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1. ELEVATOR — OWNER OR OPERATOR — INDUSTRIAL COMMISSION OF OHIO — WHERE INSPECTOR MAKES REPORT OF INSPECTION, APPROVED BY CHIEF OF DIVISION OF FACTORY AND BUILDING INSPECTION, HOW APPEAL MAY BE PERFECTED — SECTION 1038-13 GENERAL CODE.

2. WHERE ELEVATOR OPERATED IN VIOLATION OF STATUTES OR CODE OF SPECIFIC SAFETY REQUIREMENTS, AND OWNER OR OPERATOR FAILED OR REFUSED TO COMPLY WITH ORDERS AND DIRECTIONS, STATUS AS TO SECOND OR SUBSEQUENT INSPECTION.

3. WHEN COMPLIANCE WITH RULES OF PROCEDURE, STATUS TO CONTINUE TO OPERATE ELEVATOR.

4. APPEAL AUTHORIZED BY NO PERSON OTHER THAN OWNER OR OPERATOR — STATUS AS TO CHANGES OR REPAIRS FOR REASONABLY SAFE OPERATION.

SYLLABUS:

1. *By the provisions of Section* 1038-13 *and cognate sections of the General Code, the Industrial Commission of Ohio is without jurisdiction to consider an appeal from the orders and directions lawfully made upon inspection of an elevator unless a written application be filed with the Industrial Commission within twenty days, after the report of an inspector, as approved by the chief of the division of factory and building inspection, is given to the owner or operator of such elevator.*

2. *Where an elevator is inspected, found to be operating in violation of the General Code, or the Code of Specific Safety Requirements duly adopted by the Industrial Commission of Ohio, and a report of the findings, orders and directions of the inspector as approved by the chief of the division of factory and building inspection, is given to the owner or operator of such elevator, no appeal is filed with the Industrial Commission of Ohio within twenty days in accordance with the provisions of Section* 1038-13, *General Code, and the owner or operator has wholly failed or refused to comply with the orders and directions contained in such approved report, a right of appeal may not be re-created and vested in such owner or operator by a second or subsequent inspection of the elevator.*

3. *Where an elevator has been inspected and certain changes and repairs are ordered and directed to be made in accordance with law, and a copy of the report containing recommendations as to such changes or repairs, as approved by the chief of the division of factory and building inspection, has been given to the owner or operator of such elevator, and a lawful appeal is perfected to the Industrial Commission or the Industrial Commission and the Supreme Court of Ohio, as the case may be, the owner or operator may continue to operate such elevator pending a hearing on the issuance of a certificate of operation, as provided for in Section* 1038-13 *and cognate sections of the General Code.*

4. *There is no provision in Section* 1038-13, *or any other section of the General Code, authorizing an appeal by any person other than the owner or operator of an elevator, where such elevator has been lawfully inspected and it has been found that such elevator requires certain changes or repairs to make it reasonably safe to operate.*

Columbus, Ohio, December 22, 1941.

The Industrial Commission of Ohio,
Columbus, Ohio.

Gentlemen:

I have your letter requesting my opinion, which letter reads as follows:

"Attached hereto please find a request for your opinion with reference to questions arising out of appeals from elevator orders issued by the Department of Industrial Relations and pending before the Industrial Commission of Ohio.

For your information I am also attaching hereto a copy of our letter to the Department of Industrial Relations under date of October 13, 1941. There is also attached hereto a copy of the form used by the Department of Industrial Relations for issuing said orders and copy of Bulletin No. 110, Specific Safety Requirements Covering the Construction, Maintenance and Operation of Elevators, Dumb-Waiters, Escalators, Man Lifts and Their Hoistways.

We will be glad to furnish any additional information which you may require in connection with this opinion."

The request which you enclose with your letter reads as follows:

"The Industrial Commission of Ohio respectfully requests your opinion on the following questions:

"Effective August 31, 1939, Section 1038-13 Ohio General Code provided as follows:

'Every inspector shall forward to the division of factory and building inspection a full report of each inspection made of any elevator, as required to be made by him under the provisions of law, showing the exact condition of the said elevator, and said inspector shall leave a copy of said report at the elevator on the day the inspection is completed.

In event that any elevator requires certain changes or repairs to make it reasonably safe to operate, such recommendations shall be made by the inspector upon his report and a copy of such report as approved by the chief of the division shall be given to the owner or operator of such elevator, and unless appealed, upon compliance therewith, and upon the payment of the fees required by law, the chief of the division shall issue a certificate of operation for a capacity not to exceed that named

in the said report of inspection, which certificate shall be valid for one year after the date of inspection and as hereinafter provided.

Also in the event that a construction plan or an application of specifications as provided for in section 1038-16 of the General Code is not approved, the chief of the division shall state in writing the necessary changes to obtain approval, and the owner or operator shall be given a copy thereof, and unless appealed, upon compliance therewith, the chief of the division shall approve such plans or specifications and issue a permit for construction.

Such owner or operator, with(in) 20 days from receipt of the copy of such report or statement of changes in plans or specifications, may make written application to the industrial commission of Ohio, upon forms to be furnished by the industrial commission of Ohio, for a hearing on the report or the statement regarding changes in plans or specifications as to whether the elevator in question is reasonably safe, or whether the elevator if constructed in accordance with such plans and specifications would be reasonably safe. The industrial commission shall promptly consider such application and proceedings consistent herewith shall be had thereon in accordance with section 871-27 of the General Code and related sections.

If it is made to appear by the evidence that said elevator will be reasonably safe to operate without such changes or repairs as shown in such report or by making only a part or all thereof, or if none or only a part or all the changes in the plans or specifications are found necessary to make the elevator reasonably safe, the industrial commission of Ohio shall make its finding and order accordingly. If such finding and order requires changes or repairs to be made in the elevator or changes in the plans or specifications the chief of the division of factory and building inspection shall upon the payment of the fees required by law, issue a certificate of operation when such order has been duly executed, or issue his approval of the plans or specifications as the case may be. In event the finding and order of the Industrial commission of Ohio has been affirmed or modified by appeal as provided in sections 871-38 and 871-39 of the General Code on the grounds of reasonable safety considered by the industrial commission of Ohio, then the chief of the division of factory and building inspection shall, upon compliance with such order, and the payment of fees required by law, issue such certificate of operation or issue his approval of the plans and specifications as the case may be, but, if such finding and order of the industrial commission has been vacated such certificate of operation, upon the payment of fees required by law or such approval of plans and specifications as the case may be, shall be issued forthwith. No elevator shall be operated after being inspected after the effective date of this act without having such certificate of operation conspicuously posted thereon,

except pending a hearing on the issuance thereof, and as herein provided."

Section 1038-12 Ohio General Code provides:

'Every passenger elevator, escalator, freight elevators, including gravity elevators, shall be inspected once every six months. Power dumb-waiters, hoists and other lifting or lowering apparatus permanently installed, between rails or guides, shall be inspected at least once every twelve months.'

Contained in Section 1038-13, supra, is the following sentence: 'The industrial commission shall promptly consider such application and proceedings consistent herewith shall be had thereon in accordance with section 871-27 of the General Code and related sections.'

Section 871-27 Ohio General Code provides:

'(1) Any employer or other person interested either because of ownership in or occupation of any property affected by any such order, or otherwise, may petition for a hearing on the reasonableness and lawfulness of any order of the commission in the manner provided in this act.

(2) Such petition for hearing shall be by verified petition filed with the commission, setting out specifically and in full detail the order upon which a hearing is desired and every reason why such order is unreasonable or unlawful, and every issue to be considered by the commission on the hearing. The petitioner shall be deemed to have finally waived all objection to any irregularities and illegalities in the order upon which a hearing is sought other than those set forth in the petition. All hearings of the commission shall be open to the public.

(3) Upon receipt of such petition if the issues raised in such petition have theretofore been adequately considered, the commission shall determine the same by confirming, without hearing, its previous determination, or if such hearing is necessary to determine the issues raised, the commission shall order a hearing thereon and consider and determine the matter or matters in question at such time as shall be prescribed.

Notice of the time and place of such hearing shall be given to the petitioner and to such other persons as the commission may find directly interested in such decision.

(4) Upon such investigation, if it shall be found that the order complained of is unlawful or unreasonable, the commission shall substitute therefor such other order as shall be lawful and reasonable.

(5) Whenever at the time of final determination upon such hearing it shall be found that further time is reasonably necessary for compliance with the order of the commission, the commission shall grant such time as may be reasonably necessary for such compliance.'

We are advised that the reports mentioned in Section 1038-13 Ohio General Code are by the elevator inspector left at the elevator on the day of inspection or placed in the hands of the owner or operator.

We have on file at the office of the Industrial Commission of Ohio many written applications for hearings on said reports which have not been filed within 20 days from the receipt of the copies of such reports by the owners or operators, or within 20 days after they have been left at the elevator.

The Industrial Commission of Ohio on August 12, 1938, adopted, formulated, compiled and issued its Specific Safety Requirements Covering the Construction, Maintenance and Operation of Elevators, Dumb-Waiters, Escalators, Man Lifts and Their Hoistways. It is the failure of owners and operators of elevators to comply with these Specific Safety Requirements and perhaps requirements which may be found in Section 1038-1 to 1038-24 Ohio General Code that gives rise to the reports mentioned in Section 1038-13 Ohio General Code.

Section 1038-20 Ohio General Code provides in part as follows:

"Prosecutions for the violations of the provisions of this act, or the rules and regulations of the industrial commission of Ohio, shall be instituted by the chief of the division of factory and building inspection, and shall be in the form of summary proceedings before a common pleas court or municipal court.

Does Section 1038-13 Ohio General Code limit the power of the Commission to consider only such written applications as are filed in the office of said commission within twenty days after said inspector has made an inspection and left a copy of same at the elevator or placed a copy of same in the hands of the owner or operators?

In the event that an elevator is inspected, found to be operating in violation of the code of Specific Safety Requirements, a report placed on it or in the hands of the owner or operator, no appeal filed with the Commission within twenty days, is it possible, without any changes in the elevator by way of repairs or alterations to re-inspect same at a later date and recreate the right of appeal to this Commission?

After an elevator has been inspected, found defective and in violation of the elevator code, copy of the report showing

the defects or code violations left at the elevator, within twenty days an appeal is filed with the Commission. May the owner or operator operate said elevator with immunity while the appeal is pending?

It also has come to the attention of the Commission that certain elevator manufacturers have maintenance contracts with the owners or operators of certain elevators. After reports of inspections showing violations of the code are made the elevator manufacturers, without authorization being filed with this Commission, have filed appeals under section 1038-13 Ohio General Code with the Commission. Please advise if this is a proper appeal giving the Commission jurisdiction."

At the outset it should be noted that Section 1038-20 of the General Code, quoted in your request, was repealed by the 93rd General Assembly in Amended Senate Bill No. 86, passed on May 22, 1939, and effective on August 31, 1939, Section 1038-13, General Code, also quoted in your communication, having been amended in the same act as were certain other cognate sections of the General Code (118 v. 456).

The sections of the General Code providing for the "Inspection of Elevators" (Sections 1038-1 to 1038-24, inclusive) were first enacted by the 90th General Assembly on June 8, 1933 (115 v. 489). Section 1038-2a, General Code, requiring seats to be provided for the use of the operators of passenger elevators, and Section 1038-2b, General Code, providing penalties for the violation of Section 1038-2a, were enacted by the 92nd General Assembly on April 28, 1937 (117 v. 312), Section 1038-2b being subsequently repealed in Amended Senate Bill No. 86, supra (118 v. 456), in which Section 1038-20, General Code, was repealed and certain sections were amended as above noted.

In so far as the sections amended in the act of May 22, 1939 (118 v. 456), are concerned, it is necessary for the purposes of this opinion only to notice Section 1038-3, General Code, and Section 1038-13, supra. As amended, Section 1038-3 reads as follows, the asterisks indicating the omission of the word "or" and the emphasis showing the changes and additions:

"To carry out the provisions and the intent and purpose of this act, the department of industrial relations shall have the power, and its duty shall be, to make, alter, amend *** *and* repeal rules and regulations *exclusively* for the inspection of elevators used in this state, *and in no way relating to construction,*

maintenance and repair of such elevators."

The material amendments to Section 1038-13, supra, consisted of the requirement in the first paragraph to the effect that "said inspector shall leave a copy of said report at the elevator on the day the inspection is completed", and the addition of the last four paragraphs to the section, those provisions relating to an appeal to the Industrial Commission being entirely new.

With reference to Section 871-27, General Code, quoted in your request, and Sections 871-38 and 871-39, General Code, all of which are referred to in Section 1038-13, supra, no comment is necessary other than to point out that they have remained unchanged since their enactment in the act of March 12, 1913, creating the Industrial Commission of Ohio (103 v. 95, §§ 27, 38 and 39) and that Sections 871-38 and 871-39 provide for an appeal of any order of the Industrial Commission to the Supreme Court of Ohio.

With these preliminary observations upon the history and as to the character of the statutes pertinent to your inquiries, I come now to a consideration of your questions, which will be answered in the order asked.

I. Your first question must be answered in the affirmative. You will note that in the fourth paragraph of Section 1038-13, supra, it is expressly provided that the "owner or operator, *with(in)* 20 *days from the receipt of the copy"* of the report of an elevator inspector, as that term is defined in Section 1038-1, General Code, "may make written application to the industrial commission of Ohio, upon forms to be furnished by the *** commission ***, for a hearing on the report *** as to whether the elevator in question is reasonably safe", the industrial commission being required, upon the filing of such an application, promptly to consider the proceedings to be in accordance with Section 871-27 and related sections of the General Code in so far as the provisions of such sections are consistent with Section 1038-13, supra. The above language prescribing the time within which an appeal must be perfected is plain and unambiguous. The rule is stated in 3 Am. Jur. 137, in the following language:

"The procedure for obtaining a review by appeal or error

> proceedings is outlined by statute in the various jurisdictions, and these must be consulted. *There must be a compliance with the statutory requirements,* in order to confer jurisdiction upon the appellate court. None of the material requirements can be dispensed with by the court." (Emphasis mine)

And at page 139 of the same authority, the text reads:

> "The time for instituting review proceedings is regulated by statute or rules of court in the various jurisdictions, and these must be consulted on the question.
>
> It is essential to the jurisdiction of the appellate court that the proceeding be taken within the time limited. * * * "

That is to say, a statute prescribing that an appeal may be had to some judicial or quasi-judicial body within a prescribed period of time, contains both a grant and a limitation and is jurisdictional in character.

The holding of the Supreme Court of Ohio, in the case of Beach v. The Union Gas and Electric Company, 130 O.S. 280, 199 N.E. 181 (1935), is here in point. The first branch of the syllabus reads:

> "Section 1465-90, General Code (111 Ohio Laws, 227), provides that, after workmen's compensation has been denied by the Industrial Commission finding that it has no jurisdiction over the claim, the claimant has sixty days within which to file his action in the Common Pleas Court against an employer self-insurer, making it a party defendant to the suit and causing a summons to be issued to such employer. Compliance with the provision that claimant may file his petition within sixty days after notice of disallowance is made, by the foregoing section, a condition *sine qua non* to the assumption of jurisdiction by the trial court."

At page 284 of the opinion in this case, Judge Jones said as follows:

> " *** Compliance with such provisions, the filing of a petition within sixty days, and the making of the defendant self-insurer a party to the action are, under the foregoing section, made conditions *sine qua non* to the assumption of jurisdiction by the trial court. To hold otherwise we would have to ignore those statutory requirements by judicially deleting them from the act. These requisites are not found in previous acts but were inserted for the first time in the amendment of Section 1465-90, General Code, in the year 1925, thus conclusively showing a legislative purpose of making them an essence to jurisdiction."

The above excerpt from the opinion in the Beach case was quoted with approval by the Court of Appeals of Hamilton County (sitting by assignment in Warren County) in the case of Gillen v. Industrial Commission, 59 O.A. 241, 12 O.O. 353, 27 Abs. 383, 17 N.E. 663 (1938), the court commenting thereon as follows at page 244:

> "It is seen from this quotation that the requirement that the appeal be taken within sixty days, if at all, is a limitation — and more. It is a condition '*sine qua non* to the assumption of jurisdiction by the trial court.' "

See also the case of Young v. Shallenberger et al., 53 O.S. 291 (1895), and the cases referred to in the answer to your second question.

II. The answer to your second question must be in the negative. The second paragraph of Section 1038-13, supra, clearly provides that where upon inspection it is found that an elevator "requires certain changes or repairs to make it reasonably safe to operate" and a copy of the report of the inspector, as approved by the chief of the division is served upon the owner or operator of the elevator in accordance with such section, upon compliance with the directions and recommendations contained in the report and the payment of the fees required by law, *"unless appealed"*, a certificate of operation good for one year shall be issued by the chief of the division of factory and building inspection. Under the sections here involved a certificate of operation is essential to the lawful operation of an elevator. See Section 1038-14, General Code. And from the plain provisions of Section 1038-13, supra, it is patent that where an inspector directs or recommends that changes or repairs are required, only these alternatives exist. Either there must be a compliance with the orders contained in the report as approved, or an appeal must be perfected within the time specified in the statute.

A similar question was before the Supreme Court of Ohio in the case of The Industrial Commission of Ohio v. Glenn, 101 O.S. 454, 129 N.E. 687 (1920), cited with approval and followed in the cases of The State ex rel. Randolph v. Industrial Commission of Ohio, 128 O.S. 27, 190 N.E. 217 (1934), and The State ex rel. Szalay v. Industrial Commission of Ohio, 130 O.S. 269 (1935).

In the Glenn case, the commission rejected a claim for compensation

"on the ground that the disability which was the basis thereof was not caused by an injury in the course of his (Glenn's) employment." At that time, Section 1465-90, General Code, provided that an appeal might be taken in such a case "within thirty (30) days after the notice of the final action of such commission". Under its rule-making powers in such cases (Section 1465-44, General Code) the commission had provided that an application for rehearing might be filed with the commission by the claimant "within thirty days after being notified of the final action of the commission adverse to the claimant". An application for a rehearing was not filed until almost two years after notice of the rejection of Glenn's claim.

In a per curiam the court held as follows at pages 456 to 458:

> "These rules of the commission do not take away any right conferred upon the claimant by law; rather they extend the time for consideration of the applicant's claim and give further opportunity to present proofs before a final order is made. This, however, upon the condition that such application for rehearing is filed within thirty days. If that be done, then, under the rules of the commission, its final order is deferred until the conclusion of the further hearing.
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> * * * The claimant cannot by the mere act of filing such application for rehearing, which is denied, re-vest himself with a right which he has lost under the express terms of the very statute upon which he must rely for any relief whatever. The argument of counsel for applicant, that the thirty-day period for appeal does not begin to run until the final order, that the final order is the last order, that there is no limitation of time for filing an application for rehearing, and that action by the commission refusing to grant such rehearing is their last order, travels in a circle, and if adopted would completely wipe out any and all limitations upon time for appeal.
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> * * * The limitation has been fixed by the legislative provision which is clear and explicit, and if the time for appeal so prescribed is too short the legislature should so amend the law as to afford a proper period for such purpose. That limitation as fixed by the statute in force is thirty days. The application in this case was filed nearly two years after the order of the commission disallowing the claim. The common pleas court did not have jurisdiction to entertain the appeal. * * * "

The syllabus in the Randolph case reads as follows:

> "Under the provisions of Section 1465-90, General Code, a claimant for compensation, upon filing application therefor

within the period fixed therein, is entitled to a rehearing of his claim if denial of his right to receive compensation or to continue to receive compensation was based upon the ground that the commission did not have jurisdiction of the claim.

A claimant, having failed to file such application within the prescribed period, cannot by subsequently filing an application for modification of award revest himself with the right lost by failure to comply with the requirement of the statute."

Like conclusions are laid down in the fourth branch of the syllabus of the Szalay case, the Randolph case being therein expressly approved and followed.

If it were to be held that by a second or subsequent inspection, there having been no compliance with orders engendered by the first inspection, an appeal might be taken within twenty days from service of the report of the second or subsequent inspection, the twenty day limitation on an appeal expressly contained in Section 1038-13, supra, would become meaningless, and by the simple resort to repeated inspections the manifest intent and purpose of the Legislature might be entirely defeated. In other words, the twenty day limitation prescribed in the statute would become a dead letter.

Both upon principle and the authorities above cited, therefore, I am constrained to hold that where an elevator is inspected, found to be operated in violation of the General Code or Code of Specific Safety Requirements adopted by the Industrial Commission, a report approved by the chief of the division of factory and building inspection is given to the owner or operator of such elevator and no appeal is filed with the industrial commission within twenty days as provided in Section 1038-13, the owner or operator having failed to comply with the orders and directions contained in the report, the right to appeal may not be re-created and invested in the owner or operator by a second or subsequent inspection and report as provided by law.

III. The answer to your third question is found in the words "unless appealed" contained in the second paragraph of Section 1038-13, supra, above commented upon and in the last sentence of such section which reads:

"No elevator shall be operated after being inspected after

> the effective date of this act without having such certificate of operation conspicuously posted thereon, except pending a hearing on the issuance thereof and as herein provided."

This language seems clearly to contemplate that if an appeal be perfected in accordance with the statute, either to the industrial commission, or to the industrial commission and to the Supreme Court of Ohio, in accordance with Sections 1038-13, 871-38 and 871-39, supra, the orders and directions of the inspector shall be stayed until such appeal or appeals shall have been considered by the Industrial Commission and the Supreme Court, as the case may be.

IV. Your fourth question is answered by the plain terms of the statute. In paragraphs 2 and 4 of section 1038-13, supra, the right of appeal is granted only to the "owner or operator" of the elevator. No provision is made in this section, or any other section of the General Code, for an appeal by a person, firm or corporation with whom the "owner or operator" may have a contract for the maintenance and repair of the elevator. It might well be in certain cases that where changes or repairs are ordered and directed, the "owner or operator" would choose to discontinue the use of the elevator rather than incur a possible liability for the expenses and costs of an appeal, or the expense of making the changes and repairs ordered in accordance with law.

In view of the foregoing, and in specific answer to your question, it is my opinion that:

1. By the provisions of Section 1038-13 and cognate sections of the General Code, the Industrial Commission of Ohio is without jurisdiction to consider an appeal from the orders and directions lawfully made upon inspection of an elevator unless a written application be filed with the Industrial Commission within twenty days, after the report of an inspector, as approved by the chief of the division of factory and building inspection is given to the owner or operator of such elevator.

2. Where an elevator is inspected, found to be operating in violation of the General Code, or the code of Specific Safety Requirements duly adopted by the Industrial Commission of Ohio, and a report of the findings, orders and directions of the inspector, as approved by the chief of the division of factory and building inspection, is given to the owner or

operator of such elevator, no appeal is filed with the Industrial Commission of Ohio within twenty days in accordance with the provisions of Section 1038-13, General Code, and the owner or operator has wholly failed or refused to comply with the orders and directions contained in such approved report, a right of appeal may not be re-created and vested in such owner or operator by a second or subsequent inspection of the elevator.

3. Where an elevator has been inspected and certain changes and repairs are ordered and directed to be made in accordance with law, and a copy of the report containing recommendations as to such changes or repairs, as approved by the chief of the division of factory and building inspection, has been given to the owner or operator of such elevator, and a lawful appeal is perfected to the Industrial Commission or the Industrial Commission and the Supreme Court of Ohio, as the case may be, the owner or operator may continue to operate such elevator pending a hearing on the issuance of a certificate of operation, as provided for in Section 1038-13 and cognate sections of the General Code.

4. There is no provision in Section 1038-13, or any other section of the General Code, authorizing an appeal by any person other than the owner or operator of an elevator, where such elevator has been lawfully inspected and it has been found that such elevator requires certain changes or repairs to make it reasonably safe to operate.

Respectfully,

THOMAS J. HERBERT,

Attorney General.