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WORKMEN'S COMPENSATION—MAY NOT BE LAWFULLY ALLOWED FOR FIRST WEEK AFTER AN INJURY—IF PERSON LATER SUFFERS TOTAL DISABILITY—COMPENSATION MAY NOT BE ALLOWED FOR FIRST WEEK OF TOTAL DISABILITY.

SYLLABUS:

Workmen's compensation may not be lawfully allowed for the first week after an injury is received and if thereafteer the person receiving such injury suffers total disability, compensation may not be lawfully allowed for the first week of such total disability.

Columbus, Ohio, April 29, 1946

The Industrial Commission of Ohio
Columbus, Ohio

Gentlemen:

This will acknowledge receipt of your request for my opinion, which reads in part as follows:

"Ohio General Code, Section 1465-78, as amended effective August 28, 1939, reads as follows:

'No compensation shall be allowed for the first week after the injury is received and no compensation shall be

> allowed for the first week of total disability whenever it may occur. There shall be no waiting period in connection with the disbursements provided by Section 1465-89.'
>
> Recently there have been presented to the Commission two claims which have come to the Commission for reconsideration of the action of two separate Claims Boards. In each of these claims the injured claimant did not become totally disabled concurrently with his injury but did suffer some partial disability immediately following the injury or within a short period of time thereafter. Subsequently, each became totally disabled as a result of the injury.
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> The practice of the Claims Department of the Commission since the amendment to the above section became effective, has been to withhold seven days from the award of temporary partial compensation at the time it is made, and then when the disability becomes total to withhold another seven day period from the claimant's award of compensation. It is the definite conviction of at least one of the Claims Boards that this is contrary to the spirit and intent of the legislature of Ohio and this particular Board believes 'it cannot be conceived that the State of Ohio is the only state invoking at times two waiting periods instead of one'. It is further significant that there seems to be some difference of opinion among the personnel of the Commission as to the precise meaning of this section. Many feel that it was never intended that two waiting periods be employed while an equal number believe that the statute as existing requires this construction thereof. Will you please furnish us with your opinion as to the meaning of this language?"

An examination of Section 1465-78, General Code, discloses no ambiguity or uncertainty of meaning of the terms thereof. However, ambiguity, apart from any fault of expression, would seem to arise if consideration is given to the consequences of such a literal interpretation. Such an interpretation would require that in some cases, for no comprehensible reason, an injured workman would be compelled to undergo two weeks of disability without compensation while in other cases his period of disability without compensation would be limited to one week. The unreasonableness of such an interpretation would seem to be clearly manifested when attention is directed to the fact that the man who is less able to procure the means by which he can care for himself and the needs of his dependents, is required to suffer the greater deprivation. In fact, it might be argued that it is scarcely conceivable that these consequences,

which are certainly contrary to the spirit and trend of workmen's compensation laws, were ever intended by the Legislature.

A reading of the authorities on workmen's compensation indicates to me that there are two reasons for the establishment of a waiting period in connection with the disbursement of funds to injured workmen. One is to prevent malingering for a few days in order to collect compensation. 81 A. L. R. 1261; Dodd, W. F., Administration of Workmen's Compensation, page 623 (1936); Horovitz, Samuel B., Injury and Death under Workmen's Compensation Laws, page 261 (1944). The other is to reduce expenses of administration by eliminating the necessity of investigating and deciding cases involving minor injuries. Horovitz, loc. cit.; Dodd, loc. cit. I am quite unable to perceive how either of these reasons is applicable to the cases about which you inquire. In these cases the first waiting period has already served the purpose of proving that the cases do not involve malingering for a few days in order to collect compensation and are not cases involving minor injuries which result in only a few days of disability.

Furthermore, a careful review of the authorities fails to reveal any reason for a second waiting period. I have been unable to find any state in the union or any foreign country which in its law relating to workmen's compensation provides for two waiting periods. In fact, the present trend is in the direction of no waiting period at all. Horovitz, op. cit., page 262.

The Workmen's Compensation Law of Ohio was enacted by the General Assembly in 1911. 102 O. L. 524. Section 25 of the original act, which was designated as Section 1465-64, General Code, provided as follows:

> "No benefit shall be allowed for the first week after the injury is received, except the disbursement provided for in the next two preceding sections."

The next two preceding sections, Sections 1465-62 and 1465-63, General Code, provided for payment of expenses for medicines, nurse and hospital services and for payment of medical and funeral costs.

In 1913, Section 1465-64, General Code, was repealed and Section 1465-78, General Code, was enacted to read as follows (103 O. L. 72, 85):

> "No compensation shall be allowed for the first week after the injury is received except the disbursements hereinafter authorized for medical, nurse and hospital services and medicines, and for funeral expenses."

For a quarter of a century this section was interpreted by those charged with its execution and application to mean that a waiting period of the first week of disability was effective, during which time the injured worker was out of work and received no compensation. This was in conformity with the Workmen's Compensation Laws of the various states. Dodd, loc. cit.

In April, 1938, the Court of Appeals of Franklin County rendered a decision in State, ex rel. Morris v. Industrial Commission (27 O. L. A. 689), an action in mandamus brought to compel the payment of compensation for the week immediately following the commencement of total disability by a workman who had received a compensable injury on June 26, 1934, who had worked during the first week after the injury and for a few months thereafter, and who had become totally disabled on December 1, 1934. The Industrial Commission had found that this workman had become totally disabled on December 1, 1934, and awarded him compensation beginning on December 8, 1934, refusing to award compensation over the period from December 1, 1934, to December 8, 1934, the first seven days of disability.

The writ in mandamus was granted by the Court of Appeals. The first branch of the syllabus of its opinion reads as follows:

> "1. Sec. 1465-78, G. C., providing that no compensation shall be allowed for the first week after the injury is received does not authorize the Industrial Commission to withhold compensation for the first week of total disability of a workman, where such total disability has arisen more than a week after the injury."

The respondent, the Industrial Commission of Ohio, appealed to the Supreme Court of Ohio. There the judgment of the Court of Appeals was affirmed by a decision rendered on November 16, 1938, reported in 134 O. S. 380, the syllabus of which reads as follows:

> "By virtue of Section 1465-78, General Code, an employee who suffers a disability compensable under the Workmen's Compensation Law is not entitled to compensation for the disability

> for the first week after the injury is received; but, when the disability arises a week or more after the injury is sustained, the employee is entitled to compensation from the beginning of the disability."

In an actuarial audit conducted pursuant to the terms of Section 1465-55a, General Code, reported to the Industrial Commission under date of December 22, 1938, the decision in this case was considered. The auditors recommended the introduction of an amendment which would provide for a waiting period during the first week of disability. This was to enable the Industrial Commission to return to its practice of long standing which had been upset by the above case.

At the next regular session of the Legislature, Section 1465-78, General Code, was amended (118 O. L. 410, 414.) As a result of that amendment said section now reads as follows:

> "No compensation shall be allowed for the first week after the injury is received and no compensation shall be allowed for the first week of total disability whenever it may occur. There shall be no waiting period in connection with the disbursements provided by section 1465-89."

In light of the above history, it would seem that the sole purpose of the amendment to the section in question was to cure the defect existing therein, which was brought to light in the Morris case. In order to accomplish such result all that was required was an amendment which merely provided for a waiting period during the first week of disability resulting from an injury.

Be that as it may, however, the fact remains that such an amendment was not enacted by the General Assembly. The meaning of the language written into the law by that body is, as above stated, apparent on its face. What the General Assembly has omitted certainly should not be supplied by the Attorney General. It is not his function to undertake the correction of legislative mistakes. Even though the circumstances surrounding the enactment of the amendment to Section 1465-78, General Code, clearly seem to indicate that the General Assembly, in enacting such amendment, intended thereby to remedy the deficiency in the then existing law, I find myself compelled to adhere to the statute as it reads.

In Slingluff v. Weaver, 66 O. S. 621, at page 628, it is stated:

> " * * * The province of construction is to arrive at the true sense of the language of the act, not to supply language to help out a conjectured intent not to be gathered from the words used. The question is not so much what did the legislature intend to enact, as what did it mean by what it did enact. * * * "

Whatever may be thought as to the wisdom or justice of the statute in question, I am unable to see therein anything doubtful or uncertain as to meaning. Consequently, there is nothing to interpret.

The statute should be applied as the words thereof demand. While I realize that our courts have frequently stated that a construction which results in harsh or unjust consequences should, if possible, be avoided, it must be borne in mind that said rule can not be invoked where the statute under consideration contains no ambiguity. In regard thereto, it is stated in 37 O. J., pages 642 and 643:

> "There are definite limitations upon the extent to which the courts, in interpreting statutes, may consider hardship or injustice. Thus, considerations of hardship are resorted to only in cases of construction of statutes of doubtful meaning and should never prevail against the positive provisions of the statute. If the meaning of a statute is plain and its provisions are susceptible of but one interpretation, the courts, in construing the statute, may not take into consideration the hardship, inequality, unfairness, or injustice which may be caused thereby. In other words, it would be highly improper for the court to distort the language or the evident meaning of a statute in such manner as to give the statute a construction consistent with their own feelings of justice when such construction would manifestly defeat the intention of the legislature. If the provisions seem harsh or unjust, the place to seek the remedy is in the legislature, not in the courts."

The statute as it now reads begins with the words "No compensation shall be allowed for the first week after the injury is received * * *". This language is, of course, clear and needs no interpretation. Continuing, the statute then reads: "and no compensation shall be allowed for the first week of total disability whenever it may occur". Similarly, these words need no interpretation since no doubt can conceivably exist as to their meaning.

Furthermore, the word "and" joins the first and second parts of the sentence. No other words in the sentence or in the section in any way indicate that such word is used to express an alternative. Consequently, it must be held to mean "in addition to," "together with" or "joined with."

I am, therefore, obliged to conclude and you are consequently advised that in my opinion the one week waiting period after total disability, whenever it may occur, is added to the one week waiting period after injury.

Respectfully,

HUGH S. JENKINS,
Attorney General