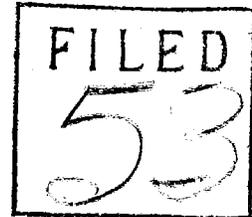


May 10, 1941

5-20



Mr. Max M. Librach
Representative
61st General Assembly
Jefferson City, Missouri

Dear Mr. Librach;

We are in receipt of your request for an opinion wherein you state as follows:

"I would appreciate receiving from you an opinion as to the constitutionality of House Bills 487 and 488. These bills deal with workmen's compensation cases and are commonly called the Second Injury Statutes. One Bill is the Enabling Act for the second Bill.

"The problem that arises is as to whether or not the creation of a special fund out of which second injury cases are to be paid is constitutional under the Missouri Constitution. Some doubt arose in the minds of the Members of the Committee as to whether or not this special fund could be created in the State of Missouri. I might add that the Department of Education, of this State, as well as the Social Planning Council of the City of St. Louis, are very much in favor of this Bill; that no one seems to be opposed to it as it is already law in some twenty states throughout the United States."

House Bill No. 487 provides as follows:

"Section 3709. If the injury causes death, either with or without disability, the compensation therefor shall be as provided in this section.

"(a) In all cases the employer shall pay direct to the persons furnishing the same the reasonable expense of the burial of the deceased employe not exceeding one hundred fifty dollars, and, if not covered by the provisions of section 3701, the reasonable expense of his last sickness not exceeding two hundred and fifty dollars. But no person shall be entitled to compensation for the burial expenses of a deceased employe unless he shall have furnished the same by authority of the widow or widower, the nearest relative of the deceased employe in the county of his death, his personal representative, or the employer, who shall have the right to give such authority in the order named. All fees and charges under this section shall be fair and reasonable, shall be subject to regulation by the commission and shall be limited to such as are fair and reasonable for similar service to persons of a like standard of living. The commission shall also have jurisdiction to hear and determine all disputes as to such charges. If the deceased employe leaves no dependents the death benefit in this subsection provided shall be the limit of the liability of the employer under this chapter on account of such death, except as provided by Section 3707 of this chapter.

"(b) The employer shall also pay to the total dependents of the employe a single total death benefit, the amount of which shall be determined in the following manner, to-wit: There shall first be determined as a basis for computation $66\frac{2}{3}$ per cent of the employe's average weekly earnings during the year immediately preceding the injury as provided in section 3710 and such amount shall

then be multiplied by three hundred and the amount so determined shall be the amount of such death benefit. The death benefit provided for shall be payable in installments in the same manner that compensation is required to be paid under this chapter, but in no case less than at the rate of six dollars per week nor more than twenty dollars per week. There shall, however, be deducted from such death benefit any compensation which may have been paid to the employe during his lifetime for the injury resulting in his death. If there be a total dependent or total dependents as the case may be, no death benefit shall be payable to partial dependents, or any other persons except as provided in paragraph (a) of this section.

"(c) If there be partial dependents, and no total dependents, a part of the death benefit herein provided in the case of total dependents, determined by the proportion of his contributions to all partial dependents by the employe at the time of the injury, shall be paid by the employer to each of such dependents proportionately.

"(d) The word 'dependent' as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employe, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employe in the following order and any death benefit shall be payable in the following order, to-wit:

"1. A wife upon a husband legally liable for her support, and husband mentally or physically incapacitated from wage earning upon a wife: Provided, that on the death or marriage of a widow, the death benefit shall cease unless there be other dependents entitled to any unpaid remainder of such death benefit under this chapter.

"2. A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years, or over that age if physically or mentally incapacitated from wage earning, upon the parent with whom he is living at the time of the death of such parent, there being no surviving dependent parent or step-parent. In case there is more than one child thus dependent, the death benefit shall be divided among them in such proportion as may be determined by the commission after considering their ages and other facts bearing on such dependency. In all other cases questions of total or partial dependency shall be determined in accordance with the facts at the time of the injury, and in such other cases, if there is more than one person wholly dependent the death benefit shall be divided equally among them.

"(e) All death benefits provided for in this chapter shall be paid in installments in the same manner as provided for disability compensation.

"(f) Every employer shall keep a record of the correct names and addresses of the dependents of each of his employes, and upon the death of an employe by accident arising out of and in the course of his employment, shall so far as possible immediately furnish the commission with said names and addresses."

House Bill No. 488 provides as follows:

"Section 3707. (a) All cases of permanent disability where there has been a previous disability shall be compensated on the basis of the average annual earnings at the time of the last injury. If the condition resulting from the last injury is a permanent partial disability, there shall be deducted from the resulting condition the previous disability

as it exists at the time of the last injury, and the compensation shall be paid for the difference. If the condition resulting from the last injury is a permanent total disability, the employer at the time shall be liable only for the last permanent injury considered alone and of itself: Provided, that if the compensation for which the employer at the time is liable, as herein provided, is less than the compensation provided in this Act for permanent total disability, then in addition to the compensation for which such employer is liable and after the completion of payment of such compensation, the employee shall be paid by the state the remainder of the compensation that would be due for permanent total disability under Section 3706(a) of this chapter out of a special fund known as the Second Injury Fund created for such purpose in the following manner:

"Every employer shall pay to the State Treasurer for every fatal injury arising out of and in the course of employment sustained by an employee having no dependents as defined by Section 3709 of this chapter, a lump sum of \$1,000, which shall be in addition to the amounts provided for burial and the expenses of the employee's last illness. Such payments are to be placed in a fund to be known as the Second Injury Fund, which is to be used exclusively for the payment of compensation as provided above. The State Treasurer shall be the custodian of the Second Injury Fund and the Missouri Workmen's Compensation Commission shall direct the distribution thereof in the manner and amounts provided for in this chapter for the payment of compensation. In event a deposit is or has been made by an employer under the provisions of this section in the Second Injury Fund, and dependence in any degree is later proved as in this chapter provided, the State Treasurer is hereby authorized and directed to refund such deposit upon certification of the Workmen's Compensation Commission of the establishment of such dependency.

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"(b) If more than one injury in the same employment causes concurrent temporary disabilities, compensation shall be payable only for the longest and largest paying disability.

"(c) If more than one injury in the same employment causes concurrent and consecutive permanent disability, compensation payments for each subsequent disability shall not begin until the end of the compensation period of the prior disability."

As we construe the above House Bills, whenever an employee sustains a fatal injury arising out of and in the course of employment, and said employee has no dependents, the employer is required to pay the State Treasurer as custodian a lump sum of \$1,000.00. These payments are to be placed in a fund to be known as the Second Injury Fund for the compensation of employees who by a combination of successive injuries have become permanently and totally disabled.

A good statement of the purpose of the above statutes is found in the case of Salt Lake City v. Industrial Commission, 199 Pac. (Utah) 152, l. c. 155, 156, wherein the court said:

"The real purpose of the statute, both subdivision 1 and subdivision 6 heretofore quoted, is the building up and maintaining of a special fund for the compensation of employees who by a combination of successive injuries have become permanently and totally disabled, but whose total disability is not otherwise provided for in the Industrial Act. We submit the following as a typical illustration: If A. should suffer the total loss of one eye, his compensation under the regular schedule (Comp. Laws Utah 1917, Sec. 3138) would be not exceeding \$16 per week for 100 weeks. If he should afterwards lose the other eye in the same or different employment within the act, he would be entitled under the same schedule to an additional sum of not exceeding \$16 per week for 100 weeks.

The total compensation for the loss of both eyes would be not exceeding \$16 per week for 200 weeks. But the loss of both eyes under section 3139 of the same compilation constitutes permanent total disability, for which the injured employe is allowed 60 per cent. of his average weekly wages for a period of five years from the date of the injury, and thereafter 45 per cent. of such average weekly wages during the remainder of his life, the maximum not to exceed \$16 and the minimum not less than \$7 per week. The discrepancy between the total amount payable to the employe for these successive injuries under the regular schedule and the amount he would receive had he lost both eyes in the same accident under section 3130 would amount to a considerable sum, dependent entirely upon how long the employe lives after the expiration of the first 200 weeks. The \$750 exaction from employers is to take care of this discrepancy so that the entire burden may not be cast upon the last employer. If the law imposed the liability from him alone, the result would be that the unfortunate employe who has suffered only the loss of a single member would be handicapped in obtaining employment thereafter, for the loss of another member might result in permanent total disability. State Ind. Com. v. Newman, 222 N. Y. 363, 118 N. E. 794.

"These were undoubtedly the considerations which moved the Legislature to enact the provisions of the statute of which plaintiff complains. * * *"

House Bill No. 448, supra, declares that "the State Treasurer shall be the custodian of the Second Injury Fund and the Missouri Workmen's Compensation Commission shall direct the distribution thereof in the manner and amounts provided for in this chapter for the payment of compensation."

In determining the constitutionality of the above two House Bills we are immediately confronted with Section 19, Article X of the Constitution of Missouri, which reads in part as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, * * *"

In the case of *B. F. Sturtevant Co. v. O'Brien*, 186 Wisc. 10, 202 N. W. 324, the Supreme Court of Wisconsin was considering provisions similar to that contained in the above two House Bills. The Industrial Commission had found that the appellant employer was liable under a statute providing that where an employee came to his death through accident in the course of his employment, without dependents, \$1,000 was to be paid into the state treasury for the benefit of persons entitled thereto under the act. The employer refused to make the payment as ordered by the Commission, alleging that same was unconstitutional for a number of reasons.

The statutes of Wisconsin, before the court for construction and determination, contained the following subsections:

"(f) In each case of injury resulting in death, leaving no person wholly dependent for support, the employer or insurer shall pay into the state treasury such an amount, when added to the sums paid or to be paid on account of partial dependency, as shall equal four times the deceased employe's average annual earnings, such payment to the state treasury in no event to exceed one thousand dollars.

"(g) The moneys paid into the state treasury pursuant to paragraph (f) of this subsection with all accrued interest is hereby appropriated to the Industrial

Commission for the discharge of all liability for additional death benefits accruing under this subsection."

The court said (l. c. 326):

"But, no matter how beneficial or wise the legislation, it must be conceded that the Legislature must have complied with constitutional requirements in passing the act. Section 2, art. 8, Wisconsin Constitution, provides:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law."

"The act in question requires that certain funds be paid into the state treasury and paid out of the state treasury by direction of the Industrial Commission. It therefore comes clearly within section 2, art. 8, and the money can be paid out of the state treasury only in pursuance of an appropriation by law.

"Paragraph (g) of subdivision (4m) of section 102.09, provides:

"The moneys paid into the state treasury pursuant to paragraph (f) of this subsection with all accrued interest is hereby appropriated to the Industrial Commission for the discharge of all liability for additional death benefits accruing under this subsection."

"The provision of the Constitution is positive and prohibitory, but the language of the statute uses apt and appropriate terms to constitute an appropriation by law, and we entertain no doubt that the Legislature complied with section 2, art. 8, in the amendment of the compensation statutes in question."

The above House Bills provide no appropriation of the Second Injury Fund to the Workmen's Compensation Commission, held by the State Treasurer as custodian, and would seem therefore to be in conflict with Section 19 of Article X of the Missouri Constitution. An examination of the Sturtevant case, supra, reveals that the statutory provisions are quite distinguishable. In the Wisconsin case the employer paid the funds into the "State Treasury" while under the provisions of the above House Bills it is paid to the "State Treasurer" as "custodian." From a reading of the provisions in the above bills it is evident that if same were enacted into law it would not be the intention of the Legislature that the Second Injury Fund, held by the State Treasurer, be state funds. Otherwise, the Legislature would provide that the funds be paid into the State Treasury.

In State ex rel. Stevenson v. Stephens, 37 S. W. 506, money and securities were deposited with the State Treasurer by investment companies for the protection of investors. The question arose whether this money could be paid without a warrant and appropriation. The court, after citing Sections 15 and 19 of Article X of the Constitution, said (l. c. 508, 509):

"It is next insisted that though respondent may hold the money as treasurer, and for the purpose of making the security good, still he can only be required to pay it out in the manner and under the restrictions of the constitution and laws of the state. Section 15 of article 10 of the constitution requires that 'all moneys now, or at any time hereafter, in the state treasury, belonging to the state, shall, immediately on receipt thereof, be deposited by the treasurer to the credit of the state for the benefit of the funds to which they respectively belong,' and 'shall be disbursed by said treasurer for the purposes of the state, according to law, upon warrants drawn by the state auditor, and not otherwise.' Section 19 of the same article provides that 'no moneys shall ever be paid out of the treasury of this state, or any of the funds under its management, except

in pursuance of an appropriation by law.' The statute contains like provisions. Rev. St. 1889, Sec. 8662. It is manifest that these provisions only apply to money 'belonging to the state.' The money in question, though it was deposited with the treasurer, was for the specific purpose of making good the security intended for the protection of those dealing with bond investment companies, and was not money belonging to the state, within the meaning of the constitution. The securities, whether in money, bonds, or notes, are held by the treasurer in trust, not for the use or benefit of the state, but for the protection of those who may hold the bonds, certificates, or debentures of bond investment companies which are authorized to sell such securities on the partial payment or installment plan. * * * * *

* * * It is clear that the legislature did not intend that the money or securities deposited should be paid out or returned under the regulation required in paying out the public money. We are of the opinion, therefore, that respondent had the implied power, under the act, to make the agreement, and that an appropriation or warrant of the auditor was not necessary. * * * * *

The moneys paid to the State Treasurer as custodian, are to be paid out under the direction of the Workmen's Compensation Commission for a special purpose, viz., employees who have suffered misfortune in their employment. These funds are held by the State Treasurer as a mere depository, and clearly are not state funds. We are therefore of the opinion that the Second Injury Fund may be collected and paid out by the State Treasurer under the terms of House Bills 487 and 488 without violating Section 19 of Article X of the Missouri Constitution.

The constitutionality of the Commission's order requiring payment of \$1,000 into the State Treasury was attacked in the Sturtevant Case, supra, for the additional reason that it violated the Fourteenth Amendment to the Federal Constitution. The court in answering this complaint said (l. c. 328):

"It is further claimed by the appellants that the legislation in question is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the federal Constitution. These objections are set at rest by the decision of the United States Supreme Court in the case of R. E. Sheehan & Co. v. Shuler, 265 U. S. 371, 44 Sup. Ct. 548, 68 L. Ed. 1061."

In the Sheehan Company Case, referred to in the above opinion, provisions similar to the ones at issue were upheld by the United States Supreme Court as not being in conflict with the Fourteenth Amendment. The court said (Law Ed. 1063):

"The companies contend that these subdivisions are in conflict with the 14th Amendment, and that the awards made thereunder deprive them of their property without due process and deny them the equal protection of the laws.

"The substance of these two provisions is that when an injury causes the death of an employee leaving no beneficiaries, the employer or other insurance carrier shall pay the state treasurer the sum of \$500 for each of two special funds: one to be used in paying additional compensation to employees incurring permanent total disability after permanent partial disabilities; and the other, in the vocational education of employees so injured as to need rehabilitation. The use of such special funds for such purposes is an additional compensation to the employees thus injured, over and above that prescribed as the payments to be made by their immediate employers. Such additional compensation is neither unjust nor unreasonable. Thus, an employee who, having lost one hand in a previous accident, thereafter loses the second hand, is, obviously, not adequately compensated.

by the provision requiring his employer to make payment for the loss of the second hand, independently considered, the total incapacity finally resulting from the loss of both hands working much more than double the injury resulting from the loss of each separate hand, considered by itself. In such a case, however, as in the case of an injury requiring vocational rehabilitation, it is the theory of the law that such additional compensation to the injured employee should not be required of the particular employer in whose service the injury occurred, but should be provided out of general funds created by payments required of all employers when injuries resulting in the death of their own employees, leaving no beneficiaries, do not otherwise create any liability under the Compensation Law.

"We do not think that the due process clause of the 14th Amendment requires that such additional compensation to injured employees of the specified classes should be paid by their immediate employers, or prevents the legislature from providing for its payment out of general funds so created. * * *"

And in holding that these provisions did not conflict with the equal protection clause, the court said: (Law Ed. 1064)

"Nor are these provisions in conflict with the equal protection clause. The contention of the companies is that the prescribed awards are in the nature of a tax imposed upon the happening of a contingency, and are of unequal application; that is, that they are imposed only upon such employers as happen to have employees who are killed without leaving survivors entitled to compensation. However, this is not a discrimination between different employers, but merely a contingency on the happening of which all employers alike become subject to the requirements of the law. All are required to contribute, under identical conditions, to these special funds. State

Industrial Commission v. Newman, 222 N. Y. 368, 118 N. E. 794."

In the case of Home Accident Insurance Co. v. Industrial Commission, 34 Ariz. 201, 269 Pac. 501, provisions similar to those contained in the above two House Bills before us for consideration were attacked as being in conflict with the Fourteenth Amendment and a denial of the equal protection clause of the Federal Constitution. The court said (l. c. 505, 506):

"It is contended that the statute providing for the payment of the \$850 in question is unconstitutional and void, because it deprives petitioners of their property without due process of law, and denies them the equal protection of the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and by section 4, article 2, Constitution of the state of Arizona. The argument is that this provision is arbitrary, unreasonable, and discriminatory, in that it provides for a special classification, consisting of only those employers coming under the Workmen's Compensation Act who employ persons without dependents, but with the right to claim compensation, and that it is not required that the beneficiaries of the payments thus made be employees of the persons whose payments create the fund, nor the dependents of such employees, but merely that they be employees disabled in industry. We think it perfectly plain that, though subdivision 9 does provide that only those employers who happen to have an employee without dependents killed shall make the payments in question, and that the beneficiaries of the fund may be employees of employers other than those making the payments, neither of these facts render it arbitrary or discriminatory, because the contingency upon the occurrence of which the employer becomes liable, is just as applicable to one employer as another. And perhaps it was thought that it would tend to place all employees upon a more nearly equal footing in

the matter of securing employment, since the Legislature may have entertained the idea that employees without dependents would be given the preference by some employers, in the absence of such provision, inasmuch as the accidental death of a workman without dependents would mean that the employer would pay the funeral expenses and nothing more.

"It is necessary on this phase of the case to do no more than give an excerpt from a decision of the Supreme Court of the United States in *Sheehan Co. v. Shuler*, supra, in which that court held in plain and unmistakable language that such a provision violated neither the due process nor the equal protection clause of the Constitution of the United States."

From the foregoing we are of the opinion that the provisions of the House Bills, Nos. 487 and 488, do not violate the Fourteenth Amendment and are not in conflict with the equal protection clause of the Federal Constitution.

Section 3, Article X, of the Missouri Constitution provides as follows:

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

In the Home Accident Insurance Company Case, supra, the statutes were also attacked as being violative of a constitutional provision providing for uniformity of taxation. The court said (l. c. 504, 505):

"Petitioners contend, further, that the portion of subdivision 9 providing for the payment in question is a tax measure, and the \$850. to be paid a tax, and that

it contravenes section 1, article 9, of the Constitution of Arizona, reading as follows:

"The power of taxation shall never be surrendered, suspended, or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax, and shall be levied and collected for public purposes only."

"It is obvious that the tax referred to in this section is a tax on property, and not a tax on an occupation or business. This court so held in *Re Auxiliary Eastern Canal Irrigation District*, 24 Ariz. 163, 207 P. 614, when it said that it 'relates to the revenue required for the general purpose of government, state and municipal.' It is equally clear that the \$850 subdivision 9 requires to be paid is not a tax on property at all, but a part of the compensation the employer, his insurance carrier, or the state compensation fund is compelled to pay, when the employee killed in the course of his employment leaves no dependents. It is just as much a part of the expense the employer must bear or the insurance carrier assume as the amounts to be paid directly to the employee or his dependents, because it is imposed for the same general purpose, the promotion of the welfare of those disabled in industry, and in the exercise of the same power, the police power of the state. The fact that it reaches the injured employee for whom it is intended through a somewhat different channel--that is, is paid into the state treasury and held in a special fund, to provide in the manner stated for the promotion of the vocational rehabilitation of persons disabled in industry--does not give it a tax status different in any degree from that of the compensation that must be paid directly to employees or their dependents.

Being imposed for the same purpose, and in the exercise of the same power, it is necessarily the same kind of tax as other compensation, and under all the authorities this is not a tax on property, but a tax on occupation or business."

* * * * *

"Under the great weight of authority, a tax on occupation, business, etc., is not, in legal contemplation, a tax on property, which falls within the inhibition imposed by the usual constitutional provision in relation to uniformity of taxation.

* * * * *

"To substantiate their contention that the \$850 is a tax on property petitioners cite two cases, People v. Yosemite Lumber Co., 191 Cal. 267, 216 P. 39, and Bryant v. Lindsay, 94 N. J. Law, 357, 110 A. 823, upon which they chiefly rely. The New Jersey case is not in point, though the court did hold that the \$400, which an act of the Legislature, separate and distinct from the Workmen's Compensation Law and in no way amendatory or supplementary thereof, required employers to pay in all cases in which an employee killed left no dependents, was a tax on property, and therefore unconstitutional. This holding, however, was based principally upon the purpose for which the payment was required; the law providing that it be made to the commissioner of labor, to be used in defraying the expenses of the state labor bureau, and the court said that this was 'nothing more nor less than a tax imposed for the purpose of supporting the expense of a state agency,' very much the same as if it had been prescribed that it 'be turned into the state or county treasury, to be used in helping to defray the salaries of the various judges of the courts of common pleas,' whose duties required them to try cases arising under the Compensation Law. The other

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case is based on provisions somewhat similar to Arizona's, and is authority for petitioner's position; but we are clearly of the view, notwithstanding the holding therein, that the payment in question is not a property, but an occupation, tax. The great weight of authority is to this effect."

From the foregoing we are of the opinion that House Bills 487 and 488 are constitutional.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG