Workmens' Compensation Act—Plan II—Election by Employer.

An employer under Plan II of the Act is liable for the payment of compensation to an injured employee in case the insurance company becomes insolvent. Upon the cancellation of an insurance policy an employer may then come under Plan I or Plan III of the Act.

November 5th, 1917.

Industrial Accident Board,
Helena, Motnnaa.

Gentlemen:

You have requested my opinion upon the following propositions:

1. Is an employer, under Plan Two of the Act, liable for the payment of compensation in case the Insurance Company becomes insolvent?

2. In case insurance policy is cancelled by the Insurance Company, may the employer then become subject to the provisions of Compensation Plan No. I or Compensation Plan No. III.

On page 7 of the Corpus Juris Treatise on Workmen's Compensation Acts, it is said:

> "The compensation acts, as was well said in one of the earlier opinions on the constitutional questions involved, form a legislative response to an emphatic, if not a peremptory, public demand that a system be afforded whereby employers and employed might escape from personal injury litigation, and every employee not guilty of willful misconduct might receive at once a reasonable recompense for injuries accidentally received in his employment under certain fixed rules and without friction."

The following quotation is found on pages 1412 and 1413 of Senate Document No. 338 of the 62nd Congress, transmitting a report of the hearings held before the Employers' Liability and Workmen's Compensation Commission, and is taken from one of the briefs on the legal aspects of systematic compensation for industrial accidents.

> "Compulsory compensation is the root of every system, and generally, as we have seen, the compulsion is addressed to employers. This element of compulsion needs to be emphasized as being fundamental because some writers seem to emphasize compulsion only where insurance of compensation is made obliga-

tory. But in truth, insurance, even though a statute link it with compensation, is essentially a sequent and not an intrinsic factor thereof. It is a method for at once effectuating and disbuting a *primary obligation* already imposed. In treating insurance, whether compulsory or not, as ancillary to compulsory compensation, we do not minimize its real importance—we simply put it in its proper place.

"Insurance of compensation benefits the injured workman by presumably securing to him the payment of whatever sums may become due, and where it is made obligatory we may assume that the workman's interest is the prominent motive.

"But to the party responsible for compensation insurance, whether obligatory or not, is of equal or even greater concern. Indeed it is usually a commercial necessity, for only by some method of insurance may the burden of his risk be lightened through distribution.

"This need is completely met in the States where the law at once requires insurance and ordains the method. It is partly met where the law encourages insurance by indicating institutions to which the employer may transfer his obligations. Where the law is silent he who would insure must do it in his own way and at his own risk.

"Always bearing in mind that insurance in its passive sense tends to secure the workman, we have also to consider it in its active sense—as something to be done by the responsible party for his immediate protection."

Also on page 13 of the same report is found the following quotation:

"I believe that insurance as important as it is in relation to this entire problem should be regarded as a means to an end and not an end itself. I think we are to distinguish forms of compensation from employers' liability by recognizing that compensation legislation of any kind, as I understand it, is to provide a systematic recovery for persons injured in employment, as distinguished from any system in which recovery is predicated upon fault, and to which we apply the term an employers' liability system as distinguished from a compensation system. I can not imagine any successful system which provides for the systematic compensation of injuries received in the course of employment which must not be predicated, in order to lessen the shock of so great a *primary burden* upon a system of insurance."

You will notice that in both of the above quotations it is recognized that the primary obligation rests upon the employer to pay compensation to his injured employee, and that the insurance features of the Act are merely a means to an end, and a method of distributing the burden of the risk imposed upon the employer.

Also in Section 35 (b) of the Act, it is provided that after the Board has determined the amount of insurance which an employer

under Plan II of the Act shall carry, "the said employer shall file the policy or policies of insurance herein provided for with the Board, which policy or policies shall insure in the amounts so fixed by the Board against any and all *liability of the employer* to pay the compensation and benefits provided for in this Act." Also by Section 16 of the Act it is provided that *every employer* and insurer who shall become bound by and subject to the provisions of Compensation Plan No. II, shall be *liable* for the payment of compensation to an injured employee. Not only does Section 35 (b) recognize the primary liability of the employer, but by Section 16, both the employer and the insurer are made liable for the payment of the compensation provided for in the Act.

In Winfied vs. N. Y. C. & H. R. R. Co., 153 N. Y. Supp., on pages 501-2, it is said:

> "The statute should be given a broad and liberal construction, in order to carry out the beneficient purposes for which it was enacted. It is not a law fixing a liability for negligence, or fixing a liability upon or creating a cause of action against the employer, but, as we have said, is in substance a provision that the state will make compensation to injured employes in hazardous employments from moneys which it has collected or secured from them. It is a state system of insurance. No liability other than for premiums is imposed upon the employer, except by way of penalty. He may relieve himself from the payment of premiums by becoming a self-insurer.
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> The state may regulate business, and it is its duty to regulate business of such a hazardous nature that the employes are exposed to great dangers from risks incident to them. The people, in adopting the constitutional provision, and the Legislature, in enacting this statute, recognize the fact that these hazardous employments as a whole must contribute to the compensation for the injuries they ordinarily inflict upon the employes engaged in them. I think the real intent and purpose of the act is plain, when it is treated purely as a requirement of insurance in the state fund, and that the provision for a self-insurer and other insurance carriers are makeshifts adopted for the convenience of the employer, but which should not in any way infringe upon the integrity or the real spirit of the act. The legislative intent primarily is not to require any employer to make satisfaction to his employe for an injury sustained, but to make all the hazardous businesses contribute to a fund which shall compensate for any injury received in any one of such employments. The fact that the employer takes advantage of certain provisions in the act and becomes a self-insurer does not affect the construction of the act, nor work to the prejudice of the employes engaged in that particular employment.
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> "The act was intended to benefit equally all employes engaged in such employments. There was no intent to allow the employer by his act to change the purposes of the law, or to affect the benefits which his employes were entitled to under it,

and which other employes receive. An employe is not prejudiced by the fact that his employer qualifies as a self-insurer, or insures otherwise than in the state fund. *The rights of the employe under the act do not depend at all upon the manner in which his employer has elected to carry his insurance.*"

I am therefore of the opinion that in case an insurance company becomes insolvent so that it can not pay compensation to an injured employee, or in case of his death to his beneficiaries or dependents, the employer, being primarily responsible for the payment of same, must pay the compensation provided for in the act. That this is the intention of our Workmen's Compensation Act, is further evidenced by the language in Sec. 40 (u) in connection with disbursements out of the Industrial Accident Fund under Plan III.

The second proposition which you have submitted is very difficult owing to the absence of any adjudicated cases upon this or any similar question. As previously stated to you in a letter dated June 28th, 1917, (See pages 327-8 of your last annual report) I stated that I considered the filing of the insurance policy as a very vital factor in the employers obtaining the benefits of the act under Plan II, and that such policy must be kept in force. The question now presented is altogether different in that the employer has fully complied with the provisions of Plan II, and the Insurance Company has cancelled his policy, leaving the employer without any insurance or protection.

Section 35 (a) and (b), of the Act, provide that an employer by filing his election to become subject to and bound by Compensation Plan No. II, may insure his liability to pay the compensation in any Insurance Company authorized to transact such business in this State. It is then provided that the employer shall file with the Board, written acceptance of the provision of Plan No. II, together with certain information upon which the Board determines the amount of insurance which the employer shall carry during the fiscal year. Section 3 (h) of the Act, provides in part as follows:

"After having once elected to be bound by one or the other of the Compensation Plans provided in this Act, such employer shall be bound by such election for said first fiscal year and each succeeding fiscal year, unless such employer shall, not less than thirty or more than sixty days prior to the end of any fiscal year, elect not to be bound by either of such Compensation Plans, after the expiration of said fiscal year or unless he shall elect to be bound for the succeeding fiscal year by a different Compensation Plan than the one by which he is then governed. Such election must be made in the manner provided for in reference to the first election of such employer under this Act."

Also Section 35 (i) of our Act provides as follows:

"No policy of insurance issued under the provisions of Compensation Plan Number Two shall be cancelled within the time limited for its expiration except upon thirty days' notice to the employer in favor of whom such policy is issued, and to

the Board unless such policy sought to be cancelled shall have been sooner replaced by *other insurance*."

From these two sections it might be argued that an employer after having once elected to come under Plan No. II of the Act, is bound by such election for the whole of such fiscal year, and in case of the cancellation of his policy he must, in order to be entitled to the benefits of the Act, file another insurance policy with the Board. But, I do not believe that our Act should receive such a narrow construction. The provision of Section 35 (i) relating to replacing by other insurance, does not necessarily mean by another "insurance policy," but by other assurance to the employee that he will be protected under the Act. And it seems to me that this may be effected either by electing to come under Plan I, upon proof of solvency to the Board, or by electing to come under Plan III and pay assessments. The insurance policy being cancelled and no longer in force and effect, such policy being a vital factor under Plan II, the employer is no longer under the Act and should immediately bring himself within the Act by filing his election under Plan I or Plan III and complying with the several provisions relating to the plan under the provisions of which he brings himself.

I do not believe that the provisions of Section 3 (h) were intended to affect the substantial rights of either the employer or the employee, but rather that such restrictions were intended as an administrative feature of the Act. As was said in McQueeney against Sutphen & Hyer, 153 N. Y. Supp., 558, "the law should be liberly construed, so as to give to the employee and the employer alike the protection manifestly intended," and the employee certainly cannot complain, as long as he is properly protected, whether his employer is under Plan II of the Act or under Plan I or Plan III. The employer is also certainly entitled to receive the benefits of the Act, and upon the cancellation of his policy, he being no longer under the Act should be permitted to come under which ever Plan he elects.

Respectfully,

S. C. FORD,

Attorney General