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1. INDUSTRIAL COMMISSION OF OHIO—NO AUTHORITY TO GRANT INJURED EMPLOYE OF SELF-INSURING EMPLOYER THE RIGHT TO SELECT MEDICAL, HOSPITAL OR NURSING SERVICES OF OWN CHOICE—EXCEPTION—EMERGENCY—EMPLOYER UNABLE TO SELECT AND FURNISH SERVICES—OPINIONS ATTORNEY GENERAL, 1914, VOLUME II, PAGE 1556 APPROVED AND FOLLOWED.

2. WHERE MEDICAL, HOSPITAL AND NURSING SERVICES FURNISHED BY SELF-INSURING EMPLOYER ARE CLEARLY INADEQUATE OR INCOMPETENT, NO RIGHT GIVEN TO INJURED EMPLOYE TO SUBSTITUTE SERVICES OF OWN CHOICE SO AS TO HOLD EMPLOYER LIABLE, UNLESS EMPLOYE FIRST SECURED AUTHORIZATION FROM INDUSTRIAL COMMISSION.

SYLLABUS:

The Industrial Commission of Ohio does not have authority to grant an injured employee of a self-insuring employer the right to select medical, hospital or nursing services of his own choice, except in an emergency where the employer is unable to select and furnish the services (Annual Report of Attorney General, 1914, Vol. II, 1556, approved and followed).

Furnishing medical, hospital and nursing services by a self-insuring employer that are clearly inadequate or incompetent does not give an injured employee the right to substitute services of his own choice so as to render the employer liable therefor, unless the employee has first secured authorization from the Industrial Commission to engage said services.

Columbus, Ohio, December 16, 1943.

The Industrial Commission of Ohio,
Columbus, Ohio.

Gentlemen:

This will acknowledge receipt of your request for my opinion which reads:

"Certain questions have arisen before the Industrial Commission of Ohio concerning the interpretation of General Code

Section 1465-69, paragraph 2, particularly the following:

'* * * 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.'

Claims have arisen in which the claim has been allowed by the Industrial Commission and specific surgery authorized, for example,—

'That the employer be directed to furnish claimant surgical treatment for correction of left inguinal hernia,'

and the employer in such a case is ready and willing to furnish the necessary surgeon who, it appears, is entirely adequate and competent to perform the surgery contemplated, but the claimant desires to have a physician of his own choice perform the surgery and does not desire to accept the services of the surgeon or surgeons designated by the employer, although the claimant does not contend that the surgeons chosen by the employer are incompetent. Such claimant requests authority to have the surgeon of his choice perform the herniotomy, and further requests that the Commission order the employer to pay such services in accordance with the Commission's established rates.

The Commission would be pleased to have your opinion as to whether or not they have authority in law to grant the claimant's request, namely, to authorize the claimant's surgeon to perform the operation and to order the employer to pay such services in accordance with the established rates.

Would the situation be altered were it shown that the medical, hospital or nursing service furnished by employer was inadequate or incompetent?

Would the situation be altered were it shown that the medi- such services to be performed by parties of the claimant's choice, and further authority to order the employer to pay for the services according to the scheduled rates?

Further, should the above be prohibited by law, under what circumstances, if any, would it be permissible for the claimant to choose his own physician, surgeon, nurses or hospital, and have such services paid by the employer in accordance with the Industrial Commission's established rates?

The Commission has adopted the Rule which provides:

'Except in emergencies or where the condition of the patient might be endangered by delay, consent from the Commission must

be obtained in advance where any surgery is contemplated. No bills for major surgery will be approved, even when authorized, until a copy of the hospital record of operation has been placed on file.'

Assuming any of your answers to the foregoing would be in the affirmative, would the situation be altered where the surgery was performed by the physician chosen by the claimant prior to the authorization of such surgery by the Commission, assuming, of course, that there were no circumstances present that would constitute an emergency or endanger the claimant by delay?"

A determination of the questions set forth in your request involves an interpretation of that portion of Section 1465-69, General Code, relative to self-insuring employers, which states:

"* * * 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 employes or the dependents of killed employes, 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 employes; * * *" (Emphasis mine.)

The requirement in this section relative to medical, surgical, nursing and hospital attention for injured employes of self-insuring employers calls for an interpretation primarily of the words "furnish" and "furnishing." Webster's New International Dictionary defines "furnish" as "To provide for; To provide what is necessary for; To fulfill or satisfy the needs of."

In Annual Report of the Attorney General for 1914, Vol. II, at page 1556, one of my predecessors had occasion to interpret Section 22 of the Workmen's Compensation Act (103 Ohio Laws, 72), pertaining to the furnishing of medical, hospital and nursing services, which section contained, in so far as the present inquiry is concerned, the same language as that in Section 1465-69, above quoted. In that opinion it was held in the syllabus:

"The industrial commission has authority to permit employers carrying their own insurance under section 22 of the

> workmen's compensation act to require employes of such company to receive medical attendance and hospital and nursing services from the physicians, surgeons, and hospitals maintained by such company. If the employe calls upon physicians other than those employed by such company, the employer is not liable for the expenditure so incurred by such employe. This is a general rule and is subject to modification under exceptional circumstances, such as those which might arise when the company surgeons or physicians were unable by reason of absence or from some other cause to furnish the necessary medical attendance to the employe in case of emergency. This is especially true when the employe has first resorted to one of the company physicians and has later gone to another physician not in the employ of the company, for no valid reason."

As no change has been made in the section since the rendition of the 1914 opinion, I see no reason for amending or altering the rationale contained therein.

While it is my belief that said opinion answers your questions, inquiry is made as to what authority the Industrial Commission would have to authorize medical, nursing and hospital services to be performed by parties of claimant's choice or to order a self-insuring employer to pay therefor according to the scheduled rates where it was definitely shown that such services furnished by the employer were inadequate or incompetent.

Certainly, from the ordinary definition of the word "furnish" or "furnishing," if a situation were to occur where the employer furnished inadequate or incompetent services, the Industrial Commission would not only have authority, but would have the duty to order the employer to pay for adequate services necessary for the treatment of an employe's pathological condition. However, Rule 23 of the Industrial Commission (Important Resolutions, Rules, Motions and Instructions issued by the Industrial Commission of Ohio—revised October 1, 1942) provides:

> "Surgery, Authority For. * * *
>
> Except in emergencies or where the condition of the patient might be endangered by delay, consent from the Commission must be obtained in advance where *any* surgery is contemplated. * * *" (Emphasis mine.)

Under this rule the Industrial Commission, we believe, would have authority to substitute adequate services for inadequate services furnished by the employer, but an employe still could not select his own surgeon, nurse or hospital without first obtaining from the Industrial Commission, as provided by said rule, an authorization for such selection. Should the

claimant, even though inadequate service is furnished, on his own volition, secure his own services without complying with the above quoted rule, we believe the Industrial Commission would not have authority to order the employer to pay for such services.

As stated in the syllabus of the opinion hereinbefore quoted, the general rule is subject to modification under exceptional circumstances; for example, in a situation in which an emergency arose and where the employer's physicians or surgeons were not then available, it is probable that the employer could be required to pay for the services performed even though the claimant had selected a physician of his own choice prior to an authorization by the Industrial Commission. However, if the employe's physical condition was such that an emergency, requiring immediate surgical or medical attention, did not exist, then the claimant could not select the services of his own choice, and the Industrial Commission would not have authority to order the employer to pay for the services selected and used by the employee.

It is therefore my opinion that the Industrial Commission of Ohio does not have authority to grant an injured employee of a self-insuring employer the right to select medical, hospital or nursing services of his own choice, except in an emergency where the employer is unable to select and furnish the services.

Furnishing medical, hospital and nursing services by a self-insuring employer that are clearly inadequate or incompetent does not give an injured employee the right to substitute services of his own choice so as to render the employer liable therefor, unless the employee has first secured authorization from the Industrial Commission to engage said services.

Respectfully,

THOMAS J. HERBERT,
Attorney General.