Workmen's Compensation—Employers—Election.

Where an employer has made his election to come under plan No. 3 of the workmen's compensation act he is under the act from the time of receiving the election by the board, even though he does not make his initial payment until thereafter.

Jerome G. Locke, Esq., Oct. 6, 1926.
Chairman, Industrial Accident Board,
Helena, Montana.

My dear Mr. Locke:

You have requested my opinion whether the Ardsley Butte Mines Corporation was bound by the provisions of plan No. 3 of the workmen's compensation act on September 8th of this year.

The facts, as stated in your letter, are as follows:

On August 20, 1926, W. J. Thomas, insurance agent residing at Butte, addressed a letter to the industrial accident board advising that he had an application for compensation insurance from a quartz mining company and that he had referred the company to the industrial accident

board for coverage under plan No. 3. He requested the necessary blanks upon which the company might make application for compensation coverage and said:

> "Give me rate per $100.00 of payroll and amount of minimum premium required."

On August 25, 1926, the required blanks were transmitted to Mr. Thomas. These were returned by him properly made out and were received by your board on September 8th. In his letter of transmittal dated the preceding day, he said:

> "Kindly advise me the amount of the initial payment by return mail and I will send you check for the amount."

Two days later your department mailed Mr. Thomas a bill for $108.75, the amount due as computed by you, and on September 14, 1926, a check for this amount was received and the application for compensation coverage immediately approved.

On September 8, 1926, the day the application was received, but six days prior to the time the initial deposit was made, Albert R. Francis, an employee of the company, was accidentally killed.

The question presented is whether the company was legally enrolled under the compensation act on the date the accident occurred.

It further appears that the notice of election of the company to come under the provisions of the compensation act was posted as required by section 2841 on September 4, 1926, and proof of posting accompanied the application which you received on September 8, 1926.

The various statutory provisions applicable are as follows:

> "Every employer * * * may, on or before the first day of July, 1915, if such employer be then engaged in such hazardous industry, work, occupation, or employment, or at any time thereafter, or, if such employer be not so engaged on said date, may, on or after thirty days before entering upon such hazardous work, occupation, or employment, or at any time thereafter, elect whether he will be bound by either of the compensation plans mentioned in this act. Such election shall be in the form prescribed by the board, and shall state whether such employer shall be bound by compensation plan number one, or compensation plan number two, or compensation plan number three, and a notice of such election, with the nature thereof, shall be posted in a conspicuous place in the place of business of such employer, and a copy of such notice, together with an affidavit of such posting, shall be filed with the board." (Sec. 2841.)

Section 2990 provides:

> "Every employer, subject to the provisions of compensation plan No. 3 shall, in the manner and at the times herein speci-

fied, pay into the state treasury, in accordance with the following schedule, a sum equal to the percentage of his total annual payroll specified in this section."

Section 2994 provides:

"There shall be collected from all classes as initial payment into the industrial accident fund, on or before the fifteenth day of July, 1915, one-fourth of the premium assessment for that fiscal year."

In an opinion of this office dated December 22, 1924, it was held that under the provisions of section 2994 the act contemplated that all assessments should be payable in advance. The act took effect on July 1, 1915, but it is apparent that under the provisions of section 2994 each employer engaged in hazardous occupation who desired to be bound by the provisions of the act and elected to do so had until July 15th of the year in which the act took effect within which to make his initial payment.

There are no provisions in the act which definitely state the time when subsequent employers, who apply to come under its provisions, are bound thereby. Section 2841 says that the election shall be in the form prescribed by the board; and section 2995 provides:

"Every employer who shall enter into business at any intermediate day shall make his payments in the same manner and upon the same basis before commencing operations."

This section (2995) was formerly a part of section 40 of chapter 96 of the laws of 1915, which section allowed until July 15th within which to make the initial payment.

The act contains a provision which indicates that the employee may elect to come under the provisions of the act, even though the employer is in default, section 3003 providing:

"For any injury happening to any of his workmen during default in any payment to the industrial accident fund, the defaulting employer as to such injury shall be considered as having elected not to come under the provisions of this act, except that he shall be and remain liable to pay to the industrial accident fund the amount of such default, together with the penalty prescribed by section 2996."

In case the employee elects to accept compensation from the industrial accident fund he is required to assign to the state his cause of action against the employer. (Section 3004 R. C. M. 1921.)

In the case of Ginnochio vs. Hydraulic Press Brick Co. (Ohio), 266 Fed. 564, it was held that under the Ohio workmen's compensation act which went into effect January 1, 1914, section 22 of which provided that employers subject to the act "shall in the month of January, 1914, and semi-annually thereafter" pay the premium determined by the state industrial commission, an employer who prior to January 1, 1914, notified

the commission of his intention to comply with the statute and his election to pay direct, and thereafter did all that was required of him without delay or default, paying the premium and furnishing bond on January 30, was held to be under the provisions of the act as of January 1st. The act also contained a provision that "Employers mentioned in subdivision 2 of section 13 hereof, who shall fail to comply with the provisions of section twenty-two hereof, shall not be entitled to the benefits of this act during the period of such noncompliance, but shall be liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer," and took away from the employer certain common-law defenses.

Your board has a rule requiring the first payment to be made before the act is in effect, and the substance of this rule was contained in your letter accompanying the forms sent on August 25, 1926.

There is, however, some doubt in my mind whether the right to elect to come under the act which the statute gives the employer requires the initial payment to accompany the application. This is indicated by the provisions of sections 2994 and 2995, above referred to, as well as by the inequality which would result to employers in various parts of the state in coming under the provisions of the act if payment is required to accompany the application and election. The clerical act of computing the initial payment can only be made upon the estimated pay-roll submitted by the employer upon the form of election prescribed by your board. An employer residing in Helena might submit his election and have this amount computed the same day, and thus secure the instant application of the act to him, while an employer living in some remote part of the state might submit his election upon the same forms by mail and it would require a week or two weeks to obtain your estimate of the amount due and make remittance before the amount would be received by your board, and even then he would not be sure of the date of receipt until he had received your return acknowledgment. In the meantime his operations would be suspended, or he would be without compensation insurance if he commenced operations before notice from the board if the act is not in effect upon receipt of the election.

The employer is bound by his election when made and your board has no power to reject it, nor, in my opinion, to postpone the date of its application to the time of receipt of the initial payment. If payment is not made within fifteen days from receipt of the election the employer is in default and subject to the penalties prescribed by section 3003 R. C. M. 1921, and any employee injured during his default would be entitled to the option provided by section 3004.

In Industrial Commission vs. Madden, 152 N. E. 662, the state of Ohio had no such provision as to employers in default and the right of employees to elect to take under the act and assign their cause of action to the state as we have under sections 3003 and 3004 (supra); but in that case the court held that the dependents were entitled to payment from

the accident fund when death of an employee occurred during default by the employer, where the premiums were subsequently voluntarily paid.

It is, therefore, my opinion that the employer who elects to come under the provisions of the compensation act and has done all he is required to do, except to make the initial payment, is entitled to have his coverage date from the filing of his application with your board, where payment does not accompany the application by reason of the fact that the applicant does not know what payment is required.

Very truly yours,
L. A. FOOT,
Attorney General.