

County Commissioners—Highways—Expenses—Per Diem.

Cases enumerated in which county commissioners are entitled to collect per diem and expenses in connection with the inspection of highways.

Frank Woody, Esq.,

January 23, 1926.

Counsel, Montana Taxpayers' Association,
Helena, Montana.

My dear Mr. Woody:

You have requested my opinion in regard to the per diem and expenses which members of a board of county commissioners may lawfully charge and collect from the county under section 1632 R. C. M. 1921, and submitting the following specific questions:

"1. May members of a board of county commissioners inspect an established, opened and traveled highway, when no work is being done thereon, for the purpose of ascertaining and determining whether any portion of such highway should be reconstructed or rebuilt, without any change being made in the location of the highway, and charge and collect per diem and expenses for making such inspection?

"2. May members of a board of county commissioners inspect, from time to time, established, opened and traveled highways for the purpose of ascertaining and determining their general condition and what work, if any, should be done thereon to maintain the same and to keep them in good condition and repair, and charge and collect per diem and expenses for making such inspections?

"3. May members of a board of county commissioners make an inspection of an established, opened and traveled highway, which is in need of repairs, for the purpose of ascertaining and determining what repairs should be made thereon, and the extent thereof, and charge and collect per diem and expenses for making such inspection?

"4. May members of a board of county commissioners inspect established, opened and traveled highways on which work is being done by day labor and not under contract, and charge and collect per diem and expenses for making such inspection?

"5. May a board of county commissioners divide a county into districts, placing in each such district certain road districts and assigning one commissioner to each such district, who takes charge of and superintends all work done on the highways in his district, and inspects such highways for the purpose of ascertaining and determining whether work should be done thereon for the purpose of maintaining and keeping the same in repair, and the extent of such work, charging and collecting therefor per diem and expenses?"

The term highway, as used in this opinion, includes bridges as well as other highways.

Section 1632 R. C. M. 1921, to which you refer in your letter, is as follows:

“The board of county commissioners may direct the county surveyor or some member or members of said board to inspect the condition of any proposed highway, or highways, or work on any highway or bridge in the county during the progress of the work, and before payment therefor, and such member or members of said board shall receive for making such inspection the sum of eight dollars (\$8.00) per day, and actual expenses, and the county surveyor shall receive for making such inspection when directed and for all other work performed for the county under the direction of the board of county commissioners, the sum of eight dollars (\$8.00) per day and actual expenses, which shall be audited and allowed in the same manner as any other claims against the county.”

The foregoing is such section as amended by chapter 15, session laws extra session 1919. The amendment changes the original section but slightly, and not at all so far as it relates to members of the board of county commissioners. Construing such section the supreme court in the cases of *State ex rel Payne vs. District Court*, 53 Mont. 350 and *State vs. Story* 53 Mont. 573, held that members of boards of county commissioners could draw per diem and expenses under such section only when inspecting contract work and before payment for the same. Attorney General Rankin also construed such section in the same manner in opinions rendered to J. E. Kelly, county attorney of Jefferson county, (9 Op. Atty. Gen. p. 36) and Max P. Kuhr, county attorney of Hill county (9 Op. Atty. Gen. p. 302).

From the wording of this section and from the foregoing opinions of the supreme court and of the attorney general it is my opinion that under such section members of boards of county commissioners are entitled to charge and collect per diem and expenses only in the following cases:

1. When an inspection is made of a proposed highway or highways, before being established or opened, for the purpose of ascertaining and determining the advisability of opening and establishing the same as a public highway or highways.

2. When an inspection is made of a highway on which work is being done under contract, during the progress of the work, for the purpose of ascertaining and determining whether such work is being done in accordance with the terms and provisions of the contract so as to entitle the contractor to payment therefore as provided in his contract.

It is further my opinion that such section does not authorize payment of per diem or expenses to members of the board of county commissioners for any other purpose or service, and that all of the foregoing questions must be answered in the negative, and, therefore, that members of boards of county commissioners cannot lawfully charge and collect

either per diem or expenses for any of the services enumerated in such questions, and that the charging and collecting of per diem or expenses for such services constitutes the collection of illegal fees for which such members may be removed from office by proceedings instituted under section 11,702 R. C. M. 1921, (State ex rel Payne vs. Dist. Court, supra, and State vs. Story, supra).

Very truly yours.

L. A. FOOT,
Attorney General.