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INDUSTRIAL COMMISSION OF OHIO—HAS AUTHORITY TO PAY FROM SURPLUS FUND CREATED AND MAINTAINED, SECTION 1465-64, G. C., AWARDS, COMPENSATION AND BENEFITS DUE INJURED EMPLOYEES OR DEPENDENTS—AMOUNTS IN ADDITION TO MAXIMUM PAID BY SURETY UNDER BOND FURNISHED, SECTION 1465-69, G. C., BY SELF-INSURING EMPLOYER, INSOLVENT, SINCE FILING BOND.

SYLLABUS:

The Industrial Commission of Ohio has authority to pay from the surplus fund created and maintained by virtue of Section 1465-54, General Code, awards of compensation and benefits due injured employees or their dependents, the amounts of which awards are in addition to the maximum provided for and paid by the surety under a bond furnished under Section 1465-69, General Code, by a self-insuring employer that has become insolvent since the filing of said bond.

Columbus, Ohio, January 14, 1943.

The Industrial Commission of Ohio,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your recent letter requesting an opinion, which reads in part as follows:

> "The Industrial Commission has directed the writer to request your opinion on the question arising out of the following situation. Pursuant to the provisions of Section 1465-69, General Code, the Commission granted The National Coal Company authority to operate as a self-insurer under the provisions of said section, and for the period between June 27, 1922 and June 29, 1923, the aggregate amount of the bond determined by the Commission was $33,900. During that period certain injury and death claims accrued and The United States Fidelity & Guaranty Company, as surety for The National Coal Company, has paid compensation in an aggregate amount to the various claimants under these claims above referred to in excess of $33,900. In certain of these claims the claimants are still disabled and are entitled to have further awards made for disability and medical, hospital and nursing expenses incidental to such disability. Said surety company has discontinued compensation payments to said claimants inasmuch as it has discharged its liability under the bond as executed. The principal, The National Coal Company, has been liquidated through receivership and no further recourse can be had against said company on these claims. * * *

> Therefore, in view of the foregoing, it is the desire of the Commission to have your opinion on the question as to whether or not the Industrial Commission has authority to pay from the surplus fund, such compensation as may be due the injured workmen or their dependents, for disability or death benefits, or medical, hospital and nursing services, the amounts of which awards are in addition to the maximum amount provided and paid by the surety under the bond furnished for the payment of such compensation by self-complying employers."

In considering the question raised it is first necessary to review the general purposes of the Workmen's Compensation Act relating to an injured employee's rights to compensation for disability or death benefits, hospital, nursing or funeral expenses.

The Workmen's Compensation Law of Ohio was originally enacted in 1911 without any specific authority in the organic law. Subsequently in 1912 the Constitution was amended by the adoption of Section 35 of Article II which expressly authorized the enactment of such legislation. By virtue of this authority, statutes were passed and have been amended from time to time constituting what is now known as the Workmen's Compensation Act.

The fundamental purpose of workmen's compensation is contained in Section 35, Article II of the Constitution of Ohio wherein it is provided that laws may be passed "for the purpose of providing compensation to workmen and their dependents, for death, (and) injuries * * * occasioned in the course of such workmen's employment," and by this section of the Constitution the state insurance fund was authorized to be "administered by the state, determining the terms and conditions upon which payment shall be made therefrom."

In conformity with the authority conferred by Section 35, Article II, the Legislature made a part of the Workmen's Compensation Act, Section 1465-68, General Code, the first paragraph of which reads as follows:

> "Every employee mentioned in section 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 1465-69, 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 provided by sections 1465-79 to 1465-87 inclusive."

Section 1465-60, General Code, designates who are "employers" and the state insurance fund is created and maintained by compulsory payments of contributions or premiums to such fund by virtue of and in the manner provided by Section 1465-69, General Code, the pertinent parts of which read as follows:

> "Except as hereinafter provided, every employer mentioned in subdivision 2 of section 1465-60, General Code, shall, in the month of January, 1914, and semi-annually thereafter, pay into the state insurance fund the amount of premium determined and fixed by the Industrial Commission of Ohio for the employment or occupation of such employer the amount of which premium to be so paid by each such employer to be determined by the classifications, rules and rates made and published by such commission; and such employer shall semi-annually thereafter pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of said commission. * * *
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> * * * And provided further that such employers who will abide by the rules of the Industrial Commission of Ohio and as may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in sections 1465-78 to 1465-89, General Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, may, upon a finding of such fact by the Industrial Commission of Ohio, elect to pay individually such compensation, and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to such injured or the dependents of such killed employees; and the Industrial Commission of Ohio may require such security or bond from said employers as it may deem proper, adequate and sufficient to compel, or secure to such injured employees, or to the dependents of such employees as may be killed, the payment of the compensation and expenses herein provided for, which shall in no event be less than that paid or furnished out of the state insurance fund, in similar cases, to injured employees or to dependents of killed employees, whose employers contribute to said fund. * * *"

Section 1465-55, General Code, provides for the adoption of rules and regulations with respect to the collection, maintenance and disbursements of the state insurance fund by the Industrial Commission and under authority of said section there was adopted as a part of its "General Procedure Rules" the following:

"1. STATE RISKS: State risks are hereby defined as those employers who pay their full premium into the State Insurance Fund.

2. SELF-INSURING RISKS: Self-insuring risks are hereby defined as those employers who are of sufficient financial ability to carry their own insurance; who do not desire to insure the payment thereof, or indemnify themselves against loss sustained by the direct payment thereof, who secure authority from the Industrial Commission of Ohio to pay compensation, etc. direct; pay into the State Insurance Fund 2% of their premium computed at the basic rate and provide a bond or other security in the amount specified by the Commission."

The surplus fund is made up of premiums and contributions paid by amenable employers and is created by the provisions of sub-sections 2 and 3 of Section 1465-54, General Code, which state:

"2. Ten per cent of the money that has heretofore been paid into the state insurance fund and ten per cent of all that may hereafter be paid into such fund shall be set aside for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars ($100,000.00) after which time, whenever necessary in the judgment of the Industrial Commission to guarantee a solvent state insurance fund, a sum not exceeding five per cent of all the money paid into the state insurance fund shall be credited to such surplus fund. On the first day of July, 1917, and annually thereafter a revision of rates shall be made in accordance with the latest five calendar year experience of said commission in the administration of the law as shown by the accounts kept as provided herein; and said commission shall adopt rules governing said rate revisions, the object of which shall be to make an equitable distribution of losses among the several classes of occupation or industry, which rules shall be general in their application.

3. The Industrial Commission of Ohio shall have the power to apply that form of rating system which, in its judgment, is best calculated to merit or individually rate the risk more equitably, predicated upon the basis of its individual industrial accident experience, and to encourage and stimulate accident prevention; shall develop fixed and equitable rules controlling the same, which rules, however, shall conserve to each risk the basic principles of workmen's compensation insurance."

Under the provisions of Section 1465-55, General Code, self-insuring employers are required to pay into the surplus fund a certain percentage, within the limits of said section, of what their premiums would have been had they not elected to become self-insuring employers. At the present time under the general procedure rules, provided for by said section, the percentage is two per cent.

An examination of Section 1465-54, General Code, creating the surplus fund, shows that the purpose of its inception and maintenance was to guarantee a solvent state insurance fund. In this section we find nothing specifically stated as to what, if any, compensation or benefits may be paid from the surplus fund. In two other sections of the Act specific mention is made of payment of compensation from the surplus fund. In Section 1465-69, General Code, where it is stated, concerning payment by self-insuring employers where a prior loss of member existed and a later injury results in permanent total disability:

> "* * * Except when an employe of an employer, who has suffered the loss of a hand, arm, foot, leg, or eye, prior to the injury for which compensation is to be paid, and thereafter suffers the loss of any other of said members as the result of any injury sustained in the course of and arising out of his employment, the compensation to be paid by such employer shall be limited to the disability suffered in the subsequent injury, additional compensation, if any, to be paid by the Industrial Commission of Ohio, out of the surplus created by section 1465-54 of the General Code * * *"

Section 1465-74, General Code, which prescribes the payment of compensation by an amenable employer who has failed or refused to comply by directly or indirectly paying premiums, provides that an unpaid award of compensation shall be paid out of the surplus fund when a judgment for such award is obtained against such employer.

While it may be contended that only those employees may be paid awards of compensation from the surplus fund where the statute makes specific provision for such payment and that, therefore, employees of self-insuring employers who are insolvent are excluded, nevertheless, the Industrial Commission has in its "Premium Rules and Rates" made provision for payments out of the surplus fund which are not expressly covered by the statute. One of the rules adopted by the Industrial Commission which provides for payment from the surplus fund, where authority is not given by statute, is Rule XI of said "General Rules", which reads:

> "Should any employee having but one hand, arm, eye, foot or leg, thereafter lose any one of the foregoing members in an industrial accident, the same shall be merit-rated, not as a permanent total disability, but as a permanent partial disability, based upon the loss of the last member only. The remaining cost shall be charged as a catastrophe claim against the Statutory Surplus Fund."

The Industrial Commission has thus seen fit, under authority of Section 1465-55, General Code, to adopt a rule which is applicable in the

same manner to complying employers as to self-insuring employers, as provided in Section 1465-69, supra.

Another of the "General Rules" adopted by the Industrial Commission is Rule XII providing for payment of certain catastrophe claims out of the surplus fund:

> "Should one accident result in the death of three or more employees of one employer, that portion of the present value, as of the date of injury, of the aggregate awards including the maximum funeral allowance of all the death claims from such accident that is in excess of $15,000, shall be charged as a catastrophe cost against the statutory surplus fund.
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> In a permanent total disability claim, that portion of the present value, as of the date of injury, of a compensation award (including an additional 10% for expected medical costs) that exceeds $15,000, shall be charged as a catastrophe cost against the statutory surplus fund.
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> That portion of the cost of catastrophe claims not chargeable to the statutory surplus fund shall be charged to the employer's account for merit rating."

While Section 1465-54, General Code, does not specifically state what compensation or benefits may be paid from the surplus fund nevertheless said section must be construed as being in *pari materia* with all other provisions of the Workmen's Compensation Act.

> State, ex rel., Bettman v. Christen, 128 O. S., 56
> Noggle v. Industrial Commission, 129 O. S., 495.

In the case of Cochrel v. Robinson, 113 O. S., 526, it is stated in the fourth branch of the syllabus as follows:

> "In the construction of a statute the primary duty of the court is to give effect to the intention of the Legislature enacting it. Such intention is to be sought in the language employed and the apparent purpose to be subserved, and such a construction adopted which permits the statute and its various parts to be construed as a whole and give effect to the paramount object to be attained."

Applying these legal principles, the specific statutory provisions for payment out of the surplus fund found in Sections 1465-69 and 1465-74, supra, are not specific limitations on what compensation may be paid out of the surplus fund when we have in mind the underlying purpose of the original enactment of the Workmen's Compensation Act. While said act since its original enactment has undergone various changes by both amend-

atory and supplemental legislation, nevertheless Sections 1465-37 to 1465-112, General Code, are now known and still considered as the Workmen's Compensation Act. However, as before stated, construing all of these sections in *pari materia,* it follows that an injured employee is entitled to awards of compensation within the statutory limits whether he be an employee of a contributor to the state insurance fund or an employee of a self-insuring employer, and the argument could certainly never be successfully maintained that an injured employee of a state fund contributor would not be entitled to payment of an award for disability occurring after the employer had become insolvent and was no longer paying premiums into the state insurance fund.

Fundamentally the surplus fund is a part of the state insurance fund and the paying directly by the employer or by the surety of an employer of compensation is tantamount to payment out of the state insurance fund. The legality of this reasoning is strengthened when the underlying principles of the Workmen's Compensation Act are considered in connection with your question, and, in line with this proposition, it has been held that the act, in view of its remedial character, is to be construed liberally in favor of the employee.

Roma v. Industrial Commission, 97 O. S., 247
Industrial Commission v. Weigandt, 102 O. S., 1
Industrial Commission v. Pora, 100 O. S., 218
Industrial Commission v. Jasionowski, 24 Ohio App. 66.

When an employer either contributes to the state insurance fund or becomes a self-insurer he is given immunity from ordinary damage or negligence suits by employees who suffer injury, and by the same law such injured employees and their dependents have also been deprived of important statutory and common law rights. There is left to them no other recourse than to file a claim and have their rights to compensation determined.

In support of this proposition your attention is directed to the case of Reinholz, Gdn. v. Industrial Commission, 96 O. S., 457, where the employee of an employer who had elected to pay compensation direct was denied participation in the state insurance fund was found to have the right of appeal to the Common Pleas Court. In this case, Nichols, C. J., said in the opinion:

"The fund with which the Industrial Commission deals is provided for by Section 22 (Section 1465-69, General Code) of the act. There are three sources provided in the act from which moneys to satisfy claimants are available.

FIRST: The fund created by the payment of full premiums of employers to the state.

SECOND: The funds of self-compensating employers, who, by express requirement of Section 22 (Section 1465-69, General Code), before authorized to carry their own insurance, in the language of the act itself, 'shall pay into the state insurance fund such amount or amounts as are required to be credited to the surplus in paragraph two of section seven hereof (Section 1465-54, General Code)'. This amount is five per cent of the full premium. (At the present time it is 2% of the full premium.)

Attention is called to the fact that the law requires this payment to be made into the state insurance fund, and the contribution so made by the self-compensating employer, although credited to the so-called surplus fund, is in fact made to the state insurance fund.

THIRD: The bond executed by the self-insuring employer, payable to the state for the benefit of injured and killed employees, *which in legal effect is a contribution to the general insurance fund.* * * *

In the eyes of the law, this bond was substantially the same as cash; and, in theory, at least, constituted a part of the fund available for payment of compensation. * * *

In contemplation of both the statute and constitution there is but ONE fund, and that is the State Insurance Fund.

The constitutional amendment, Section 35, Article II, provides for the creation of but ONE fund. The so-called surplus fund is wholly of statutory creation, and after all is only a part of the general fund."

(Parentheses and emphasis, mine.)

Thus it would seem that in view of the language used in the foregoing opinion, this class of employers, known as self-insurers, contribute to the state insurance fund, as before mentioned, since an injured employee has no recourse other than to file a claim with the Industrial Commission when his employer is a self-insurer, it would seem only legally just and fair that such an employee would be entitled to rely on the fact that the state would properly insure to him everything that might be due him under the Workmen's Compensation Act. An employee certainly should not be the one to suffer by reason of the inadequacy of the bond or of the insolvency of the employer, and it was so stated in the Reinholz case, supra, on page 464, as follows:

"It seems only just and fair to hold that an employee seeing such notice (of authorization to operate as a self-insurer) is entitled to rely on the fact that the state has properly secured to

him everything which might be due him under the Workmen's Compensation Act. *The employee should not be the one to assume the risk of the inadequacy of the bond required by the board or of the insolvency of the employer."*

(Parentheses and emphasis, mine.)

Having in mind that all the sections of the Workmen's Compensation Act are so closely inter-twined and that the underlying principle of the act is to insure payment of compensation to injured employees for disability and benefits accruing from said injuries, no other conclusion can be reached than that the surplus fund, in so far as your question is concerned, is available to an employee of a self-insuring employer, and that he is entitled to an award of compensation for disability even though the employer is insolvent and the aggregate amount of the bond given for security has been liquidated.

It is, therefore, my opinion that The Industrial Commission of Ohio has authority to pay from the surplus fund created and maintained by virtue of Section 1465-54, General Code, awards of compensation and benefits due injured employees or their dependents, the amounts of which awards are in addition to the maximum provided and paid by the surety under a bond furnished under Section 1465-69, General Code, by a self-insuring employer that has become insolvent since the filing of said bond.

Respectfully,

THOMAS J. HERBERT,
Attorney General.