WORKMEN'S COMPENSATION COMMISSION: RULES AND REGULATIONS IN REGARD TO EXAMINATION OF RECORDS OF EMPLOYERS:

Workmen's Compensation Commission may not make a rule authorizing the Commission to examine the records of employers to determine whether or not such rule has been violated.

October 6, 1939

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Mr. Edgar C. Nelson, Chairman
Missouri Workmen's Compensation Commission
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an official opinion from this department on the following state of facts:

> "Our attention has been called to the alleged failure of certain self-insurers to report all accidents as provided for by Section 3332, Revised Statutes of Missouri.
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> "With this alleged situation in mind, do we have the right, under the Law, to send an investigator into an industrial plant and check its first-aid records or to make any investigation we deem necessary in order to ascertain whether or not the quoted section is being violated?
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> "Self-insurers under the Missouri Workmen's Compensation Law are governed by our 'Revised Rules for Self-Insurers,' made effective January 1, 1936, which we set up under the authority given us by Section 3361, which reads as follows:
>
> "'The Commission and its members shall have such powers as may be necessary to carry out all the provisions of this chapter, and it may make such rules and regulations as may be neces-

sary for any such purpose.'

"A reading of these rules reveals that there is nothing said about any investigation on the part of the Commission, but it is our impression that under Section 3332 we would have the right to make an investigation where we thought that the section was being violated. I think that this would cover all employers, both self-insurers and those who carry insurance.

"If we do not have authority under this section, is our authority under Section 3361 broad enough to permit us to make a rule providing for such investigations when deemed necessary by the Commission?"

Section 3332, R. S. Missouri 1929, to which you refer in your letter is as follows:

"Every employer in this state, whether he has accepted or rejected the provisions of this chapter, shall within ten days after knowledge of an accident resulting in personal injury to an employe, notify the commission thereof, and shall, within one month, file with the commission under such rules and regulations and in such form and detail as the commission may require, a full and complete report of every injury or death to any employe for which the employer would be liable to furnish medical aid or compensation hereunder had he accepted this chapter, and every such employer shall also furnish the commission with such supplemental reports in regard thereto as the commission shall require. Every such employer and his insurer, and every injured employe, his dependents

> and every person entitled to any rights hereunder, and every other person, receiving from the commission any blank reports with direction to fill out the same shall cause the same to be promptly returned to the commission properly filled out and signed so as to answer fully and correctly to the best of his knowledge each question propounded therein and a good and sufficient reason shall be given for failure to answer any question. No information obtained under the provisions of this section shall be disclosed to persons other than the parties to compensation proceedings and their attorneys, save by order of the commission, or at a hearing of compensation proceeding, but such information may be used by the commission for statistical purposes. Every person who violates any of the provisions of this section, or who knowingly makes a false report or statement in writing to the commission, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than one week nor more than one year, or by both such fine and imprisonment."

It will be noted that an employer who violates the provisions of this section is subject to prosecution and a fine.

You also refer in your letter to Section 3361, R. S. Missouri 1929. This section is as follows:

> "The commission and its members shall have such powers as may be necessary to carry out all the provisions of this chapter, and it may make such

rules and regulations as may be necessary for any such purpose."

Under this section we think the Commission may make a rule or regulation to carry out the provisions of the Workmen's Compensation Commission Act, provided such rule or regulation is not in violation of some statute or a constitutional provision. This rule is announced in Volume 71 Corpus Juris, page 922, Section 669, which provides in part as follows:

"The board is authorized to make such orders as in its judgment may meet the ends of justice, and to promulgate reasonable rules of procedure relative to the exercise of its powers and authority for the protection of those who are injured, and also to protect the rights of the employer and of the insurance carrier, and to safeguard the state insurance fund. The rules, however, must be reasonable, and must not be inconsistent with the workmen's compensation act or with other laws of the state. * * * * * * * * * Rules made by the board in compliance with the act, and not in conflict with organic laws, when proper and reasonable, have the force and effect of law. * * * * * * * * * * * * * * * * * * * * "

Since the purpose of your proposed rule is to determine whether or not an employer has violated the provisions of said Section 3332, thereby subjecting such employer to prosecution, we think the first obstacle to such a rule would be: Does it require the employer to furnish evidence which might incriminate him? If it does, then such a rule would be in violation of Section 23 of Article II of the Constitution of Missouri, which is as follows:

"That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, after being once acquitted by

> a jury, be again, for the same offense, put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted fail to render a verdict, the court before which the trial is had may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court, or, if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law."

In the case of State ex rel. Attorney General v. The Simmons Hardware Co., 109 Mo. 118, the construction of a statute which required a corporation to furnish certain information was under consideration. This statute required the corporation to make a report in which the corporation was required to divulge information which might subject it to a prosecution. This statute was declared unconstitutional because it violated the provisions of said Section 23 of Article II of the Constitution of Missouri in that it required a person to furnish evidence against himself which might be used in a criminal case against such party. At l. c. 124 of said Hardware case the court, in speaking of this rule, said:

> "The defendant here does not attempt to assert any exemption from regulation or modification of its charter powers within the proper limits of constitutional authority, so that question need not be discussed; but it insists that to demand of one of its officers an answer under oath to an official inquiry, touching a matter which may form the subject of a criminal accusation against him, is an infringement of his rights and of its

own, as secured by the federal constitution as well as by that of our own state.

"In looking into the merits of this contention we shall merely consider it with reference to the constitution of Missouri, as in the view we take of the subject it will not be necessary to go further.

"It is scarcely essential at this day to premise that our written constitution, as the most direct expression of the will of the people, furnishes the paramount rules for their government. Any enactment by their accredited representatives which comes in conflict with it, must be regarded as in excess of the authority of the latter, and hence of no effect. When such a clash is plainly apparent, it is the province of the courts, when properly invoked, to so declare. In so doing they merely execute a power intrusted to them by the people, and which must, obviously, be lodged somewhere, to give the organic law a practical vitality.

"Strictly speaking, the courts do not assume, and have no authority, to nullify an act of the legislative department. They are simply empowered to decide, upon proper occasion, whether or not there is an inconsistency between such an act and the terms of the constitution."

Again in the same case the court further said at l. c. 125:

"The Missouri constitution asserts

'that no person shall be compelled to testify against himself in a criminal cause.' This command is found in the same, or closely similar, language in the fundamental law of most, if not of all, of the United States. To fully grasp its meaning we must note its place in the history of the law as one of the most important of the rules of procedure that express the fundamental difference between the criminal practice prevailing in continental Europe and that of countries which trace their laws, as we do, to the English source. In the former, the accused is required to submit to a rigid official examination touching the charge against him. In the latter such an examination is positively forbidden. The reason of this difference is found in that higher regard for the personal rights of the individual citizen, which obtains in countries following the English common law, and to which, in part at least, is traceable the growth of that independent spirit which has secured to the people of those countries so large a share of liberty, and placed them in the vanguard of the world's progress.

"The constitutional provision before us is, no doubt, quite inconvenient in some instances, as a barrier to investigation of criminal conduct, but its larger value in expressing and enforcing a principle of individual right is thought to more than counterbalance such inconvenience.

"But what is its scope? In answering this question, we must keep in view the reason and spirit which form its background. Does the term 'criminal cause' refer merely to litigated proceedings in a court of justice? If it does, then the provision in question does

not reach far enough to shield the defendant in its present position. Fortunately, at this point of our inquiry we are greatly aided by recent decisions elsewhere.

"In Counselman v. Hitchcock (1892), 142 U. S. 547, the supreme court of the United States construed the language of the federal constitution (declaring that no person 'shall be compelled in any criminal cause to be a witness against himself') as protecting one, subpoenaed before the grand jury, from making disclosures which might subject him to subsequent prosecution for violation of the interstate commerce act. In the course of the opinion in that case, reviewing a great number of state decisions on the same point (which we need not, therefore, otherwise cite) the court by Mr. Justice Blatchford says: 'But, as the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation. * * * It is a reasonable construction, we think, of the constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him." Emery's Case, 107 Mass. 172, 182.'

"This led, of course, to the conclusion that the witness in question could not

be required to make the disclosures sought.

"In Boyd v. United States (1886), 116 U. S. 616, the same result was reached by that court in an elaborate opinion by Mr. Justice Bradley, in which it was held that the act of congress of June 22, 1874, was unconstitutional in that it required a claimant of property, seized for violation of the revenue laws, to produce his private books and invoices in court, or, in event of failure to do so, the allegations against him, respecting the property seized, should be 'taken as confessed.' That decision embodies the results of much research, and strongly supports the applicability of the constitutional protection to such a case as that at bar.

"One of the most philosophical text-writers on the law of evidence summarizes the conclusions of many decisions on the subject thus: 'It has been said that a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can be insured, and this position is abundantly sustained by authority.' 1 Wharton on Evidence (3 Ed.) sec. 536, and cases cited."

Again at l. c. 129 the court said:

"In the formation of political organisms, called states, under written constitutions like ours, the people sometimes see fit to expressly reserve to themselves the continued enjoyment of certain rights, which they deem too sacred to be surrendered to the control or regulation of their governing representatives.

> "By those who are familiar with the historic struggles through which the present peaceful acknowledgment of the civil liberties of the people has been reached, those reserved rights are justly regarded as objects of the most tender and earnest care, and are accorded a reasonable construction in harmony with the principles of freedom, which they seem designed to embody. They form an important part of the personal liberty which all our American systems of government are intended to secure."

We have quoted the Simmons Hardware case, supra, quite at length because the reason for this provision of the constitution is so well discussed by the court in that case.

If the Compensation Commissioners were permitted to make and enforce a rule which would authorize them to go into the records of an employer to determine whether or not the law had been violated, we also think such a rule would be in violation of the search and seizure provisions of the Constitution of Missouri which are as follows: (Section 11, Article II)

> "That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

We think that the foregoing constitutional provisions would apply so that the Workmen's Compensation Commission would be prohibited from obtaining evidence from an employer, either by the provisions of a rule and regulation of the Commission, or by any statute which

purported to authorize the search or inspection of records of an employer.

CONCLUSION.

From the foregoing it is the opinion of this department that the Workmen's Compensation Commission would neither under the provisions of the law nor under a rule it might make, be authorized to send an investigator into an industrial plant to determine whether or not the Workmen's Compensation law is being violated or whether a rule of the Commission is being violated.

Respectfully submitted

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APPROVED:

W. J. BURKE
(Acting) Attorney General

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