4800.

APPROVAL, CONTRACT FOR ROAD IMPROVEMENT IN HARRISON COUNTY, OHIO.

COLUMBUS, OHIO, December 9, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

4801.

WORKMEN'S COMPENSATION—PRINCIPAL CONTRACTOR LIABLE FOR PREMIUM OF NON-COMPLYING SUB-CONTRACTOR—AWARD TO EMPLOYE OF SUCH SUB-CONTRACTOR MAY NOT BE CHARGED TO PRINCIPAL CONTRACTOR—ELECTION BY INJURED EMPLOYE TO HOLD SUB-CONTRACTOR.

SYLLABUS:

A principal contractor is responsible for the premium of his sub-contractor who is amenable to the workmen's compensation law but fails to comply with the provisions of section 1465-69 *during said period of non-compliance on the part of said sub-contractor.*

An award made to an injured employe or the dependents of an employe who is killed while working for a sub-contractor, who is amenable to the workmen's compensation law of Ohio but has failed to comply with the provisions thereof by either paying premiums into the state insurance fund or by electing to pay compensation direct, is payable from the state insurance fund and cannot be charged against the principal contractor. However, if the injured employe or the dependents of the employe killed in the course of his employment elect, after the injury or death, to hold the sub-contractor as his employer, the award made is charged against the sub-contractor.

COLUMBUS, OHIO, December 9, 1932.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your request for my opinion as follows:

> "The Commission respectfully requests your opinion in the following situation.
>
> A is the employer and is a road construction contractor and as such is amenable to and complies with the Workmen's Compensation Act of Ohio.
>
> B is a trucking contractor and is an independent contractor or sub-contractor under A, that is, doing the trucking on a road construction job for which A had the general contract. B, although he is amenable to the Workmen's Compensation Act, does not comply with said act.

C who is one of the regular employes of B, was killed in the course of and arising out of his employment, being killed while working on the contract that B had with A. C's widow files an application for a death award claiming A as decedent's employer under Section 1465-61, paragraph 3.

Assuming that a death award were to be made to the decedent's widow, what steps can be taken by the Commission against A to collect the premiums or to secure payments of this award from A?

We will be pleased to have your opinion on the following questions:

1. Is A liable for all the premiums on B's employes?
2. Or is A only liable for the premium on C's payroll?
3. Can A be compelled to pay the entire award made by the Commission to C?"

Your first question is whether or not the principal contractor, who is amenable to the Workmen's Compensation Law of Ohio and who has paid premiums into the State Insurance Fund, is required to pay premiums on the employes of his subcontractor, who is amenable to said Workmen's Compensation Law but has failed to comply with the provisions thereof by either paying premiums into the Fund or qualifying to carry his own insurance. Section 1465-69, General Code, requires all employers to pay into the Fund a premium based upon the payroll of their employees. This is by virtue of the language of the section requiring the employers to pay into the State Insurance Fund the premium fixed by the Industrial Commission of Ohio. This is fixed by virtue of section 1465-53, General Code, which provides that the Commission "shall fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry."

It is well known that the payroll is the amount of money which is paid to the employes of an employer. Among other things, section 1465-61 of the General Code, insofar as is pertinent to this question, reads as follows:

> "Every person in the service of an independent contractor or subcontractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for his employment or occupation, or to elect to pay compensation direct to his injured and to the dependents of his killed employes, as provided in section 1465-69, General Code, shall be considered as the employe of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employes, or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer."

This section provides that if the sub-contractor is amenable to the law and does not pay his premium into the State Insurance Fund or obtain permission to pay compensation direct, the employes of such sub-contractor "shall be considered as the employes of the person who has entered into the contract with such independent contractor." Therefore, during the time that such a subcontractor fails to comply with the Workmen's Compensation Law, these employes are considered the employes of the original contractor. That being the case, the original contractor, by virtue of section 1465-53 and section 1465-69, is required to pay the premium of those employes based upon the payroll of the

independent contractor until such time as the independent contractor complies with the Workmen's Compensation Law and his employes are no longer considered the employes of the original principal contractor.

Therefore, in specific answer to your first and second questions, it is my opinion that a principal contractor is responsible for the premium of his sub-contractor who is amenable to the Workmen's Compensation Law but fails to comply with the provisions of section 1465-69 during said period of non-compliance on the part of said sub-contractor.

Your third question is whether or not a principal contractor who is amenable to the Workmen's Compensation Law and who has paid premiums as provided in section 1465-69 of the General Code, and has entered into a contract with a sub-contractor who is amenable to the Workmen's Compensation Law but has failed to comply with the provisions thereof, in case one of the sub-contractor's employes is injured or killed, is liable for the award which is due to the injured employe or the dependents of the killed employe.

Under the state of facts given, this employer has complied with the provisions of section 1465-69 of the General Code. Since the employe of the sub-contractor in this event is considered to be the employe of the principal contractor, the award must be paid from the state insurance fund. This was passed upon by one of my predecessors in an opinion found in the Opinions of the Attorney General for 1917, Vol. III, p. 2248, the syllabus of which is as follows:

> "An employe of an independent contractor who has failed to pay into the state insurance fund the amount of premiums determined and fixed by the industrial commission of Ohio, or to elect to pay compensation direct under section 1465-69 G. C. if he (such employe) makes claim for compensation, is to be considered as the employe of the person who entered into the contract with such independent contractor. If such person has paid into the state insurance fund the required premiums compensation must be made out of the fund; if such person has elected to pay compensation direct under section 1465-69 G. C., compensation must be made under that section; if such person has failed to pay into the state insurance fund the required premiums, or to elect to pay compensation direct under section 1465-69 G. C., then the employe may claim and be awarded compensation in the manner provided by section 1465-74 (section 27) G. C."

This practically answers your question. I might say in addition, however, there is no authority for the Industrial Commission to charge an award on account of an injured employe or the dependents of such employe who was killed in the course of his employment, except in section 1465-74, General Code. Said section applies only to "any employe whose employer has failed to comply with the provisions of section 1465-69." Since the injured workman in question is considered the employe of the principal contractor and since the principal contractor has complied with the provisions of section 1465-69 of the General Code, said section has no application.

It is therefore my opinion, in answer to your third question, that an award made to an injured employe or the dependents of an employe who is killed while working for a sub-contractor, who is amenable to the workmen's compensation law of Ohio but has failed to comply with the provisions thereof by either paying premiums into the state insurance fund or by electing to pay compensation direct, is payable from the state insurance fund and cannot be charged against the prin-

cipal contractor. However, if the injured employe or the dependents of the employe killed in the course of his employment elect, after the injury or death, to hold the sub-contractor as his employer, the award made is charged against the sub-contractor.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4802.

COMPENSATION—CONSULTANT ENGINEER TO COUNTY SANITARY ENGINEER—SPECIFIC CASE.

SYLLABUS:

Discussion of measure of compensation in contract between county commissioners and assistant to county sanitary engineer in connection with the county sewer district.

COLUMBUS, OHIO, December 10, 1932.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This acknowledges receipt of your letter of recent date enclosing copy of a letter from Mr. F. A. Kilmer, Clerk of the Board of County Commissioners of Montgomery County, submitting certain questions relative to a contract between the Commissioners of that county and a Consultant Engineer to the County Sanitary Engineer. You ask my opinion upon the question so submitted.

It is unnecessary, for the purposes of this opinion, to set forth in full either the letter of the Secretary of the Board of County Commissioners, or the terms of the contract, copy of which is attached to that letter. The inquiries relate to the manner of determining the compensation due to the Consultant Engineer under the terms of the contract which, on this point, provides as follows:

> "One and one-half (1½%) percent (based upon the general estimates of cost of said improvements) shall be payable when the general plans, specifications and estimates for each or any improvements are presented to and approved by said first party, an additional one and one-half (1½%) percent (based upon the detailed estimates of cost of said improvements) shall be payable when the detailed plans, specifications, estimates and tentative assessments for each or any improvement are presented to and approved by said first party and an additional three (3%) percent (based upon the construction estimates due the contractor) shall be payable during the progress of the actual construction and installation of the work. The foregoing schedule to apply only to newly formed districts where a general plan of the entire district is required for the approval of the State Department of Health. Where later installations are made in an already formed district and no general plans are necessary for the approval of the State Department of Health the following schedule shall apply: Three (3%) percent (based upon the