LABOR, DEPARTMENT OF: Female contestants in a "walkathon" come within the provisions of Section 10171, R. S. Mo. 1939, and cannot participate more than nine hours a day or fifty-four hours a week.

December 8, 1941

12-11

Mr. Orville S. Traylor
Commissioner,
Labor and Industrial Inspection Department
Jefferson City, Missouri

FILE
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Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

> "Please advise this Department is female contestants of an establishment known as a "walkathon", come within the prohibition of Section 10171, R. S. Mo., 1939.
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> "As I understand it, a "walkathon" is a place of amusement where spectators are charged an admission fee to watch the contestants walk around a platform or track twenty-four hours a day with the exception of a fifteen minute rest period each hour. The contest usually lasts five or six weeks and a prize is given for the last contestant able to walk the track, a contest of the most gruelling sort.
>
> "Also advise if the above female contestants are prohibited if they received compensation other than the prize given at the end of the contest."

Section 10171, R. S. Mo. 1939, provides as follows:

> "No female shall be employed, permitted, or suffered to work, manual or physical,

> in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, hereinabove described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week: * * * * *"

This statute has never been passed upon by the appellate courts of this State. It might be well to note, however, that our Supreme Court in State v. Cantwell, 179 Mo. 245, 78 S. W. 569, sustained a statute prohibiting persons from working beneath the earth while searching for minerals or coal longer than eight hours a day. The court held that the police power of the State extended to the hours of labor in dangerous occupations. However, in State v. Miksicek, 225 Mo. 561, 125 S. W. 507, a statute regulating the hours that employees in a bakery could be worked, was held unconstitutional because the court could see no direct relation to the public health, welfare or morals. This case was decided upon authority of Lochner v. New York, 198 U. S. 45, 49 L. Ed. 937, 25 S. Ct. 539, which involved an identical statute and which statute the Supreme Court of the United States by a five to four decision held to be unconstitutional.

An examination of the cases which deal with statutes limiting the hours of labor in private employment of women have almost universally been upheld as a valid exercise of the police power of the state. The principal case is that of Muller v. Oregon, 208 U. S. 412, 52 L. Ed. 551, 28 S. Ct. 324. The court in that case in deciding the purpose of this type of statute said:

> "'That woman's physical structure and the performance of maternal

> functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on h r feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. . . . * * * * * The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. * * * *"

It is a rule of statutory construction that statutes limiting hours of service are liberally construed to effect their purpose. 31 Am. Jr., p. 1057. In determining what employers are within the meaning of statutes regulating hours of labor it has been said that the statutes should be "read in the light of the general purpose of the Legislature in enacting" them. Commonwealth v. Riley, 210 Mass. 386, 97 N. E. 367. Of course, the legislative intent must be determined, and, when determined, is controlling. State v. Pacific

American Fisheries, 73 Wash. 37, 131 Pac. 452.

As was pointed out in Schapp v. Bloomer, 181 N. Y. 125, 73 N. E. 568, that in construing statutes regulating hours of labor the court should endeavor to ascertain their fair and reasonable meaning so as to avoid any construction which would either extend or limit their provisions beyond that which was evidently intended.

The evident purpose of Section 10171, supra, is to protect women from "the physiological phenomenon, fatigue" and to provide "rest to repair the waste of the toxin." Frankfurter's, Hours of Labor and Realism, 29 Harvard Law Review 353. Such laws are justifiable in so far as they relate to woman because of her physical organization, her maternal functions, the rearing and education of children and the maintenance of the home. 31 Am. Jr. 1062.

The question so arises - Are women who participate in a "walkathon," being allowed to "work in a place of amusement," within the meaning of Section 10171, supra?

A "walkathon" has been defined in Sportatorium Inc. v. State, 104 S. W. (2d) 912, as:

> "A further variation of the Marathon Dance in which contestants walk instead of dance."

In Weaver v. Stone, 11 Fed. Supp. 559, the court gives the following definition (l. c. 560):

> "Although the term has not yet found its way into the dictionaries, a 'marathon dance' is generally understood to be a commercialized evolution of the marathon race. It is an indoor endurance contest in which the contestants, instead of running, profess to dance in couples in an arena over long periods of time, with short but insufficient intermissions for rest and hygiene, the usual periods being 45 minutes of dancing and 15 minutes of rest in each hour during the continuance of the contest, thus

> competing against each other until one by one they are eliminated by exhaustion until only one couple remains.
>
> "A 'walkathon' is also well understood to be a further variation of the marathon dance in which the contestants walk instead of dance. In short, it is just such an endurance contest as the plaintiff describes in his bill and alleges that he proposes to conduct. * * * * *"

That such an exhibition has a deleterious and harmful effect upon the health of the contestants, especially the women, we believe is apparent upon its face. For a woman to walk forty-five minutes out of every hour, twenty-four hours a day, for a number of days, would have the effect of seriously impairing or injurying the health of said woman.

In People v. Bernquist, 3 N. Y. S. (2d) 594, the court commented upon the appearance of the women contestants as follows (l. c. 596):

> "The girl contestants appeared in court worn and tired. They were pale, nervous, showed effects of eyestrain and had circles under their eyes; they were continually rubbing their eyes and biting their finger nails and, at the conclusion, many broke down and sobbed. During the hearing one of the girls suddenly had a nose bleed and all appeared in a high state of nervous tension. The boys appeared normal and endured the hardships of this long-distance dance contest much better than the girls."

Therefore, it is apparent that the Legislature in enacting Section 10171, supra, intended to prohibit the very thing that is brought about by the participation of women in such an exhibition as a "walkathon." However, if such

a contest does not come within the purview of the statutes, then there is nothing that the state can do in stopping such a spectacle but the matter must be left to the good sense and decency of the public as a whole.

We do not think it can be questioned that a contest such as a "walkathon" is a place of amusement. According to the facts submitted, it is held indoors, to which structure an admission fee is charged to all those who desire to watch the contestants. The contestants are upon a platform upon which they walk and around said platform are seats for those who desire to watch them. A place of amusement has been defined as "a place to which people resort for the purpose primarily of being entertained and amused." Brown v. Meyer Sanitary Milk Co., 96 Pac. (2d) 651, 150 Kans. 931.

In the case of In Re Shibe, 177 Atl. 234, the Superior Court of Pennsylvania held that a baseball park was "a place of amusement." The court pointed out that although an exhibition was conducted in which one team contested against another, that it was viewed from the pavilion by spectators, and that it differed not at all from a circus or a theatrical performance. The same reasoning is applicable in the instant case because although the "walkathon" might be a contest in so far as those who participate are concerned, still the primary purpose in conducting such a contest is to attract spectators who will pay their money to view the proceedings and thereby be "entertained" and "amused."

The question next arises whether these contestants may be said "to work" within the meaning of the statute.

The cases which are most analogous to the proposition at hand are those which involve statutes which forbid the employment of minors "to work" in theaters. In State v. Rose, 51 So. 496, 125 La. 462, the Supreme Court of Louisiana said (l. c. 497):

> "The word 'work' has a much more comprehensive meaning than the term 'labor,' and has been thus defined:
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> "'To exert one's self for a purpose, to put forth effort for the attainment

> of an object; to be engaged in the performance of a task, duty or the like.' See Webster's Int. Dict. verbo,
>
> "The term as thus defined covers all forms of physical or mental exertions, or both combined, for the attainment of some object other than recreation or amusement."

In the well considered case of Commonwealth v. Griffith, 90 N. E. 394, 204 Mass. 18, the court said:

> "The word 'work" is of broad signification. One of its primary meanings, as it is defined in Webster's International Dictionary, is 'effort directed to an end,' and the author quotes, from Shakespeare, Portia's call:
>
> "'Come on, Nerissa; I have work in hand
> "That you yet know not of.'
>
> "The object of the statute forbids restriction of the word to a narrow meaning.
>
> "Another question is whether the jury could find that the defendant employed these children. Here again, if we go to the lexicographer, we have as a meaning of 'employ,' 'To use as a servant, agent, or representative.' These children were engaged in a regular service for the defendant in Boston, for two weeks. He depended upon them to do what was a necessary part of that which he was presenting every evening for the entertainment of theater goers. Without them his business could not go on; at least, it could not go on in the way that he desired to have it go. The facts find that he 'procured the boy to appear

> in the play as aforesaid.' He allowed a compensation for the service of the girl. He gave to the boy an opportunity for valuable training, and for constant companionship with his father, who was an actor in the company. The service was rendered regularly, under an engagement relied on by both parties, for such benefits as might result from it. The payment of compensation, as such, is not a necessary element of employment. If one is procured to work regularly under an engagement, rendering valuable service for a specified time, it may be found that he is employed, although he receives nothing as an agreed compensation. He is used and relied upon to accomplish the purpose of his employer."

The above case recognizes the rule that since these statutes are health statutes and are designed primarily to protect those within their scope from such work as would be harmful, that whether compensation is received or not is of no importance. Therefore, even if these contestants receive no compensation, still it would seem that they come within the purview of the section.

If the female contestants receive compensation we believe it is obvious that they are "employed to work."

Conclusion

It is, therefore, the opinion of this Department that a female contestant in a "walkathon" is "employed to work . . . in a place of amusement" within the meaning of Section 10171, R. S. Mo. 1939, and cannot be employed for more than nine hours a day or more than fifty-four hours a week.

Respectfully submitted,

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APPROVED:

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