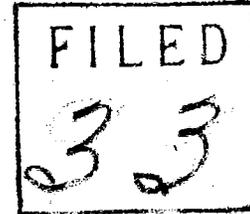


WORKMEN'S COMPENSATION; Commission, in case of self-insurers, may forfeit deposit periodically to pay award, or may cause a sum sufficient to purchase an annuity to be forfeited and applied to that purpose.

August 11, 1941

8-15

Workmen's Compensation Commission
Jefferson City, Missouri



Gentlemen:

This will acknowledge receipt of your letter of July 8, 1941, as follows:

"The Commission is asking your interpretation of Section 3737, R. S. Missouri 1939, with special reference to a particular case which presents a new problem to us. For your convenience, we are enclosing with this letter a pamphlet copy of the Missouri Workmen's Compensation Law, which booklet contains the rules for Self-Insurers to which reference will be made.

"Under the authority granted it in Section 3751 R. S. of Missouri, 1939, the Commission adopted the Rules for Self-Insurers which are found on page 70 of the enclosed booklet. Under these rules, a self-insurance authority was granted to the Dixie Machinery Company, 226 West 39th Street, Kansas City, Missouri, on June 24, 1936, upon the deposit in escrow of \$3,000 in United States Treasury Bonds with the Produce Exchange Bank of Kansas City. Early in 1939 the Commission, upon investigation, felt that additional surety should be required of this employer, and asked that an additional \$7,000 be deposited to guarantee compensation payments. This request was complied with, and on February 16, 1939, the Dixie Machinery Company placed \$7,000 in

cash in escrow, also with the Produce Exchange Bank of Kansas City. We are enclosing a copy of each of these two Escrow Agreements.

"The Dixie Machinery Company encountered financial difficulties, and at the present time, according to the Commission's records, has but one compensation claim outstanding against it. The company has ceased operations as an employer, but continued to pay on this claim up until May 4, 1941.

"The case in question is one of permanent total disability, and the award calls for the payment of compensation at the rate of \$16.00 per week for 300 weeks, and at \$6.00 per week thereafter for life, beginning June 27, 1937. The orders of the Commission in regard to this award had been complied with up to May 4, 1941, when payments ceased. The Commission, therefore, feels that the escrow deposits made to guarantee compensation payments should now be forfeited to satisfy the award.

"The employee in the case is in such physical condition that the Commission feels that commuting the payments now due and ordering them paid in a lump sum would not be to the best interest of the employee (see Section 3736 R. S. of Missouri 1939), and feels, too, in this case, that the commutation represents too much of a sacrifice in the total amount payable. The commutation, according to the actuary employed by the Commission to compute it, would amount to \$5731.14 as of July 10, 1941--the present value of the award.

"Considering these background facts, we now arrive at the question presented by Section 3737. The Commission wishes to know if, in compliance with this section which provides

that the employer may be 'discharged from further liability under an agreement, award or judgment for compensation by furnishing to the person entitled thereto an annuity or other obligation,' it could buy an annuity on behalf of the employee with the cash and bonds in escrow from an insurance company duly licensed in this state to issue such annuities, providing for the payment by such annuity at the frequency and in the amounts now provided for in the award."

Before entering upon a discussion of the legal aspects of the question presented, we desire to point out that the Ten Thousand Dollars (\$10,000) at Six Dollars (\$6.00) per week will pay this award for 1666-2/3 weeks, or 32 years and 2-5/7 weeks. The proposed commutation, as ascertained by the Commission, has a present (July 10, 1941) value of Five Thousand Seven Hundred Thirty-one dollars and Fourteen cents (\$5731.14). This sum will furnish the disabled claimant with Six Dollars (\$6.00) a week for 955-1/7 weeks, or 18 years and 19-1/7 weeks. The claimant, we are informed, is 27 years of age and therefore has a life expectancy of 37 years and 22-1/7 weeks. At Six Dollars (\$6.00) per week, over this period of time he should receive Eleven Thousand Six Hundred Seventy-six Dollars (\$11,676).

Thus, at best, (the whole Ten Thousand Dollars (\$10,000)) if nothing else may be done, this claimant stands to lose Six Dollars (\$6.00) per week for five years and nineteen and three-sevenths weeks - the difference between the maximum the \$10,000 will furnish and his life expectancy -, or One Thousand Six Hundred Seventy-Six Dollars (\$1,676). At the worst (commutation) he stands to lose Six Dollars (\$6.00) per week for nineteen years and thirty-six and one seventh weeks - the difference between the maximum amount he would receive if paid Six Dollars (\$6.00) a week for his life expectancy and the commuted present value - or Six Thousand One Hundred Forty-four Dollars and Eighty-six cents (\$6144.86). (All the foregoing figures are approximates).

In view of the great financial sacrifice that will result in this case from commutation, it is not surprising that the General Assembly has provided that "commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that unusual circumstances warrant such a departure" and has required that in order to do so it must appear "that such commutation will be for the best interest of the employee * * * *, or that it will avoid undue expense or undue hardship to either party, or that such employee * * * * has removed or is about to remove from the United States, or that the employer has sold or otherwise disposed of the greater part of his business or assets." (Sec. 3736 R. S. 1939).

We are informed that the Dixie Machinery Company has encountered financial difficulties and all its property and assets have been seized to satisfy tax liens. Clearly this is a disposition of the business or assets as contemplated by the foregoing section and we entertain no doubt but that the commission has authority to commute this award. However, in connection with commutation, Section 3736, supra, enjoins the Commission to "constantly bear in mind that it is the intention of this chapter that the compensation payments are in lieu of wages and are to be received by the injured employee * * in the same manner in which wages are ordinarily paid."

With that admonition in mind, we will proceed to see if the law does not permit some way for this claimant to receive compensation in lieu of wages for the balance of his life, or at least until the \$10,000 is consumed.

The Dixie Machinery Company was a self-insurer. Section 3713, R. S. 1939, provides:

"Every employer * * * shall insure his entire liability thereunder except as hereafter provided, with some insurance carrier * * *, except that an employer may himself carry the whole or any part of such liability without insurance upon

satisfying the commission of his ability so to do."

Pursuant to the authority granted to the Commission in Section 3751 R. S. 1939, the Commission has promulgated rules and regulations specifying what is required of a self-insurer to satisfy the commission of his ability to carry the liability. The pertinent rules are as follows:

"Rule 2. Security Required.--The employer shall furnish security in the minimum amount of \$3,000.00, and the Commission may, if it deems advisable in any particular case, require a larger amount. The employer will have the option of furnishing security in any one of three ways: (1) by filing with the Missouri Workmen's Compensation Commission an approved surety bond; (2) by depositing in escrow approved securities; or (3) by depositing cash in escrow.

"Rule 3. Method of Furnishing Security.--If a surety bond is given, the surety shall be a company authorized to transact such business in the State of Missouri. The bond shall be on a form prescribed by the Missouri Workmen's Compensation Commission.

"If securities are deposited in escrow, they shall be direct obligations (either bonds or notes) of the United States or of the State of Missouri. In lieu of depositing the securities aforesaid, the employer, at his election, may deposit cash in escrow in an amount equal to the par value of securities otherwise required to be deposited. If securities or cash are deposited, as above provided, the employer shall file with the Commission, on a form provided by the

Commission, an agreement providing that upon failure or neglect of the employer to make payment of compensation upon final award or final judgment (after employer has exhausted his rights or review and appeal under the Missouri Workmen's Compensation Law) all, or any part, of such securities, as the occasion may require, may be sold, and the proceeds thereof, as well as any cash deposited, shall be used to pay any compensation obligations which such employer has so neglected or refused to pay; but no securities shall be sold or funds used to make payments of compensation until after the Commission has given the employer ten (10) days' written notice to make payment.

"After an employer has secured his liability by any one of the methods heretofore and hereafter set out, and desires to substitute one form of security for the other, same may be done upon approval of the Commission."

In accordance with the above rules the Dixie Machinery Company has deposited in escrow with the Produce Exchange Bank of Kansas City the sum of \$3,000 in U. S. Treasury Bonds and \$7,000 in cash, under two agreements, each containing the following provision:

"That the party of the first part (Dixie Machinery Co.) and the party of the second part (Produce Exchange Bank) expressly agree that should the party of the first part, after the final adjudication of any compensation claim or claims and after ten (10) days' written notice by the Missouri workmen's Compensation Commission to said party of the first part to make payment of any and all amounts due, neglect, refuse or fail to pay any such obligation imposed upon said party of the first part by the

Missouri Workmen's Compensation Law as the result of being granted the privilege to carry its own liability under said Law, then upon written order of the Missouri Workmen's Compensation Commission, reciting such default, the party of the second part shall within ten (10) days (selling at the current market price if necessary any or all securities deposited) pay to the Missouri Workmen's Compensation Commission out of the cash deposited, and out of the funds obtained from the sale of the securities, if sold, the amount specified by said Commission in said order, sufficient to pay the obligations which the party of the first part has neglected, failed or refused to pay, so that said Commission may apply the same to the unpaid obligations of the party of the first part;"

It seems clear that under the above rules and escrow agreement it is contemplated that the Commission, in case of default in the payment of an award against a self-insurer, may forfeit a sufficient amount of the deposit to pay the "unpaid obligation" of the self-insurer. Here the self-insurer is in default at the rate of \$6.00 per week from May 4, 1941 - 14 weeks to August 9, 1941, or \$84.00.

We therefore think the Commission could, by making the necessary order, forfeit that sum, order it paid over to the Commission by the Produce Exchange Bank, and then apply the same to the unpaid award. The Commission could also create a greater unpaid obligation by commutation of the award and forfeit that sum, order it paid to the Commission and apply the same to pay the commuted award in full.

However, heeding the admonition, that the compensation provided is in lieu of wages, we feel that in order to comply with the intent of the Legislature, \$6.00 per week would have to be forfeited and paid over to the claimant rather than waiting until a substantial sum is in default. This procedure would entail a greater hardship on the Produce Exchange Bank, and for that

matter, the Commission too, and will fall One Thousand Six Hundred Seventy-six Dollars (\$1676) short of supplying this claimant Six Dollars (\$6.00) a week for the balance of his life expectancy.

Commutation is completely out of harmony with the intent of the act, and you advise the Commission does not deem it to the best interest of the claimant. Forfeiture of Six Dollars (\$6.00) per week will not accomplish the purpose of the Act. Therefore, we will no longer concern ourselves with these methods.

The question remains, as to what else may be done. You mention the purchase of an annuity insurance policy that will provide the employee Six Dollars (\$6.00) per week.

In connection with this, it is apparent that under the Act, that it was the intention of the Legislature that every liability would be guaranteed by an insurance carrier. We do not feel, that in authorizing self-insurers, the Legislature intended that an award against a self-insurer be any less secure. If the Dixie Machinery Company had not been a self-insurer, but had carried its liability with an insurance carrier, this question would never have been presented. This claimant would have gone on receiving his Six Dollars (\$6.00) per week for life. We approach the question with that fact in mind.

Section 3737 R. S. 1939, provides:

"On notice to other parties the Commission or court may permit the employer to be discharged from further liability under any agreement, award or judgment for compensation, by furnishing to the person entitled thereto an annuity or other obligation, approved by the Commission or Court, by which payment is assumed by some responsible person, or by depositing the commutable value thereof with the commission to be disbursed to the persons entitled thereto in such manner as the commission shall determine."

The question is: Does Section 3737, supra, authorize the Commission to cause the purchase of an annuity for this claimant, and, if so, will the amount determined as necessary for that purpose be an "unpaid obligation" of the Dixie Machinery Company that it is in default, so that the Commission may order the escrow agent, Produce Exchange Bank, to pay over a sum sufficient to meet said unpaid obligation?

It is arguable that Section 3737 grants a privilege to the employer alone, to be exercised by him if he so chooses, and the Commission or Court permits. Such a construction, of course, will prevent the Commission from exercising that privilege for the employer.

In *Scars v. Scars-Lovelace, Inc.*, 142 S. W. (2d) 866 (Mo. Sup.) the Court, in speaking of the authority of the Commission, said, l. c. 871:

"Like other administrative tribunals, it is a creature of the Legislature and does not have any jurisdiction or authority except that which the Legislature has conferred upon it."

However, in ascertaining the authority conferred, we find that it has been uniformly held, as evidenced by *Dauster v. Star Mfg. Co.*, 145 S. W. (2d) l. c. 503 (Mo. App.) that:

"The language used in the act and all reasonable implications therefrom shall be liberally construed to effectuate its purpose, and all doubts resolved in favor of the employee."

This latter rule is particularly enjoined on those who are charged with construction of the act by Section 3764 R. S. 1939, thereof.

It will be noted that Section 3737 not only speaks of relieving an employer from further liability on an award by furnishing an annuity or other obligation, but also provides for the same relief by "depositing the commutable value thereof with the commission to be disbursed to the persons entitled thereto in such manner as the Commission may determine." This certainly is not a privilege that may be exercised only if the employer so chooses, and has the consent of the Commission. We say this, because under Section 3736 R. S. 1939, the Commission may, if the facts warrant, "upon application of either party, with due notice to the other," commute any award to a lump sum. Therefore, if a claimant or employee so requests, the Commission by commutation could cause the employer to relieve himself of further liability, by payment in a lump sum, whether he desires to be so relieved or not.

It is difficult to see why the Legislature would authorize the Commission to cause an employer to relieve himself of further liability in the case of commutation, and not also extend the same authority to the Commission in connection with the employer being relieved from further liability by furnishing an annuity or other obligation.

Section 3737, supra, is not at all clear in the meaning. It says, "On notice to the other parties" but does not in terms provide who is to give said notice - the employer, employee or the Commission. However, the statute by use of the term "other parties" eliminates the Commission. If the notice is to be given to the "other parties" then these words clearly contemplate that one of the parties is the person that gives the notice. The Commission is not a party to a compensation proceeding. (Workmen's Compensation Law - Schneider, 2nd Ed. Vol. 2, p. 2095, Sec. 566) Further, as previously noted in the case of commutation of an award, it is provided such may be done "upon application of either party, with due notice to the other." Clearly that statute contemplates the applicant for commutation is the party who is to give notice to the other. Neither does said section expressly provide for an application to be made, but the Commission, not being a party, could not of its own motion institute a proceeding to relieve an employer of further liability. The invoking of the authority of the Commission in any respect presupposes an application by someone.

Therefore, it would appear that, if either employee or employer applies to have the employer relieved of further liability on an award by furnishing an annuity or other obligation, the party making the application is the one required to give notice to the other. However, as yet it does not appear that the employee may make such application.

Section 3737 further says "the commission * * * may permit the employer to be discharged * * *" Note that the underlined words are concerned with what the commission may do and not what the employer or employee may choose to do.

The word "permit" means "authorize" (Words and Phrases, Perm. Ed., Vol. 4, p. 836. Vol. 32, p. 148.)

Section 3737 further says "by furnishing to the person entitled thereto an annuity or other obligation." Of course, this clearly means that the employer is to provide the annuity, but again there is nothing about this language that necessarily restricts the right to make that choice to the employer alone.

Thus it appears that Section 3737 not restricting the privilege granted to either employer or employee, (the designation being "parties"), may be construed to mean that upon application of either employer or employee, on notice to the other party, the Commission may, if it sees fit, "authorize" an employer to relieve himself of future liability by furnishing an annuity or other obligation.

With respect to whether such authorization would be binding on the employer, in the sense that he could not refuse to follow that method in liquidating his future liability, we find that the Commission has control, without regard to the desire of either party, over the method whereby an award is to be paid. (Subject of course to be reviewed by the courts to determine if the facts support the method authorized. Mitchell v. Knutson, 137 S. W. (2d) 648 (Mo. App.)) However, it does not generally (in case of insurance carrier) have any power to enforce such award. McCoy v. Simpson, 125 S. W. (2d), 833 (Mo. Sup.)

Therefore, when any such award is made the employer is authorized to pay the same in a particular manner, such as a certain sum a week, a lump sum or perhaps part of both. The point is that the employer can only liquidate the award in the manner "authorized" by the Commission. If the award be not paid, then the employee has recourse to the courts to enforce the same. (Section 3733 R. S. 1939.) The Commission never, in such case, "requires" an award to be paid in a particular way. It only "authorizes" the way it shall be paid and the court by enforcing such an award, requires it to be paid in that manner. Therefore, the use of the word "permit" meaning "authorize" does not vest an employer with any right to refuse to liquidate his future liability by furnishing an annuity or other obligation, if the commission "authorizes" that method as the way in which the award shall be paid.

Thus we can see no reason why, upon application by an employee and notice to the employer, the Commission cannot, on an award of a certain sum each week for life, after a hearing and if the facts warrant, authorize the future liability of the employer to be liquidated, by said employer furnishing an annuity or other obligation to the employee that will provide that sum each week.

If such an award was against an employer carrying its liability with an insurance carrier, the courts would enforce the same. In the case of a self-insurer, it seems, there would be no necessity of resorting to court action. By Rule 3, supra, and the terms of the escrow agreement, the commission could cause the award to be paid, by forfeiting so much of the deposit as may be necessary to pay the award in the mode authorized.

Section 3737 does not in terms vest in the employer a right of choice as to the method that may be authorized to liquidate his future liability. Nor does such privilege exist by "reasonable implication." On the contrary, reasonable implication, when considered with the rights granted to employer and employee in connection with commutation, indicates that the opposite view is the implication to be drawn from the language used in Section 3737.

It is our view, construing the act liberally in favor of the employee, as required, and resolving any doubt in favor of the employee, that Section 3737 merely provides additional methods by which the Commission may authorize an award to be liquidated; that nothing therein should be construed as dependent upon a choice being made by the employer as a condition precedent to the right of the Commission to designate the manner in which the future liability of an employer on an award is to be liquidated. To rule otherwise in this case would frustrate the very object of the act - to provide compensation in lieu of wages. This is apparent because nothing but an annuity can provide this claimant with Six Dollars (\$6.00) a week for life, assuming, as we may, that he will live his life expectancy. It will require Eleven Thousand Six Hundred Seventy-six Dollars (\$11,676) to do that, and there is only a deposit of Ten Thousand Dollars (\$10,000) to guarantee this award. Further, it would work an inequity between employees of self-insurers and employees

those who carry their liability with an insurance carrier. The former would receive compensation in lieu of wages for life while the latter would only do so to the extent that the deposit made would permit. Such inequity should be avoided if the act permits. The purchase of an annuity will place such employees on an equal footing.

As heretofore illustrated, the Commission having the right to authorize the liquidation of an employer's future liability by furnishing an annuity or other obligation, in effect, when it does so, makes the cost thereof an obligation of the employer which, if not complied with, will be in default, and it may therefore, under its rules, forfeit so much of the deposit as may be necessary to comply with the terms of the award.

CONCLUSION.

It is therefore our opinion that the Commission may (1) forfeit the deposit periodically and require the same to be paid over to the Commission to apply on the unpaid obligation of the employer, that is in default, or (2) upon application and notice, after a hearing and if the facts warrant, it may authorize that the employer be relieved of future liability on the award by furnishing an annuity or other obligation, and upon the award becoming in default may forfeit a sufficient amount of the deposit and require it to be paid over to the Commission to be applied as authorized by the award.

Respectfully submitted,

APPROVED:

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