

State Fire Marshal, Authority to Pay Witnesses. Fire Marshal's' Account, Liability of for Witnesses. Witnesses Testifying Before Fire Marshal, Fees of. Fees, of Witnesses Before State Fire Marshal.

The state fire marshal's account is not liable for the fees of witnesses, who testify in investigations held by state fire marshal.

November 8th, 1913.

Hon. William Keating,  
State Auditor,  
Helena, Montana.

Dear Sir:

I beg to acknowledge receipt of your letter of November 5th, with attached correspondence, submitting for my opinion the question of whether the state fire marshal's account is liable for witness fees in investigations by the state fire marshal, under Secs. 9, 10, 11, 12 and 13 of Chap. 148, Session Laws of the Twelfth Legislative Assembly, or whether the counties in which such investigations are had are liable for such fees. The proceeding provided for by the sections above mentioned pretend to be nothing more than an investigation. It is, therefore, not strictly speaking, a judicial proceeding, and

witnesses would not be entitled to fees as for attendance upon a judicial proceeding in a court established under the provisions of the constitution. (Art. VIII, Sec. I, of the Constitution of Montana.) The act itself nowhere expressly provides for the payment of witness fees, and the only basis for arguing that the state fire marshal's fund is liable for such fees would be by classing them as "expenses incurred by the department," mentioned in Sec. 21 of the act; but expense in the ordinary sense of the term does not mean witness fees, used in connection with such work as is prescribed for the fire marshal or other boards of an administrative character, which contemplates such matters as traveling expenses, clerk and stenographer hire, rent, etc.; expenditures necessarily incurred in carrying on the duties of the office.

A further reason for concluding that witness fees are not intended to be paid out of the fund of the state fire marshal is that the legislature nowhere specifically provides for such fees, either as to when, where or by whom they are to be paid, nor the amount thereof, nor any method by which they are to be computed. It is a very well known and established principle of law that fees cannot be charged or paid by the disbursing officer, in the absence of express statutory provisions defining and creating such fees and giving authority for their payment. The matter of allowing such fees is entirely within the discretion of the legislature, and the legislature may impose upon individuals the duty of appearing and giving their testimony in such hearings, as one of the burdens and duties of citizenship.

You are, therefore, advised that because there is an entire absence of any express provision as to witness fees in investigations by the fire marshal, under Secs. 9, 10, 11, 12 and 13 of Chap. 148, Session Laws of the Twelfth Legislative Assembly, either as to the fund from which they are to be paid, the amount thereof, or by what method they are to be computed, it is my opinion that such fees are not a proper charge against the fire marshal's fund.

Yours very truly,

D. M. KELLY,  
Attorney General.