1740.

WORKMEN'S COMPENSATION ACT—INTERPRETATION OF SECTION 1465-75 G. C. (108 O. L. 1145)—WHERE EMPLOYER IN DEFAULT FOR PAYMENT OF PREMIUM—PAYMENT OF PREMIUM AFTER INJURY DOES NOT DEPRIVE EMPLOYE OF RIGHT TO BRING SUIT OR HAVE AWARD MADE UNDER SECTION 1465-74 G. C.—INDUSTRIAL COMMISSION NOT REQUIRED TO EXONERATE EMPLOYER IN SUCH CASE—WHEN COMPENSATION MAY BE MADE TO SUCH EMPLOYE.

When an injury is received by the employe of an employer mentioned in section 1465-60 *sub-section* 2, *and such employer is in default for the payment of his premium as required by the Workmen's Compensation Law as amended in* 108 *O. L. Part II, p.* 1145, *the payment of such premium and judgment therefor after such injury does not deprive such employe of the right to bring suit against such employer or to have an award of compensation made to collect the same as provided in section* 1465-74 *G. C., nor does such payment require the Industrial Commission to compensate such employe so as to exonerate the employer from doing so. When the attempt to make collection of the award under section* 1465-74 *G. C. fails, and not before, compensation may be made such employe from the state insurance fund, the premium due from the employer having been paid.*

COLUMBUS, OHIO, December 29, 1920.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your recent communication you request an interpretation of section 1465-75 G. C., as amended January 22, 1920, affecting the payment of premiums by employers who are in default for such payment under the provisions of the workmen's compensation law, and put these specific questions:

"1. Has the commission the right or authority to accept such premiums from non-participating or defaulting employers after accident to an employe of such employer, such premium to cover the period for which such employer was in default at the time of such injury and six months in advance, as provided by the law?

2. After payment of such premium covering such defaulting period, has the commission the right to allow compensation to such injured employe of such employer, charging the loss occasioned thereby or compensation to be paid against the state insurance fund as though such premium had been paid when due or as contemplated by the law?

3. Does the payment of such premium by such employer relieve him from the provisions of section 1465-74, being section 27 of the act, or abrogate any of the rights of the employe to which he would be entitled under such section?

4. If a workman is injured in the employ of an employer who has failed to comply with the provisions of the workmen's compensation law, either by paying premium into the fund or by getting authority to carry his own risk as provided by the law, and such injured workman files a claim under section 27 of the workmen's compensation law prior to the time such delinquent employer pays premium into the state insurance fund or elects to carry his own risk under the provisions of the law, has the commission the right to hear such claim and make an award of compensation

to be paid by such delinquent employer, or must it dismiss the claim on payment of premium and order claimant to file a claim under the other provisions of the law?"

Your inquiries manifestly have to do with employers as the term is defined in section 1465-60, subsection 2, of the General Code:

> "Every person, firm and private corporation, including any public service corporation, that has in service five or more workmen or operatives, regularly in the same business, or in or about the same establishment under any contract or hire, express or implied, oral or written."

What is hereafter said is therefore to be understood as a discussion of the status of these employers and their employes and does not consider the obligations of the state or its subdivisions mentioned in section 1465-70, subdivision 1.

Section 1465-68 G. C. contains this language:

> "Every employe mentioned in subdivision two of section fourteen hereof (G. C. 1465-61), who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, on and after January 1, 1914, shall be entitled to receive, either directly from his employer as provided in section twenty-two hereof, or from the state insurance fund, such compensation for loss sustained on account of such injury or death, and such medical, nurse and hospital services and medicines, and such amount of funeral expenses in case of death as is provided by sections thirty-two to forty inclusive of the act. (G. C. 1465-41a to 1465-43, 1465-45, 1465-46, 1465-53 to 1465-106)."

Section 1465-69 G. C. declares it the duty of the employers mentioned in section 1465-60 G. C., subsection 2, to pay into the state insurance fund in January and July of each year the amount of premiums determined and fixed by the industrial commission of Ohio "for the employment or occupation of such employer." The section contains a provision excepting from the duty of making these payments those employers who carry their risks and are of course not comprehended within your inquiries.

Section 1465-70 G. C. provides:

> "Employers who comply with the provisions of the last preceding section shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of any employe, wherever occurring, during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation direct to his injured or the dependents of his killed employes as herein provided."

The language of section 1465-72 G. C. is in part as follows:

> "The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong, who have been injured in the course of their employment, wheresoever such injuries have occurred, and which have not been purposely self-inflicted, or to their dependents in case death has ensued. * * *

And such payment or payments to such injured employes, or their dependents in case death has ensued, shall be in lieu of any and all rights of action whatsoever against the employer of such injured or killed employes."

Section 1465-73 G. C. declares that:

"Employers mentioned in subdivision two of section thirteen hereof (G. C. 1465-60), who shall fail to comply with the provisions of section twenty-two hereof (G. C. 1465-69), shall not be entitled to the benefits of this act during the period of such non-compliance, but shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes, and also to the personal representatives of such employes where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common law defenses:

The defense of the fellow-servant rule, the defense of the assumption of risk or the defense of contributory negligence.

And such employers shall also be subject to the provisions of the two sections next succeeding."

Section 1465-74 G. C. contains the following provision:

"Any employe whose employer has failed to comply with the provisions of section twenty-two hereof (G. C. 1465-69), who has been injured in the course of his employment, wheresoever such injury has occurred, and which was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceeding against his employer by civil action in the courts, as provided in the last preceding section, file his application with the state liability board of awards for compensation in accordance with the terms of this act (G. C. 1465-41a to 1465-43, 1465-45, 1465-46, 1465-53 to 1465-106), and the board shall hear and determine such application in like manner as in other claims before the board; and the amount of the compensation which said board may ascertain and determine to be due to such injured employe, or to his dependents in case death has ensued, shall be paid by such employer to the person entitled thereto within ten days after receiving notice of the amount thereof as fixed and determined by the board; and in the event of the failure, neglect or refusal of the employer to pay such compensation to the person entitled thereof, within said period of ten days, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the board, which with an added penalty of fifty percentum, may be recovered in an action in the name of the state for the benefit of the person or persons entitled to the same. And any employe whose employer has elected to pay compensation to his injured, or to the dependents of his killed employes in accordance with the provisions of section twenty-two hereof (G. C. 1465-69), may, in the event of the failure of his employer to so pay such compensation or furnish such medical, surgical, nursing and hospital services and attention or funeral expenses, file his application with the state liability board of awards for the purpose of having the amount of such compensation and such medical, surgical, nursing and hospital services and attention or funeral expenses determined; and thereupon like pro-

ceedings shall be had before the board and with like effect as hereinbefore provided."

And by section 1465-76 G. C. it is provided:

"Every employe, or his legal representative in case death results, who makes application for an award, or accepts compensation from an employer who elects, under section 22 of this act, directly to pay such compensation waives his right to exercise his option to institute proceedings in any court, except as provided in section 43 hereof. Every employee, or his legal representative in case death results, who exercises his option to institute proceedings in court, as provided in this section, waives his right to any award, or direct payment of compensation from his employer under section 22 hereof, as provided in this act."

Old section 1465-75 G. C. was as follows:

"If any employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him shall be collected by civil action against him in the name of the state as plaintiff; and it shall be the duty of the state liability board of awards on the first Monday in February, 1914, and on the first Monday of each month thereafter, to certify to the Attorney-General of the state the names and residences of all employers known to the board to be in default for such payments for a longer period than five days, and the amount due from each such employer, and it shall then be the duty of the attorney-general forthwith to bring, or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due, and the same when collected, shall be paid into the state insurance fund, and such employer's compliance with the provisions of this act requiring payments to be made to the state insurance fund shall date from the time of the payment of said money so collected as aforesaid to the treasurer of state for credit to the state insurance fund."

108 O. L., Part II, p. 1145 (Am. S. B. 208) amending section 1465-75 of the General Code and supplementing section 1465-69 by section 1465-69a requires the industrial commission when it finds that a person, firm or private corporation, including any public service corporation, is an employer within the meaning of the act, to determine the date when he or it became such and give notice of its action. Such employer shall immediately furnish the commission with a payroll covering the period included in the finding together with an estimated payroll for the six months next succeeding from the date of such finding and comply with all the provisions of section 1465-69 of the General Code. Upon his refusal to comply with said section within five days after receiving the notice, it shall be conclusively presumed that he has elected to pay his full premium into the state insurance fund and the commission shall thereupon determine the amount then due from him and the amount due for the next succeeding six months, give him notice of such amount and order the same paid into the fund. If such payment is not made within five days after the receipt of such notice by the employer, the commission shall certify such amount to the attorney-general to be collected by him by civil action. Unless the employer shall within the five days above mentioned execute a bond to secure the payment of any judgment and costs rendered against him for said premium, the court at the time of the filing of the petition and without notice shall appoint a receiver for the property and business of the employer, to take

charge of his property and assets and administer the same under the orders of the court.

Amended section 1465-75 G. C. contains the following language:

> "If upon final hearing of said cause it is found and determined that the defendant is an employer within the meaning of this act, the court shall render judgment against said defendant for the amount of said premium, with interest from the date of the determination of said amount by the commission, together with costs, which judgment shall be given the same preference as is now or may hereafter be allowed by law on judgments rendered for claims for taxes, and shall be paid by the receiver into the state insurance fund. The payment of such judgment shall entitle employes of such employer to the benefits of this act from the date on which the latter became subject to this act as determined by the commission. If the judgment can not be paid in full, the commission shall determine the date upon which said employes' right to participate in the fund shall inure.
>
> If any employer who has complied with this act shall default in any payment required to be made by him or it to the state insurance fund, for a period of ten days after notice that such payment is due, the same proceedings shall be had as in the case of an employer against whom the commission has made a finding as hereinbefore provided.
>
> All such cases shall have precedence over all other civil actions and shall be assigned for trial as soon as the issues are made up."

Section 1465-69a G. C. provides a penalty for non-compliance with the provisions of section 1465-69 but that is not material here.

In attempting to arrive at the correct answers to your questions, two propositions should be borne in mind. First, that repeals by implication are not favored, and, second, that the manifest purpose of amended Senate Bill No. 208 was not to deprive the employe of any right which he had, but to afford him additional protection by making it possible to secure speedy payment of premiums from employers so that the coverage would be provided.

I do not believe therefore that the enactment of amended Senate Bill No. 208 deprives the employe of his right to enforce the liability of his employer who has failed to pay his premium by an action for damages sustained by the wrongful act, neglect or default of his employer, or of the latter's agents, officers and employes as provided in section 1465-73 G. C. Nor do I believe that such employe is deprived of the right secured by section 1465-74 to file his application with the state liability board of awards for compensation and have that compensation determined by the board. These rights are not taken away by any provision of Amended Senate Bill No. 208, either expressly or by implication.

The commission clearly has the right and authority to accept premiums from non-participating or defaulting employers after an accident to an employe of such employer for the period for which such employer was in default and for an advance premium of six months; for it is expressly made the duty of the employer by amended section 1465-75 to pay this amount into the fund or it may be collected from him by civil action.

But more difficult questions now arise: Does the payment after an injury has occurred of the amount of premium for the period of default and for the succeeding six months,

(a) relieve the employer from paying the award mentioned in section 1465-74?

(b) prevent the employe's resorting to the courts to enforce such award or stay his action therefor if one has been begun?

(c) require the commission to pay said award from the state insurance fund, so as to exonerate the employer from the payment of said award.

I find no decisions illuminating these questions because of their novelty, but upon principle and reason I answer each of them in the negative.

Amended Senate Bill 208 does not purport to repeal any portion of section 1465-74 G. C. or to direct the commission to pay the award therein provided from the funds in its hands. Against this fact which is of great weight, the most plausible argument is that the employer, having paid the premium for the entire period of his liability as determined by the commission, ought not to be compelled to satisfy awards made for injuries occurring during that period. But it is to be remembered that this penalty falls upon the employer on account of his own disregard of a clear and positive law.

In U. S. F. & G. Co. vs. Wickline, 170 N. W. 193 (Nebr.) it was held by the court that a provision of a penalty for failure to promptly pay an award under the employer's liability act of that state did not violate the constitutional guaranty of due process of law.

Under the provisions of section 1465-74 G. C. the award is increased by "an added penalty of fifty per cent" if it is not paid by the employer within the period of ten days after he has received notice of its determination.

On the other hand, if the employer could escape the consequences of an award by paying his premiums after an injury occurred, there would be ever present the temptation to disregard the provisions of the act as to the payment of premiums upon the theory that if he had no injuries he might escape altogether; if he had, he would be no worse off from his neglect because he could relieve himself by paying his premium.

The legislature has constitutional authority to compel "compulsory contribution" to the workmen's compensation fund. Ohio constitution, Art. II, section 35. The law enacted by it has this general purpose. But experience has shown that some employers, many of them of little financial strength, have decided to run a risk and violate this law. The amendment was designed to make such course less inviting. I do not see anything in the language of the amendment, or perceive any principle or reason upon which a conclusion should be reached that the employer may now be relieved by paying his premiums from an award made while he was in default, or that it is the duty of the commission to pay so as to save him harmless.

The amended act provides that

> "The payment of such judgment shall entitle employes of such employer to the benefits of this act from the date on which the latter became subject to this act as determined by the commission."

The term "benefits" is somewhat indefinite but it was used as comprehending the right to participate in the state insurance fund. But when and how? May an employe who has an application pending before the commission cease the pursuit of his employer and claim compensation from the fund when his employer pays his premium? Or must he continue the procedure outlined in section 1465-74 G. C. and make the award from his employer if he can? While the question is close, I think he must. To adopt the contrary view would be to say that the employe might shift the obligation from the employer (where we have determined that it belongs) to the commission. The influence or persuasion of the employer might result in thus putting himself into a better position than he was before the passage of the act. But if the employer cannot be made to pay, resort may be had to the fund. The "benefit" is received but its enjoyment is postponed to permit the operation of machinery left intact by the amendment. This construction in my judgment makes

for a prompt compliance with the law and ultimately cares for the employe. The opposite conclusion would, in my judgment, encourage culpable and wilful disregard of the law and be out of harmony with its purpose.

Perhaps section 1465-75 should be made specific as to when an employe may receive compensation from the fund, or provision be made for compensating the employe and enforcing the award against the employer for the benefit of the fund.

But the law must be construed as it stands and I therefore advise you that where an injury is received by an employe of an employer in default for the payment of his premium under the workmen's compensation law, as amended in 108 O. L., Part II, 1145, the payment of such premium or a judgment therefor does not deprive such employe of the right to bring suit against the employer, or to have an award of compensation made him and to collect the same as provided in section 1465-74 G. C. When the attempt to make collection of the award under such sections fails and not before, such award may be paid from the state insurance fund, the premium of the employer having been paid.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1741.

MAYORS—CITIES AND VILLAGES—CRIMINAL DOCKET--MAY RETAIN FINES TO PURCHASE SAME.

Mayors of cities and villages may retain out of fines or other moneys belonging to the county, coming into their hands in criminal proceedings, the amount paid for a criminal docket.

COLUMBUS, OHIO, December 29, 1920.

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

GENTLEMEN:—Acknowledgment is made of your letter reading thus:

> "We are enclosing you herewith copy of communication written to the county auditor of Montgomery county, Ohio, based upon conversation reported to this office by Mr. Bliss, who had consulted some of your force. However, as there is considerable doubt in the mind of the writer upon this point as the preceding opinions of the attorney-general had held just the contrary under the old law, we are respectfully requesting your written opinion upon the following question:
>
> May the mayors of cities and villages retain out of fines or other moneys belonging to the county coming into their hands in criminal proceedings, the amount paid for criminal docket?"

The opinion of the attorney-general to which you refer, is doubtless that which was rendered to your department November 5, 1917 (Opinions of Attorney-General for 1917, Vol. III, p. 2035). The head note of said opinion says:

> "Neither a mayor nor a police judge has authority, under section 1742 or any other section of the General Code, to retain a part of the fines or