

WORKMEN'S COMPENSATION:
SECOND INJURY FUND:

Second Injury Fund provided for in Section 3707, R. S. Mo. 1939, and amendments thereto, is liable for the payment of additional medical attention to an injured employee by special order of the Workmen's Compensation Commission, even though such employee is drawing regular payments from said Fund because of permanent total disability.

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Honorable Spencer H. Givens
Director, Division of Workmen's Compensation
Jefferson City, Missouri

Dear Mr. Givens:

This will refer to your letter requesting the opinion of this department as to whether the Second Injury Fund provided for in Section 3707, R. S. Mo. 1939, as amended Laws Missouri 1943, page 1068, and Laws Missouri, 1945, page 1996 is liable for the payment of medical attention, as is provided for in the first paragraph of Section 3701, R. S. Mo. 1939, to an employee who is drawing regular payments from the Second Injury Fund for permanent total disability. Your letter is as follows:

"We respectfully request your opinion on the following problem:

"Is the Second Injury Fund liable for the payment of medical attention(as set forth in Section 3701a R. S. Mo. 1939) asked for by an employee who is drawing regular payments from the Fund as an adjudged permanent total disability case. The part of Section 3701a especially referred to is the phrase "and thereafter such additional similar treatment as the commission by special order may determine to be necessary."

"The third paragraph of Section 3707a (Second Injury Fund section) reads: 'The Commission shall direct the distribution of said Second Injury Fund in the manner and amounts provided for in this chapter for the payment of compensation.' Our Courts have repeatedly held (see 145 S.W.(2nd) 482, 145 SW(2nd) 506, 149 SW(2nd) 429) that medical attention is compensation on account of injury.

"It appears to me, therefore, that the Second Injury Fund would be liable (upon proper claim and proof of necessity therefor) for additional medical treatment provided a claimant drawing weekly payments from the Second Injury Fund."

Section 3701, of the Workmen's Compensation Act of Missouri, in paragraph 1 reads, in part, as follows:

"In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, and hospital treatment including nursing, ambulance and medicine, as may reasonably be required for the first ninety days after the injury or disability, to cure and relieve from the effects of the injury, not exceeding in amount of sum of seven hundred and fifty dollars, and thereafter such additional similar treatment as the commission by special order may determine to be necessary.

The Supreme Court and the Courts of Appeals of this state have, as you state, frequently held that medical attention is compensation, in like manner as money is compensation, to an injured employee under the Workmen's Compensation Act. This is the well-settled law of this state, established both by our compensation statutes and the decisions of our highest courts.

The Supreme Court, in the case of Wheeler vs. Mo. Pac. Rd. Co., 328 Mo. Rep. 888, had that question before it in the decision rendered by the Court. On this identical question, the Court, l.c. 893, said:

"Compensation is sought in this case under the provisions of Section 17 of the Workmen's Compensation Act, which provides for compensation for the "complete loss of the sight of one eye" as a permanent partial disability. However, the act provides for other character of compensation; Section 13 of the act provides compensation in the way of medical aid, * * *"

Our Supreme Court had the construction of Section 3311, R. S. Mo. 1929, before it in the case of McEneny vs. S. S. Kresge Co., 333 Mo. Rep. 817, on this same question. The Supreme Court quoting from a court of appeals opinion, l.c. 824, said:

"Thus it will be seen that Section 3311 specifically provides that medical treatment shall be considered as a part of the compensation the employee shall receive * * *."

The case of Parker vs. St. Louis Car Co. was before the St. Louis Court of Appeals, reported in 145 S.W.(2d) 482. The case involved the precise question here being considered. The court in

its construction of the then numbered statute 3311, now 3701, holding that medical attention to an injured employee under the Act is compensation, l.c. 484, said:

"Section 3311(a), R. S. Mo. 1929, Mo. St. Ann. Sec. 3311(a), p. 8246, provides that 'in addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, and hospital treatment * * * as may reasonably be required for the first ninety days after the injury or disability, to cure and relieve from the effects of the injury, not exceeding in amount of sum of seven hundred and fifty dollars, and thereafter such additional similar treatment as the commission by special order may determine to be necessary.'

"(1) It will thus be seen that the Workmen's Compensation Law provides not only for money compensation to be paid by the employer to the employee for injuries sustained, but that the employee is entitled to have medical aid furnished to him by his employer. The right to such medical aid is a part of the employee's 'compensation' given to him by the plain and clear provisions of the law itself, because the language used in said section, namely, 'in addition to all other compensation' has the effect of classifying such medical aid as 'compensation' on account of the injury.* * *"

There are numerous other decisions by our Appellate Courts on this question. The following are among them: Reeves v. Engineering Co., 237 Mo. App. 473; Broilier vs. Alstine, 236 Mo. App., 1233; and Mussler vs. Am. Car and Foundry Co., 149 S.W.(2d) 429.

Supplementing the provisions of Section 3701 requiring medical treatment for the employee by the employer for the first ninety days after an injury or disability, the Legislature provided this: "And thereafter such additional similar treatment as the Commission by special order may determine to be necessary."

A special order by the Commission for such additional medical treatment for the employee is provided for in Section 3701. This provision requiring such special order to be necessary was upheld in the case of Johnson v. Kruckemeyer et al., reported in 29 S.W. (2) 730. The St. Louis Court of Appeals in its decision, l.c. 734, said:

"In other words, if the injured employee at any stage of the case sees fit to incur additional expense, or to have a change in the identity of the service, and desires to have the same charged against his employer, it is necessary that he procure a special order therefor from the commission, such special order to be made before the expense is incurred or the change made, and not afterwards. We say this for the reason that the Act speaks of additional treatment which the commission by special order may determine 'to be necessary,' and not 'to have been necessary,' and does not contemplate that an award may be subsequently entered so as to be retroactive, and have the effect of relating back to the time when it was first found that additional treatment would be required. State ex rel. v. District Court, 134 Minn. 16, 158 N.W. 713, L.R.A. 1916F, 957."

The Second Injury Fund is made up of contributions, by employers coming under the Compensation Act, of \$500.00 from each employer subject to the Act, for every fatal injury by accident where death benefits would be payable under the Act, but sustained by an employee having no dependents, and the sum of \$100.00 in cases not resulting in death but where the employee sustains the loss of the use of an eye, a foot, a leg, an arm, or a hand in addition to the compensation provided otherwise in the Act. While the Fund bears the name of the Second Injury Fund, the statute creating the fund is a compensation statute and the Fund itself is a compensation fund.

The Second Injury Fund was created by the Legislature by House Bill 226 which provided for the repeal of Section 3707, Chapter 29, R. S. Mo. 1939, and the reenactment of a new section in lieu thereof to be also numbered Section 3707, Laws Missouri 1943, page 1068. The repealing and reenacting section, which is Section 1, of said House Bill 226, states, in part, as the reason for the creation of the Second Injury Fund that it should be "* * * for payments of compensation out of said Fund for permanent total disability when it results from disability and subsequent injury; for appropriations of the Second Injury Fund for the payment of compensation provided in this section; * * *". The background for the creation of the Second Injury Fund is revealed by the provisions previously expressed in Section 3706, R. S. Mo. 1939, casting upon an individual employer the obligation to pay all compensation due his employees for one or more injuries out of his own funds. In order to relieve the employer of at least a part of the compensation for which he might be liable for the last injury where there may be a second injury the Second Injury Fund was created, with the required contributions as above stated.

The Second Injury Fund statute was amended in Laws Missouri, 1945, page 1998. From the enactment of the second Injury Fund statute in 1943, including the said amendment in 1945, the Legislature has maintained and preserved the express provision that the Second Injury Fund shall be a compensation Fund.

On page 1069, Laws 1943, in the original Act--H.B. 226--in the second paragraph, in providing for the administration of the contributions to be made by the employers as hereinabove noted, the Act reads: "* * *such payments shall be placed in a fund to be known as the Second Injury Fund, which Fund is hereby appropriated by the Legislature in accordance with the law, exclusively for the payment of compensation as provided herein,* * *". The last quoted provision from Laws Missouri, 1943, page 1069 is repeated word for word in Laws Missouri 1945, page 1998, near the end of the page, and will therefore not be repeated here. The last paragraph of the new Section 3707, page 1998, Laws Missouri, 1945, has the following provision, to-wit: "The Commission shall direct the distribution of said Second Injury Fund in the manner and amounts provided for in this chapter for the payment of compensation." (underscoring ours).

The whole plan of the Compensation Act, from the beginning, including the succeeding amendments of every nature, is included in Chapter 29 of the Revised Statutes of this state.

The payment of all compensation of any nature must be made under said Chapter 29. If this be so, and it is, when the Legislature said in Section 3707 that the Commission should direct the distribution of the Second Injury Fund in the manner and amounts provided for in "this Chapter" for the payment of compensation, they thereby authorized the payment out of the Second Injury Fund for additional services to an injured employee determined to be necessary by special order of the Commission. This, too, even though the employee, entitled to such additional medical attention, may be at the time drawing regular payments from said Fund because of total disability previously determined. We believe that the Second Injury Fund being by law designated to be a compensation fund, The Workmen's Compensation Commission may distribute the fund or any part of it to the satisfaction of any element of compensation that the statutes decree to be due to an injured employee, for additional medical attention.

CONCLUSION

It is, therefore, the opinion of this department that the Second Injury Fund, as provided for in Section 3707, R. S. Mo.

Hon. Spencer H. Givens

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and amendments thereto, is liable for the payment of additional medical attention, as provided for in Section 3701(a) R. S. Mo. 1939, determined to be necessary by special order of the Commission to an injured employee who is drawing regular payments from the Fund because of permanent total disability previously adjudged, and that the Commission is by law empowered to so direct the distribution of said fund.

Respectfully submitted,

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Assistant Attorney General

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APPROVED:

J. E. TAYLOR
Attorney General