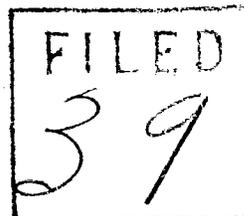


WORKMEN'S COMPENSATION: Division may make an order commuting compensation. Such order is reviewable by Commission. Commission or Division may order inspection of employer's premises, subject to limitations. Such order, if made by Division, is subject to review by the Commission.

August 19, 1947



Mr. Carl J. Henry, Chairman
Industrial Commission of Missouri
Dept. of Labor and Industrial Relations
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated July 18, 1947, wherein you requested an opinion of this department relative to the Commission's jurisdictional powers in certain procedures in Workmen's Compensation cases. Said letter reads in part as follows:

"In Section 3748 of the Workmen's Compensation Law the Attorney-General is designated as legal adviser for the Commission. Under Sections 3730 and 3731, the Commission has power to review awards of the Division of Workmen's Compensation. Under Section 3736, the Commission (meaning Industrial Commission as defined in Section 3744) may commute compensation. Under Section 3744a, the Commission may delegate powers to the Division, and in Regulation A on page 71 of the Workmen's Compensation Law the Commission has delegated powers generally to the Division.

"Acting under authority of Section 3736 and Regulation A (page 71) and Rules 21-28 (pages 74-75), a referee has made an order commuting compensation. The employer has filed a formal application for review of this order. The award in this case was made May 16 - request for commutation June 19 - order to commute July 2 - application for review of order filed July 11 - all apparently in proper order and within time. The question is - does the Industrial Commission have power to review this commutation order?

"Another question - under Section 3740, the Commission (and the Division by delegation of powers) has power to issue process and so forth. Does the Commission or Division have power under this or any other section to order an inspection of employer's premises? And if such order is made or denied by the Division does the Industrial Commission have power to review such order?"

In order to make more clear, for the purpose of this opinion, the organization of the Industrial Commission and the terms used relating thereto, we herewith quote Section 3744, Missouri Laws of 1945, page 2000, which is as follows:

"As used in Chapter 29 of the Revised Statutes of Missouri, 1939, and all acts amendatory thereof, the term 'Commission' or 'Workmen's Compensation Commission of Missouri' shall hereafter be construed as meaning and referring exclusively to the Industrial Commission of Missouri, and the term 'Superintendent of Insurance' shall hereafter be construed as meaning the Superintendent of the Insurance Department of the State of Missouri or such agency of government as shall exercise the powers and duties now conferred and imposed upon the Insurance Department of the State of Missouri. The term 'division' as used in this Act, means the division of Workmen's Compensation of the Department of Labor and Industrial Relations of the State of Missouri."

As you have indicated in your letter of request, under Section 3744a, Missouri Laws of 1945, page 2000, the Commission may delegate powers to the Division of Workmen's Compensation. Said section reads as follows:

"The division shall have and exercise such of the powers and functions of the Commission in the administration of the Workmen's Compensation law as the Commission may by regulation prescribe; provided, however,

that the power and duty to review any award made under the Workmen's Compensation law, as authorized by Sections 3730 and 3731 R.S. Mo., 1939, may not be delegated, but such power and duty shall be exercised exclusively by the Commission; and provided further, that the Commission shall exercise no authority with respect to the selection or tenure of office of any individual appointed or employed by the division in the administration of the Workmen's Compensation law."

On page 71 of the Workmen's Compensation Law, by regulation A, the Commission has delegated powers generally to the Division. Said regulation A reads as follows:

"It is hereby provided and ordered by the Industrial Commission of Missouri that the Division of Workmen's Compensation shall be and is hereby authorized to exercise all the powers and functions of the Commission in the administration of the Missouri Workmen's Compensation Law, except the power and duty to review any award made under said law or hold any hearing or rehearing as authorized by Sections 3730 and 3731, R. S. Missouri, 1939, and except such other powers and functions for the exercise of which provision is hereinafter made. It is intended by this provision to delegate all such powers to the Division of Workmen's Compensation and to designate said Division as the agency of the Commission to receive and file claims for compensation, reports, answers, settlements, agreements, applications for review, and notices as may be required by the Workmen's Compensation Law."

Section 3747, Missouri Laws of 1945, page 2001, reads in part as follows:

"The division shall appoint such number of referees as it may find necessary, but not exceeding twelve in number, who shall be duly licensed lawyers under the laws of this state. Any referee may be discharged or removed only by the governor. The referees appointed by the division shall only have jurisdiction to hear and determine claims

upon original hearing and shall have no jurisdiction whatsoever upon any review hearing either in the way of an appeal from an original hearing or by way of re-opening any prior award. With respect to original hearings the referees shall have such jurisdiction as heretofore has devolved upon the Workmen's Compensation Commission, or one of its members, under other sections of this chapter, and wherever in this chapter the word commission or commissioners is used in respect to any original hearing, those terms shall mean the referees appointed under this section. When a hearing is necessary upon any claim the division shall assign a referee to such hearing. Any referee shall have power to approve contracts of settlement between the parties to any claim under this chapter, to the same extent as elsewhere provided for the commission or one of its members. Any award by a referee upon an original hearing shall have the same force and effect, be subject to the same review and appellate procedure, and enforceable in the same manner as provided elsewhere in this chapter for similar awards by the commission or any member thereof. * * * *"

Is a commutation order such a hearing as to be termed a re-opening of a prior award so as to preclude the referee of the Division from having jurisdiction? In State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission, 113 S.W. (2d) 1034, the St. Louis Court of Appeals said at l.c. 1039:

"It is contended by respondent that the finding of the commission that the claimant in a case under the Workmen's Compensation Law is entitled to compensation and the fixing of some amount to be paid by the employer in weekly installments is the final award from which alone an appeal will lie.

"This argument is based on the contention that there can be only one final judgment

or award in a case, therefore, only one appeal can in any event be allowable. However, after a finding by the commission that the claimant is entitled to compensation and the fixing of the periodical payments of same, the commission retains jurisdiction of the case, and where, later, the claimant seeks a lump sum payment, and it is upheld by the commission, such action is a radical change in the original award, which affects the interests and rights of the claimant and the employer, who is thus required to pay in a lump sum. This order is then the last order of the commission, and may properly be deemed the final award in respect to the method of payment."

Section 3736, R.S. Mo. 1939, provides:

"The compensation herein provided may be commuted by said commission and redeemed by the payment in whole or in part, by the employer, of a lump sum which shall be fixed by the commission, which sum shall be equal to the commutable value of the future installments which may be due under this chapter, taking account of life contingencies, such payment to be commuted at its present value upon the basis of interest calculated at four per centum with annual rests, upon application of either party, with due notice to the other, if it appears that such commutation will be for the best interests of the employee or the dependents of the deceased employee, or that it will avoid undue expense or undue hardship to either party, or that such employee or dependent 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. In determining whether the commutation asked for will

be for the best interest of the employee or the dependents of the deceased employee, or so that it will avoid undue expense or undue hardship to either party, the commission will 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 or his dependents in the same manner in which wages are ordinarily paid. Therefore, commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure."

In these cases where a hearing is conducted on the question of a lump sum payment there has previously been a finding that the claimant is entitled to compensation and a fixing of the periodical payments of the same. The hearing on the question of commutation is not in the nature of an appeal from an original hearing, nor is it in the nature of re-opening any prior award so as to preclude the referee from exercising jurisdiction to hold the hearing. It is, rather, an original hearing to determine from the facts whether the claimant is to receive his compensation in a lump sum rather than in the periodical payments as previously determined. There is no determination as to the increase, decrease or continuation of the periodical payments as such. There would, therefore, appear to be little doubt that a referee acting for the Division has the delegated authority to hear and make an order commuting compensation in accordance with Section 3736, R.S. Mo. 1939, supra.

Section 3730, R.S. Mo. 1939, provides:

"Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the commission may at any time upon a rehearing after due notice to the parties interested review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall

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immediately send to the parties and the employer's insurer a copy of the award. No such review shall affect such award as regards any moneys paid."

Section 3731, R.S. Mo. 1939, reads as follows:

"If an application for review is made to the commission within ten days from the date of the award, the full commission, if the first hearing was not held before the full commission, shall review the evidence, or, if deemed advisable, as soon as practicable hear the parties at issue, their representatives and witnesses and shall make an award and file same in like manner as specified in the foregoing section."

Assuming then, as you state in your letter, that the employer has filed a formal application for review of this commutation order, in proper order and within time, does the Industrial Commission have power to review said commutation order? It is to be noted that Section 3747, hereinabove quoted, says:

"* * * Any award by a referee upon an original hearing shall have the same force and effect, be subject to the same review and appellate procedure, and enforceable in the same manner as provided elsewhere in this chapter for similar awards by the commission or any member thereof. * * *" (Underscoring ours.)

The Missouri Gravel Company case, supra, was an original proceeding in mandamus where the employer and insurer sought to compel the Missouri Workmen's Compensation Commission to allow an appeal to the Circuit Court of Pike County directly from an order of the Commission commuting into a lump sum a weekly award. The St. Louis Court of Appeals allowed the appeal, and said at l.c. 1037:

"* * * A number of appeals have been taken from the action of the Workmen's Compensation Commission in changing an

award from a periodical payment allowed the dependents of an employee into a lump sum payment. Appeals from such lump sum commutation orders have found their way through the circuit court to the appellate courts, and they have been considered uniformly by the appellate courts as if such an appeal was proper and authorized by the statute. Therefore, it would follow that the appellate courts have sub silentio held that the appeal was permissible from such orders of the Workmen's Compensation Commission.
* * * *"

The court continued at l.c. 1038:

"The commission is required to pass on many facts under the terms set out in said section 3346 in making a commutation to a lump sum payment. It must find whether any unusual circumstances exist which would require such a departure. It must find whether it will be of any real benefit to the dependent receiving such lump sum payment. Many dependents would, following the well-known weakness of human kind, speedily and injudiciously spend the lump sum payment and therefore become dependent on charity for subsistence. If the dependant receives the compensation weekly, such a result is not so probable. This is against the purpose and the spirit of the Workmen's Compensation Law. The compensation allowed the injured employee, or the dependents of a deceased employee, in a way represents wages. Society and the state are interested. Besides, the lump sum payment plan might create an undue hardship and a needless expense on the employer. It might cause him to sell a part or all of his equipment to meet the lump sum payment and head him in the direction of the bankruptcy courts. It is generally the case

that it is easier to pay in installments than in amounts which might be called 'coarse' money. In the finding of facts justifying commutation to a lump sum payment the Workmen's Compensation Commission exercises a judicial function."

Hanley v. Carlo Motor Service Company, 130 S.W. (2d) 187, involved a similar question, which was before the St. Louis Court of Appeals, involving the award by the Commission of a commutation to a lump sum payment. No appeal had been taken from the final award of the periodical payments, and payments were made in compliance therewith. Subsequent thereto, the employer filed a request for a lump sum settlement of said award. A hearing was had and the lump sum settlement was awarded. The order of commutation of the Commission was duly appealed to the circuit court by the employer and insurer, which court entered a judgment affirming it. Appeal was taken to the St. Louis Court of Appeals. The wording of the court would indicate that it felt this order of commutation was an award in the nature of an original hearing, an example of which is found at l.c. 190 where they said:

"We have emphasized in the above-quoted portion of the statute the ground on which we think the commission was authorized under the evidence herein to make the award of commutation. It will be noted that the statute provides four grounds upon which commutation may be awarded. * * * *"

And the court affirmed the fact that appeal in such a case was proper. Section 3732, R.S. Mo. 1939, provides that the final award of the Commission shall be conclusive unless an appeal is taken therefrom within thirty days from the date of the final award. Said section sets out the grounds for reversal and specifies the procedure for such an appeal. By allowing appeal to the courts from an order of commutation it would follow that, in accordance with the rules of procedure hereinabove mentioned in regard to review and appeal, on an application for review of a commutation order the Industrial Commission has the authority to review such an order of a referee. It is an axiomatic rule, as applied to these administrative agencies, that the person seeking judicial review of a final decision on a contested issue must first exhaust all administrative remedies.

Your next question relates to Section 3740, R.S. Mo. 1939, which reads as follows:

"The commission, or any commissioner, shall have power to issue process, subpoena witnesses, administer oaths, examine books and papers, and require the production thereof, and to cause the deposition of any witness to be taken and the costs thereof paid as other costs under this chapter. Any party shall be entitled to process to compel the attendance of witnesses and the production of books and papers, and at his own cost to take and use depositions in like manner as in civil cases in the circuit court. Subpoena shall extend to all parts of the state, and may be served as in civil actions in the circuit court, but the costs of such service shall be as in other civil actions. Each witness shall receive the fees and mileage prescribed by law in civil cases, but the same shall not be allowed as costs to the party in whose behalf the witness was summoned unless the persons before whom the hearing is had shall certify that the testimony of such witness was necessary. All costs under this chapter shall be approved by the commission and paid out of the state treasury from the fund for the support of the Missouri workmen's compensation commission: Provided, however, that if the commission shall determine that any proceedings before it or any of its members, have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. The commission may permit a claimant to prosecute a claim as a poor person as provided by law in civil cases."

The question is, whether under this section the Commission (and the Division by delegation of powers) has power to order an inspection of employer's premises; and, if such order is made or denied by the Division, does the Industrial Commission have power to review such order?

I think we may safely assume from the foregoing discussion that the Division, by delegation of authority, may equally have such power to issue process, and so forth, as is granted to the Commission by Section 3740, supra. It is to be noted that Section 3740 indicates that the general procedure for compelling the attendance of witnesses and the production of books and papers is the same as that prescribed for civil cases. Section 86 of the Code for Civil Procedure, Missouri Laws of 1943, at page 379, says:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, sampling, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

We feel the interpretation given to this section by the courts would likewise apply to an administrative agency such as the Division or Industrial Commission. Such provisions relating to the production of books and papers by parties to the hearing are a modern conception enacted for the purpose of supplanting the outmoded procedure for acquiring material facts and evidence, and are felt necessary and desirable in keeping with the spirit of the relatively new administrative agencies with which we are now dealing, which perform a quasi judicial function. Such rules of procedure facilitate and expedite the preparation of cases for trial and, in a measure, guard against unreasonable surprise and delay. Though these rules of procedure evidence a more liberal

policy, they will not, of course, permit an unbridled investigation or so-called "fishing expedition" into an adversary's books and papers or upon his premises; and the courts do recognize the constitutional declaration that "the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures." Constitution of Missouri, Article I, Section 15. The General Assembly has defined and permitted reasonable searches and seizures of books, papers and documents in the possession of parties to a pending cause when containing evidence material to the cause.

As we have pointed out above, Section 3731, R.S. Mo. 1939, supra, provides for review by the Commission of an award by the Division. And, as we have mentioned above, a person seeking judicial review must first exhaust his administrative remedies. If, then, this person seeks an appeal from a decision of the Division, the Commission would be authorized to review said award. Just as courts on judicial review may hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency, so would the Commission be allowed to review an order by the Division relative to a ruling under Section 3740, R.S. Mo. 1939, supra. In keeping with the spirit of the law which established administrative agencies, such as the one in question, we feel that it was the intention of the Legislature to hear and make awards on these claims in the most expeditious manner. This, we feel, would not allow a separate review on every decision made by the Division relative to the granting or refusing of an award of compensation. It would thus logically follow that any ruling the referee might make with regard to Section 3740, R.S. Mo. 1939, supra, would not justify a continuation of the original hearing in order that a review on that particular ruling be had by the Commission at that time. This does not deprive either party of any right to review since such a ruling by the referee, under Section 3740, supra, would be considered by the Commission when they review the final award as made by the referee. As is stated in 71 C. J., page 1204, relating to Workmen's Compensation Act:

"Under a general application for a rehearing on specified grounds without limiting the issues raised by the request, the whole subject matter is reopened for further consideration and determination, and the issues raised are as broad as those raised in the original application for compensation.* * *"

Section 3732, R.S. Mo. 1939, specifically provides that upon the filing of an appeal from the ruling of the Commission, "the

commission shall under its certificate return to the court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the Division of Workmen's Compensation has the delegated authority to make an order commuting compensation in accordance with Section 3736, R.S. Mo. 1939, and that such an order is subject to review by the Industrial Commission. It is further the opinion of this department that the Commission (or Division by delegation of authority) has power to order an inspection of employer's premises, subject to the same limitations as contemplated in Section 86 of the Code for Civil Procedure, Missouri Laws of 1943, page 379. Such an order for inspection, if made by the Division, is subject to review by the Commission as provided in Sections 3730 and 3731, R.S. Mo. 1939.

Respectfully submitted,

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APPROVED:

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