DIVISION OF WORKMEN'S COMPENSATION: The Division of Workmen's Compensation may make a nunc pro tunc order of record showing the acceptance by an employer of the workmen's compensation amendment with respect to occupational disease where there has been substantial compliance with subsection (b) of Section 3695, R.S. Mo. 1939.

September 8, 1949

FILED 9/23/24
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Honorable Spencer H. Givens
Director
Division of Workmen's Compensation
Jefferson City, Missouri

Dear Director Givens:

This will be in response to your request to this department for an opinion on the question of whether there has been compliance on the part of General Wesco Stove Company, a corporation, employer, of Springfield, Missouri, with sub-section (b) of Section 3695, R.S. Mo. 1939, in electing to bring itself, with respect to occupational disease, under the Missouri Workmen's Compensation Act, and whether the Division of Workmen's Compensation may now, as of March, 1944, make an order of record that the said employer has elected to bring itself under the occupational disease amendment incident to the claim of Ira D. Fetter, an employee of said company, for compensation for disability occasioned by an occupational disease acquired in the course of his employment. Your letter in that behalf is as follows:

> "Enclosed herewith is a 'Request for Order of the Division of Workmen's Compensation Holding Substantial Compliance with Acceptance of Occupational Disease Amendment,' which was filed with us yesterday by Ira D. Fetter, employee, General Wesco Stove Company, employer, and American Mutual Liability Insurance Company, insurer. In view of the nature of the request, we feel that this matter should properly be turned over to you, as our duly constituted legal adviser, for an opinion.
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> "I felt that the Occupational Disease Acceptance files of the two employers mentioned in the request--that is, the General Wesco Stove Company and the Woods-Evertz Stove Company--should be sent along with this letter so that

you might have the benefit of them in connection with the request."

There is submitted with your request for this opinion, as the background and history and present constituent facts of the case, a statement duly executed by Mr. Ira D. Fetter, the employee, General Wesco Stove Company, a corporation, employer, and American Mutual Liability Insurance Company, insurer. The facts, as revealed by the said statement, are: That the employer, General Wesco Stove Company, a corporation, at Springfield, Missouri, engaged in the manufacture of stoves and related products and equipment, succeeded in said enterprise and manufacturing business in 1944, the Woods-Evertz Stove Company, also a corporation; that in 1934, the selling or disposing corporation, Woods-Evertz Stove Company had elected to accept the terms of said sub-section (b) of Section 3695, to bring itself within the terms of said section with respect to occupational disease; that upon the taking over of the business and the operation of the business of the Woods-Evertz Stove Company by the General Wesco Stove Company in 1944, the business was continued with apparently the same personnel, the same incidents of business administration, with the only noticeable change being, as it is said, the name of the operator of the business. At all times referred to in said statement of facts, and referred to in this opinion, American Mutual Liability Insurance Company of Boston, Massachusetts, was, and continues to be, the workmen's compensation carrier for the two respective corporations engaged, respectively, the one succeeding the other, in the named business.

The said statement of facts recites that there was a foundry operated in connection with the said manufacturing business for some years prior to 1944, and during the ownership and operation thereof by Woods-Evertz Stove Company. The foundry element of the business was, at the beginning thereof, carried on by a number of the older employees of the foundry department of the business as a rather independent activity under an agreement with Woods-Evertz Stove Company.

The employees of the foundry operating that part of the business composed themselves into a co-partnership, and, as such, took over the exclusive operation of the foundry, with the knowledge and approval of Woods-Evertz Stove Company, the partnership exercising the right of hiring and discharging the employees of the foundry and carrying on all negotiations with the union with which it was affiliated respecting its contract. The foundry billed back to the Woods-Evertz Stove Company the credit charge for castings produced, and, thereafter, at regular periods a settlement between the

Woods-Evertz Stove Company and the partnership was had, and from the amount found to be due there was deducted the cost of raw material used by the foundry and ordered by the corporation in behalf of the partnership. Also were deducted insurance premiums and any other payroll deduction covering the employees of the partnership operating the foundry in accordance with the terms of the agreement between the stove company and the partnership in the foundry and under which the authors of said statement all agree that the workmen's compensation coverage including occupational disease was arranged for and the policy issued to the Woods-Evertz Stove Company, the corporation.

At the time General Wesco Stove Company took over the business from Woods-Evertz Stove Company in 1944, this same agreement was carried over with the partnership. The General Wesco Stove Company, like the Woods-Evertz Stove Company, took no part in the operation of the foundry, which was conducted solely by the partnership, but it was, nevertheless, as we understand from the statement and the facts, a recognized part and instrumentality of the manufacturing business itself carried on by the corporation.

When the General Wesco Stove Company assumed and took over the operation of the business in 1944, the insurance carrier prepared and forwarded a notice to General Wesco Stove Company for its execution and filing with the Workmen's Compensation Commission, on form 67a, constituting its election to bring General Wesco Stove Company, the said corporation, with respect to occupational disease, within the provisions of the Compensation Act, or to return the said notice of acceptance to the insurance carrier at Kansas City, Missouri, whereupon the carrier would file the same with the Commission for the corporation. The insurance carrier later, and pursuant to its preparation and forwarding of said notice of election, in the belief that it had been filed with the Commission, requested and received notice of compensation rating from the rating bureau setting out the rate fixed by the rating bureau for coverage of occupational disease, and under which rating General Wesco Stove Company continued to pay its premiums which included occupational disease rates and sums, which premiums were accepted by the carrier, each believing and understanding that sub-section (b) of Section 3695 had been fully complied with by the filing of said acceptance with the Workmen's Compensation Commission by General Wesco Stove Company.

The operation of the business continued under the belief by all concerned that the employer was under the Act as to the

occupational disease amendment. No employee of the General Wesco Stove Company, filed with the Commission and his employer any written notice that he elected to reject the acceptance by the employer of the occupational disease amendment as provided for in said sub-section (b) of Section 3695. It seems, however, that some employee of the office of General Wesco Stove Company, without understanding of its importance, laid aside or misplaced the said acceptance prepared by the insurer on form 67a for execution by General Wesco Stove Company and the filing thereof with the Commission, and the same was overlooked or lost, and the attention of no one was further called to it being at the office of the corporation. This situation was first learned in consequence of Mr. Ira D. Fetter, one of the members of the said partnership operating the said foundry, who had been an employee of the foundry for about forty years, on May 28, 1948, becoming disabled and unable to continue his duties because of contracting silicosis and a heart condition resulting therefrom arising out of and in the course of his employment. The employer, believing that it was, and intending to be, under the occupational disease amendment, caused the condition of the employee to be established by medical examination and reported the same to the American Mutual Liability Insurance Company, the compensation carrier, and upon investigation the carrier provided medical attention according to the terms of the Act believing that the employer and the employee were under said amendment to the Act, and upon investigation accepted Mr. Fetter's claim as compensable and began issuing to him regular weekly checks in the amount of $20.00 per week, the maximum rate for such condition. The carrier provided medical attention for the employee in accordance with the terms of the Act, and in accordance with the terms of their policy. The case was promptly and properly reported to the Division of Workmen's Compensation. The employee, the employer and the carrier all have conducted themselves, both before and since it became known that the actual filing of the acceptance of the occupational disease amendment had been overlooked, as if the Act had been literally complied with as to the filing of said notice of acceptance, by the doing and approving and participating in and discharging the obligations resting upon each and all of them, both under the contractual relationship of policy coverage and the terms of the occupational disease amendment itself. But, since the physical act of filing the notice of acceptance itself with the Commission in 1944, upon the assumption of the operation of the business of the General Wesco Stove Company, was not performed, the question here, and the only question, we believe, for solution is, was there at the time, and has there since,

by reason of the aforesaid acts of the employer and the carrier, with respect to accepting the occupational disease amendment by the employer, been substantial compliance with said amendment.

The question also arises that, since there was no literal compliance with the amendment by the execution and the filing of the election by the employer to accept the amendment on March 1, 1944, and if there has been substantial compliance with the amendment by the employer, does the Commission have jurisdiction to make an order of record now as of March 1, 1944, that the employer has accepted the said occupational disease amendment, so as to legally establish liability upon the employer and the carrier herein for the payment of compensation for occupational disease arising out of and in the course of their employment by the employees of said employer in like manner as the Commission would have done had the written election been actually filed with the Commission on March 1, 1944.

With these questions in view we should keep in mind the facts that the employer paid to the carrier, upon special rating in that behalf by the rating bureau, additional insurance premiums necessitated by the inclusion of occupational disease as being compensable and the employer and the carrier have paid compensation to the employee for almost a year, under the belief that they were, and in fact had the intention of being under the occupational disease amendment.

We believe the Commission has the jurisdiction and thereunder, the lawful power to make such an order nunc pro tunc, and pursuant thereto, to approve the agreement between the employer and the carrier on the one hand and the employee on the other hand, that the employee shall be paid as he is now being paid compensation for occupational disease under the authority and approval of the Commission and under the terms of said sub-section (b) of Section 3695, R.S. Mo. 1939.

In consideration of this and any other question arising in the discussion and construction of the Workmen's Compensation Act of this State, to give full and complete effect to the intent of the Legislature, as expressed in the several sections of said Act, we must keep in mind the terms of Section 3764 of the Act, which states:

> "All of the provisions of this chapter shall be liberally construed with a view to the public welfare and a substantial compliance therewith shall be sufficient to give effect to rules,

> regulations, requirements, awards, orders or decisions of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto."

The St.Louis Court of Appeals in the case of Murphy vs. Corporation, 155 S.W. (2d) 284, in discussing Section 3374, R.S. Mo. 1929, which is, and was noted in the case as being our present Section 3764, R.S. Mo. 1939, supra, l.c. 287 in giving effect to said section said:

> "In construing and applying the last above-mentioned section of the compensation law, our Supreme Court has held that the law should be liberally construed as to the person to be benefited, and that doubt as to the right of compensation should be resolved in favor of the employee. * * * ."

Sub-section (b) of said Section 3695, confers general jurisdiction upon the Commission to hear and determine claims of employees for compensation arising out of occupational disease, and in the exercise of that jurisdiction the Commission may consider and determine claims in individual cases by consent of the employee, the employer and the carrier, where there has been substantial compliance with the statute by the employer in accepting said amendment. We believe the statement of facts submitted to this department by the parties interested and the recapitulation thereof, at the beginning of this opinion, show there has been substantial compliance with the amendment by the employer. This, we believe, requires an understanding of what is meant by "substantial compliance", in this case, with sub-section (b) of said Section 3695, as the phrase has been defined by the text-writers and the Courts. 60 C.J., page 677, defines the phrase in the following text:

> "Substantial compliance. The compliance with the essential requirements, whether of a contract or of a civil or criminal statute."

Our St.Louis Court of Appeals had before it for construction the phrase "substantial compliance", in the case of Railroad vs. Houck, 120 Mo. App. Rep., page 634. The case is quite too lengthy to quote extensively here. We will content ourselves with a very brief statement of the background of the case and the definition given by the Court of the phrase

"substantial compliance." The suit grew out of a subscription made by a person for the construction of a railroad, provided it went through or into the town of Bloomfield, Missouri. After the signing of the subscription paper by the defendant in the case, the town of Bloomfield voted to extend its corporate limits some 1900 feet north of the north limits of the town as they were when the subscription was made. The railroad was constructed through a very small portion of a corner of the newly added territory, but far removed the railroad and a new depot from the property of the subscriber. The Court held that there was no substantial compliance with the contract evidenced by the subscription paper on the ground that the subscriber would derive no benfit from the construction of the road because it and its accommodations were so far removed from his property that there was a practical failure of consideration. The Court, l.c. 648, 649, so holding, defined "substantial compliance" as follows:

> "* * * By substantial compliance we understand that, although the conditions of the subscription be deviated from in trifling particulars which do not materially detract from the benefit the subscriber would derive from literal performance, but leave him substantially the benefit he expected, he is bound to pay.* * * ."

Looking at the acts of the parties in interest in this case, taking the view the Court of Appeals had in defining substantial compliance in the case cited, we must conclude that the failure to file its written acceptance of the occupational disease amendment by General Wesco Stove Company, when it assumed the business of the enterprise, did not change the interests or rights of any person concerned nor were they in anywise materially affected or damaged thereby, but on the contrary, left them all substantially in the same position as to their then, their present and future rights as if the written acceptance had actually been filed. The status of the parties in interest was not changed by such technical failure, and by carrying out fully and completely the terms of the Act resulting in the payment of compensation to the employee who contracted occupational disease arising out of and in the course of his employment as if the amendment had been strictly complied with, we believe the statute has been substantially complied with.

We believe that, while the Workmen's Compensation Commission has general jurisdiction under said sub-section (b) of occupational disease as a subject for compensation, it is necessary for the employer in the individual case to so substantially comply with the terms of said sub-section (b) of

said Section 3695, that jurisdiction may be lawfully lodged in the Commission in the individual case. Thus believing, if there has been substantial compliance with sub-section (b) by the employer, as we are convinced there has been in this case, such substantial compliance will suffice to give to the Commission jurisdiction over the individual case here and of the persons to be affected. On this question 15 C.J. 807, states the following text:

> "Where the court has jurisdiction of the subject matter, jurisdiction over the particular action may be conferred by consent; * * * . The principle as to consent has been held to be applicable only to the question of general jurisdiction to adjudicate as to the subject matter and not to the question whether the particular facts of the case bring it within that conceded jurisdiction. * * * ."

Our Supreme Court discussed the question of the elements of jurisdiction and laid down clearly and effectively the rule of what constitutes the acquisition of jurisdiction by Courts, both of the subject matter and the person, in the case of State vs. Nixon, 133 S.W. 240. We believe that case will be sufficient to satisfy the statute here, and to convince this Commission that it had jurisdiction of the subject matter on March 1, 1944 by the terms of the statute and that jurisdiction of the individual case and of the persons in interest in the individual case later was acquired by consent of the parties by reason of a substantial compliance by them with said sub-section (b), and in the exercise of such jurisdiction the Commission may make, now for then, an order of record that the employer has elected to accept the occupational disease amendment under the terms of said sub-section (b). The Court, l.c. 342, on the principle, said:

> "* * * Jurisdiction is of two kinds--one of the subject, the other of the parties--and both must exist in order to authorize the court to try and determine the cause. Unless the law gives the court jurisdiction of the subject, jurisdiction cannot be acquired by the consent of the parties, but, if the law gives jurisdiction of the subject, the court may acquire jurisdiction of the parties by their consent. If A. and B. both reside in this state and A. should sue B. for a debt in

> the circuit court of a county in which neither resides, and the writ is served on B. in that county, the court would have jurisdiction of the subject--that is, jurisdiction of subjects of that character--but it would not have jurisdiction of that case by virtue of the service of the process. But if B., without challenging the jurisdiction of the court should file his answer pleading to the merits, neither party could afterwards question the jurisdiction of the court because by their actions they are conclusively presumed to have consented to give the court jurisdiction of their persons--that is, their personal rights--in that case. * * * ."

The question of the formal compliance with a statute under the Compensation Act of Missouri, by the giving of a notice, or the failure to so comply with such statute by failing to give the notice, required to be posted in and about the place of business of an employer, as bearing upon the jurisdiction of the Commission to award compensation, or the substantial compliance with the statute in such regard, so as to confer jurisdiction without such posted notice, was before our Kansas City Court of Appeals in the case of Brollier vs. Van Alstine, et al., 163 S.W. (2d) 109. The case is lengthy, quite too much so to give an extended statement of the facts, but we may apply the rule announced by the Court growing out of the main question in the case, we believe, by stating briefly the immediate facts of the case. The case was one where a co-partnership existed. The question arose in the case whether or not the acceptance of the Act by the co-partnership was completed because notices were not posted in and about the place of business of the employer as required by Section 3693, R.S. Mo. 1939. There was no evidence of posting the notices, so the case recites. But the acts and conduct of the employer and all others connected with the case, and brought into view in the claim filed by Brollier for compensation, had been performed and carried out as if the notices had been posted as required by the statute, and as if every other fact necessary to bring the employer under the Act had been fully complied with. The Court in sustaining the award of compensation to the employee, and holding that, even if the notices were not posted as required by the statute, everything else being done as if such notices had been published, the actual failure to post the notices did not affect the right to compensation or the jurisdiction of

the Workmen's Compensation Commission to award it. The Court, in so expressing itself, l.c. 112, said:

> "It is next urged that the acceptance was never completed in law so as to become binding on the employer because no notices were ever posted in and about the place of business of employer, as required by Section 3693, R.S. Mo. 1939, Mo. R.S.A. Sec. 3693. The record is silent so far as direct evidence of the posting of the notices mentioned in said section is concerned. However, all of the testimony indicates that employer intended to operate under the Act and thought that he was doing so. He filed acceptance of it, although he stated that he did not specifically remember such filing. He took out insurance under it. He paid premiums on said insurance, said premiums being based upon the number of employees he had in his employ, plus those in the employ of sub-contractors working under him. When the instant contract was entered into he caused insurer to send certificates of his insurance to Anthony, to Bliss Realty Company, and to the owner of the property. His agent, Anthony, acting for him, employed claimant and told him that Van Alstine was one of his employers, that claimant would work under the Compensation Law, and that he would be covered by insurance. In the absence of proof to the effect that notices were not, in fact, posted, and in view of proof of his agent's direct statement to claimant that Van Alstine was an employer and was under the Act, we think there is substantial evidence to give rise to the inference that all formalities necessary for compliance with Section 3693, R.S. Mo. 1939, Mo. R.S.A. Sec. 3693, were complied with, including the posting and maintenance of notices. * * * ."

It is believed that under the facts of this case as submitted by the joint statement of all the parties in interest of their substantial compliance with, and the expressed intention by the conduct of each and all of such parties to come under, the terms of said Act, that this Commission is clothed with complete jurisdiction to make an order that there has been such substantial compliance with the terms of sub-section (b) of

Section 3695, R.S. Mo. 1939, as to bring the parties within the terms of said amendment, and that the Court has jurisdiction to so rule and order. The only remaining question, we think, is, whether the Commission may make an order of record in its record now, in view of the substantial compliance with the statute by the parties, as of March 1, 1944, that the General Wesco Stove Company, the employer herein, has accepted the occupational disease amendment. This brings again to attention, Section 3764, of the Compensation Act, supra, which requires all of the Workmen's Compensation statutes, Chapter 29 of our statutes, to be liberally construed in the entire administration of the Act to the disregard of matters of any technical nature in respect thereto. We believe that in obedience to the terms of said statute the Commission has the right to make its order of record now as of March 1, 1944, reciting that on that day General Wesco Stove Company, a corporation, had elected to accept the terms of the occupational disease amendment, sub-section (b) of Section 3695, R.S. Mo. 1939. The making of a "nunc pro tunc entry" has long been, by both convenience and necessity, followed by the Courts for the perfection of their records to make their judgments express the decrees and decisions of the Courts. We find in neither text nor decision any rule which would prevent corporations, individuals or public administrative bodies, likewise, at a later date from making an order in their records of the carrying on of incidents of their business as of a previous date, if such be the fact. There is no person complaining here. All of the parties in interest involved in this proceeding desire this to be done. We see no reason in either fact or law why it should not be done.

CONCLUSION

Considering the above recited facts and the above cited and quoted authorities, it is the opinion of this department that the Division of Workmen's Compensation of this State has jurisdiction to make an order at this time as of March 1, 1944, showing that General Wesco Stove Company, a corporation, has accepted the occupational disease amendment to Section 3695, R.S. Mo. 1939, as provided in sub-section (b) of said Section 3695.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

J. E. TAYLOR
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