and are receiving compensation pursuant to Chapter 4127., Revised Code. Section 4127.03, Revised Code, of this chapter, expressly limits payment of compensation to loss sustained on account of injuries received *in the course of employment*, reading in part:

"Every work-relief employee who sustains an injury and the dependents of such as are killed, *in the course of and arising out of employment*, wheresoever such injury or death occurs, except when such injury or death is caused by willful misconduct or intent to bring about such injury or death, or when the use of intoxicating liquors or drugs is the proximate cause of such injury or death, shall be entitled to receive out of the public work-relief employees' compensation fund, compensation, death benefits, medical, nurse, and hospital services, medicine, and funeral expenses, for loss sustained on account of such injury or death, as is provided for by sections 4123.01 to 4123.94, inclusive, of the Revised Code.

"* * *"

(Emphasis added)

Accordingly, since the persons here in question are permanently and totally disabled as the result of injury received in the course of employment, the first qualification is satisfied.

The second qualification raises the question whether work-relief employees receiving compensation pursuant to Chapter 4127., Revised Code, are receiving workmen's compensation. In this regard, while the basic workmen's compensation law is set forth in Chapter 4123., Revised Code, said Chapter 4127. refers to the provisions of Chapter 4123. in many instances, and Chapter 4127. is administered by the industrial commission.

Section 4127.02, Revised Code, provides that the "industrial commission may hear and determine all claims for compensation, death benefits * * * and its decision on all questions of fact * * * is final."

covered by workmen's compensation, had not collected premiums from the public relief agencies based on their relief payrolls.

It appears clear that the intent of House Bill No. 495, *supra*, was not to set up a compensation system separate from workmen's compensation, but rather to relieve the financial burden which was then being placed on the state insurance fund. On this point, the emergency clause of the bill appears significant, reading:

"This act is hereby declared to be an emergency measure, necessary for the immediate preservation of the public peace, health and safety.

"The reason for such necessity lies in the fact that it has become immediately necessary to provide a *separate system of compensation for public work-relief employes* and their dependents, due to the fact that considerations arise with respect to hazards of employment and injuries of such employes which do not apply to the employes mentioned in the workmen's compensation law of Ohio, and also because of the fact that this class of employment was neither foreseen nor contemplated by the legislature in originally framing the workmen's compensation law of Ohio, and there has been accordingly *an unexpected increased burden placed upon the state insurance fund in compensating such employes out of that fund.*" (Emphasis added)

The case of *Slaughter v. Industrial Commission*, 132 Ohio St., 536, dealt with the effect of the public work-relief employees compensation act on a pending "relief-worker" compensation claim. In this case the court considered the public work-relief employees' compensation act to be an amendment to the workmen's compensation law, stating at page 541:

"If relatrix obtained a vested right in the procedure prescribed by Section 1465-90, General Code, when her husband died, then she should prevail in this action; but if Sections 1465-90 and 3496-13, General Code, are purely remedial in character, then she must fail, because Section 3496-13, General Code (conceding its constitutionality), is a *later enactment* made specifically applicable to 'relief workers' and their dependents, regardless of the date of injury or death.

"* * *

"The General Assembly's authority to pass legislation creating a state fund by compulsory contribution thereto to employers to compensate workmen and their dependents for disability or death suffered by such workmen in the course of their employment, is contained in Section 35, Article II, of the Ohio Constitution. A part of that section reads:

“Laws may be passed establishing a board * * * to collect, administer and distribute such fund, *and to determine all rights of claimants thereto.*’ (Court’s Italics).

* * *

“We then revert to the question whether relatrix had a vested right to a rehearing and appeal under Section 1465.90, General Code, which attached at her husband’s death, or is that section remedial, for which the General Assembly might substitute effectively an enactment like Section 3496-13, General Code?

“In 28 Ruling Case Law, 715, Section 5, this language appears: ‘In harmony with the established principle that legislative enactments, in the absence of a clearly expressed intent to the contrary, will be deemed to be prospective and not retrospective, workmen’s compensation acts have been held not to apply to injuries which occurred before the law went into effect. On the same principle it is held that an *amendment of the statute* in respect of a matter of substantive right does not apply to existing injuries. * * * since the claim of a decedent accrues at the death of the workman, an amendment enacted after the injury but before the death applies to such claim. *If the amendment* relates to a matter of procedure, as distinguished from substantive right—such an example as the mode of review—it is held to be applicable to pending proceedings.’ * * *

* * *

“It is therefore difficult to avoid the conclusion that any right of appeal or review given by statute from an order of the Industrial Commission to a court must be classed strictly as a remedy.

* * *

“As previously indicated, a fair interpretation of *Section 35, Article II, of the Constitution*, authorizes the General Assembly to accord finality to the decisions of the Industrial Commission on questions of fact connected with the right of a claimant to compensation. *Section 3496-13, General Code*, adopts that interpretation and furnishes the aggrieved claimant a remedy in ‘due course of law’ by allowing resort to the Court of Common Pleas on questions of law. * * *” (Emphasis added)

In view of the foregoing, therefore, I conclude that even though the public work-relief employees compensation act, Chapter 4127., *supra*, is contained in a chapter of the code separate from the basic workmen’s compensation law, such act was created pursuant to Section 35 of Article II, Ohio Constitution, authorizing workmen’s compensation; and participants in the public work-relief employees’ fund are receiving work-

men's compensation within the purview of Sections 4123.412 and 4123.413, *supra*.

The third qualification for participation in the disabled workmen's relief fund is that the compensation being paid amounts to less than \$40.25 per week. By the express terms of Section 4127.04, Revised Code, maximum benefits are \$18.75 per week. This section reads as follows:

"The basis upon which compensation or benefits shall be computed, is the amount of work-relief which would have been afforded to the injured person for the calendar week in which the injury or death occurred. In no event shall such compensation exceed a maximum of eighteen dollars and seventy-five cents per week."

Thus it seems clear that work-relief employees who are permanently and totally disabled as the result of injury received in the course of their employment and are receiving compensation pursuant to Chapter 4127., Revised Code, are entitled to participate in the benefits of the disabled workmen's relief fund unless the language of Section 4127.04, Revised Code, itself, is a prohibition against such participation. In considering this aspect, however, I find it difficult to reach the conclusion that the limitation of this section refers to any compensation except "such compensation" as is provided by the chapter. Moreover, Section 4127.13, Revised Code, states as follows:

"Sections 4123.01 to 4123.94, inclusive, of the Revised Code, except sections 4123.36, 4123.51, 4123.62, 4123.64, 4123.68, 4123.69, and 4123.85 of the Revised Code, apply to sections 4127.01 to 4127.14, inclusive, of the Revised Code."

The exceptions spelled out in this section have been discussed earlier and relate to occupational disease, lump sum payments, method and right of appeal and expected increase in wages. To exclude participants in the public work-relief employees' compensation act from participation in the benefits provided by Sections 4123.412 to 4123.418, inclusive, Revised Code, because of the limitation of compensation under Section 4127.04, *supra*, would be to nullify the provisions of Section 4127.13, above.

The express purpose of the disabled workmen's relief fund is "to provide" for the relief of persons "* * * who are receiving compensation * * * in amounts less than forty dollars and twenty-five cents a week." This fund was established as a humanitarian measure designed to help permanently and totally disabled compensation recipients to more ade-

quately meet the rising costs of living. The legislature did not specifically make mention of public work-relief employees, but it is significant that the legislature did not specifically or impliedly exclude work-relief employees. I can find no good or valid reason for excepting work-relief employees from its benefits.

In view of the foregoing, it is my opinion that work-relief employees who are permanently and totally disabled and who are receiving compensation pursuant to Chapter 4127., Revised Code, are included within the provisions of Section 4123.412 *et seq.*, Revised Code, and are entitled thereby to receive payments from the disabled workmen's relief fund.

Your second question asks whether a claimant entitled to participate in the disabled workmen's relief fund may waive his right to such compensation. On this point, Section 4123.80, Revised Code, reads as follows:

"No agreement by an employee to waive his rights to compensation under sections 4123.01 to 4123.94, inclusive, of the Revised Code, is valid, except that an employee who is blind may waive the compensation that may become due him for injury or disability in cases where such injury or disability may be directly caused by or due to his blindness. The industrial commission may adopt and enforce rules governing the employment of such persons and the inspection of their places of employment.

"No agreement by an employee to pay any portion of the premium paid by his employer into the state insurance fund is valid."

Section 4123.80, *supra*, may be construed to mean either (a) that no employee shall be allowed to contract away his compensation rights generally, *i.e.*, before any claim has arisen or, (b) that in addition this general inability to waive his rights, he cannot after a claim has arisen, compromise his rights to benefits. Prohibitions against waiver have been included in most workmen's compensation acts with the obvious purpose of protecting employees against unjust and unrighteous settlements of claims by which they might be deprived of compensation to which they were legally entitled.

The above purpose was recognized in the case of *Adler v. Hohn*, 129 Ohio St., 303, in which it is stated at page 305:

"The probable purpose of this provision of the Workmen's Compensation Act was to prevent the avoidance or evasion of liability or responsibility thereunder by employers, or the shifting

of the burden thereof to the employee. Employers were precluded by this statutory provision from coercing prospective employees to enter into a contract which, as a condition of their employment, relieved the employer from liability under the Workmen's Compensation Act. * * *

In the later case of *State, ex rel., Weinberger v. Industrial Commission*, 139 Ohio St., 92, the court said in paragraph two of the syllabus:

"Under the Workmen's Compensation Act, disabilities accruing from an injury subsequent to the allowance or denial of an award of compensation for such injury may be considered and compensated by the Industrial Commission within the limitation of time fixed by statute, and a contract, to be effective as a complete settlement of a claim arising under the Workmen's Compensation Act, must expressly cover future as well as past and present disabilities arising out of the injury which is the basis of such claim."

At page 96 the court further said:

"This statute limits the right of contract, is in derogation of the common law and therefore must be strictly construed. In express terms it inhibits a contract of waiver of rights under the Workmen's Compensation Act but does not, in terms, render invalid a contract of settlement for compensation under the act. The right to settle a claim or cause of action after it has accrued is incidental to and necessarily included in the right of the claimant to assert his claim or prosecute a cause of action on such claim in a court or other tribunal having jurisdiction of the same. Therefore, the statute providing that no agreement by an employee to waive his rights to compensation under the Workmen's Compensation Act shall be valid, *applies only to an agreement made prior to the date when the claim or cause of action accrued or to an agreement of waiver or settlement consummated after such date wherein the consideration is merely nominal.* *Industrial Commission v. Broskey*, 128 Ohio St., 372, 191 N. E., 456; *Adler v. Hohn*, 129 Ohio St., 303, 195 N. E., 481 (affirming *Hohn v. Adler*, 49 Ohio App., 381, 197 N. E., 229). Especially have such settlements been regarded as valid when approved by the Industrial Commission. *State, ex rel. Fortner, v. Industrial Commission, supra.*"

(Emphasis added)

It would appear, therefore, that the purview of Section 4123.80, Revised Code, extends only to contracts of waiver made prior to the accruing of employees causes of action. Because we are concerned with a possible waiver involving the industrial commission and the employee

after the allowance of his claim, and not with an agreement to waive rights, I conclude that the statute does not bar the waiver. It then becomes necessary to inquire whether there exists any other good or substantial reason why waiver should not be possible.

The most frequently employed definition of waiver is that it is the voluntary relinquishment of a known right, and more specifically it is stated in 40 Ohio Jurisprudence, 1235, Section 3:

“As a general rule, a person may waive all personal rights or privileges to which he is individually entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided the waiver does not constitute a violation of public policy. * * *”

On considering this question I am of the opinion that the waiver in question would not be against public policy and that the industrial commission may lawfully withhold all or any part of the payment of compensation from the disabled workmen's relief fund in reliance upon a waiver filed by the compensation recipient.

Answering your specific questions, therefore, it is my opinion and you are advised:

1. A work-relief employee who has been permanently and totally disabled as the result of injury or disease sustained in the course of his employment and who is receiving compensation pursuant to Chapter 4127., Revised Code, in amounts less than \$40.25 a week, is entitled under the provision of Sections 4123.412 through 4123.418, Revised Code, to a weekly amount equal to the difference between \$40.25 and the weekly amount he receives under said Chapter 4127.

2. When it has been determined that a claimant is entitled to compensation under Sections 4123.412 through 4123.418, Revised Code, and such claimant files a waiver as to such compensation, and requests that payment not be made, the industrial commission, in reliance on such waiver, may withhold all or any part of the payment, as requested.

Respectfully,

MARK MCELROY
Attorney General