appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5904.

WORKMEN'S COMPENSATION—MEMBERS OF PARTNERSHIP OR FIRM NOT CONSIDERED AS EMPLOYEES, IN DETERMINING AMENABILITY TO COMPENSATION LAW—CONSTITUTIONAL LAW.

SYLLABUS:

The amendment to Section 1465-60, General Code, which provides that members of a partnership, firm or association shall be considered as employees in determining whether or not such partnership, firm or association employed three or more workmen or employees, and which provides for compensation for such members of the partnership, firm or association is, by virtue of the decision of the Supreme Court in the case of Goldberg, Appellee, v. Industrial Commission, Appellant, 131 O. S., 399, unconstitutional and in violation of the provisions of Section 35 of Article II of the Constitution of Ohio.

COLUMBUS, OHIO, July 28, 1936.

The Industrial Commission of Ohio, Columbus, Ohio.

DEAR SIRS: This will acknowledge your recent request for my opinion which reads as follows:

> "On July 8th you advised that the Supreme Court had reversed the action of the lower courts and rendered final judgment in favor of the Industrial Commission in Goldberg v. Industrial Commission on the grounds that the last paragraph of Section 1465-66 (111 Ohio Laws, 218) is unconstitutional.
>
> "The question naturally arises as to the constitutionality of the provisions of Section 1465-60 as amended, 116 Ohio Laws, 56, pertaining to members of partnerships, firms or associations. The Commission, therefore, requests your opinion as to the constitutionality of the above mentioned section."

The Workmen's Compensation Law was first enacted by the General Assembly in 1911, when it passed an act (102 Ohio Laws, 524).

> "To create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards."

That act was carried into the General Code as Sections 1465-37 to 1465-79, both inclusive.

In 1912 the people of the State of Ohio amended its Constitution by including therein Section 35 of Article II, providing as follows:

> "For the purpose of providing compensation to workmen and their dependents, for death, injury or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom, and taking away any and all rights of action or defenses from employes and employers; but no right of action shall be taken away from any employe when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employes. Laws may be passed establishing a board which may be emplowered to classify all occupations according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto."

Thereafter, in 1913, the legislature passed an act entitled:

> "To further define the powers, duties and jurisdiction of the state liability board of awards with reference to the collection, maintenance and disbursement of the state insurance fund for the benefit of injured, and the dependents of killed employes and requiring contribution thereto by employers, * * *"

and to repeal certain sections of the former act. (103 Ohio Laws, 72.)

This act was carried into the General Code as Sections 1465-41a to 1465-106, both inclusive.

The law has been amended and supplemented from time to time until

it is now found in our General Code as Sections 1465-37 to 1465-112, both inclusive.

The Workmen's Compensation Law must be considered as a whole, each section to a certain extent depending upon the other sections and all must be treated in pari materia.

In 1923 the people of Ohio again amended Section 35, Article II, of the Constitution, the principal change being made by the addition of the following language which became effective on January 1st, 1924 (110 Ohio Laws, 631):

> "Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, in so far as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purposes of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution."

At that time the term "employee" had been specifically defined by the legislature in Section 1465-61, General Code, which in so far as it relates to this discussion read, as it does now, as follows:

> "The term 'employe', 'workman' and 'operative' as used in this act shall be construed to mean:

1. * * *

2. Every person in the service of any person, firm or private corporation, including any public service corporation, employing three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer.

3. * * *"

The term "employer" was defined in Section 1465-60, General Code, and in so far as it relates to the question before us that section read:

"The following shall constitute employers subject to the provisions of this act:

1. * * *

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

Subsequent thereto, in 1925, the legislature amended Section 1465-68, General Code (111 Ohio Laws, 220), the part of said amendment being material to this discussion reading as follows:

"Any member of a partnership, firm or association composed of two or more individuals, who is paid a fixed compensation for services rendered to such partnership, firm or association, 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, shall be paid such compensation and benefits as are provided in case of other injured, diseased or killed employes by this act, provided such partnerships, firm or association includes in the pay roll furnished by it to the industrial commission the compensation of such member and pays the premium based thereon."

That amendment became effective in July, 1925.

Section 1465-60, supra, was further amended by the legislature in

1935 when the following provision was added to the section (116 Ohio Laws, 56):

> "Any member of a partnership, firm or association, who regularly performs manual labor in or about a mine, factory or other establishment, but not including a household establishment, shall be considered a workman or operative in determining whether or not such person, firm, or private corporation, or public service corporation has in its service three or more workmen. The income derived from such labor shall be reported to the commission as part of the payroll of such employer, and such member shall thereupon be entitled to all the benefits of an employe as defined in this act."

The language contained in that amendment is not entirely free from ambiguity; however, but one reasonable conclusion can be reached when considering it and that is that the legislature intended to consider a partner, who was working for a partnership, firm or association of which he was a member, as an employee both for the purpose of determining whether or not such partnership, firm or association was amenable to the law and his rights to receive compensation. In other words, when determining whether or not a partnership, firm or association had three or more workmen or employees this amendment required the partnership, firm or association, the Industrial Commission and the courts to take into consideration the members of such partnership, firm or association—the employers themselves—as well as requiring that the partners or members of the partnership, firm or association would be employees for the purpose of participating in the benefits of the Workmen's Compensation Law.

Your question is whether or not this provision is constitutional.

The Supreme Court of Ohio has passed upon the constitutionality of the amendment to Section 1465-68, General Code, supra, in the case of *Goldberg, Appellee, v. Industrial Commisssion, Appellant,* 131 O. S., 399 (Ohio Bar, July 13, 1936), and held that:

> 3. "The last paragraph of Section 1465-68, General Code (111 Ohio Laws, 218), purporting to provide for such compensation, is unconstitutional and void."

The court there specifically held that that provision of the Workmen's Compensation Law is unconstitutional. However, the court went even further in the decision as is shown by the second branch of the syllabus:

> "This section of the Constitution does not confer upon the General Assembly the power to provide for compensation for

employee-members of a partnership, firm or association."
In the opinion, at page 403, it is said:

> "But aside from the matter of authorities, sheer reason militates against the inconsistencies of a master-servant, principal-agent, employer-employee relationship, especially when aggravated by the element of temptation to violate the law in one capacity in order to obtain additional compensation in another capacity under the same law. It is of course true that the plaintiff in the instant case is not asking additional compensation for violation of a specific requirement, but it is equally true that the constitutional validity of a statute is determined upon the basis of what it would in fact permit, and not merely upon the prayer of a particular petition. This court is clearly of the opinion that a partner-employee is not embraced within the terms 'workmen' and 'employees' as used in Section 35 with its mandatory provision for additional compensation in case of violation of a specific requirement. Therefore, the Legislature was without power to enact the last paragraph of Section 1465-68, General Code."

It has always been a rule of practice in this office that the Attorney General will not advise that a particular law is unconstitutional unless it has been so held by the courts. Since the Workmen's Compensation Law must be considered in its entirety and the various sections thereof treated as a part of the whole, if our courts have spoken in clear and concise language relative to a principle applicable thereto it is not inconsistent therefore for this office to consider a part of a section unconsitutional simply because the courts have not passed upon that particular provision. If the courts have passed upon the constitutionality of a law, then it is proper for this office to apply that ruling to the entire act. It, therefore, follows that if the legislature violated Article II, Section 35 of the Constitution when it amended Section 1465-68, General Code, giving members of a partnership, firm or association the status of employees under the Workmen's Compensation Law and the Constitution, then necessarily when it amended another section of the same law which must conform to the same Constitutional provision, and attempted to give to members of a partnership, firm or association the status of employees that too would be in violation of the Constitutional provision.

It is therefore my opinion that the amendment to Section 1465-60, General Code, enacted in Amended Substitute Senate Bill No. 59, by the Ninety-First General Assembly, found in 116 Ohio Laws at page 56, is, by virtue of the decision of the Supreme Court in the case of *Goldberg, Appellee* v. *Industrial Commission, Appellant,* 131 O. S. 399,

unconstitutional and not in conformity with the provisions of Article II, Section 35 of the Constitution of Ohio.

Respectfully,

JOHN W. BRICKER,

Attorney General.

5905.

APPROVAL—CONTRACT FOR ELEVATOR FOR PROJECT KNOWN AS ADDITION TO HOSPITAL AND REMODELING OF WOMEN'S WARDS, ATHENS STATE HOSPITAL, ATHENS, OHIO, $4,720.00, GLOBE INDEMNITY COMPANY, SURETY—CAPITAL LIFT AND MANUFACTURING COMPANY OF COLUMBUS, OHIO, CONTRACTOR.

COLUMBUS, OHIO, July 28, 1936.

HON. CARL G. WAHL, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works for the Department of Public Welfare, and the Capital Lift and Manufacturing Company of Columbus, Ohio. This contract covers the construction and completion of Contract for Elevator for a project known as Addition to Hospital and Remodeling of Women's Wards, Athens State Hospital, Athens, Ohio, in accordance with Item No. 5 of the form of proposal dated June 30, 1936. Said contract calls for an expenditure of Four Thousand Seven Hundred and Twenty Dollars ($4,720.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence that the approval of the Controlling Board to the expenditure has been obtained as required by section 1 of House Bill No. 504 of the regular session of the 91st General Assembly.

In addition you have submitted a contract bond upon which the Globe Indemnity Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day