Opinion No. 429.

State Highway Commission—Contracts, acceptance by "Affirmative Action" of the Commission—Contracts, Acceptance by Engineers—Claims —Subcontractors—Materialmen—Laborers.

HELD: Acceptance of the contract by the State Highway Engineer in charge of particular work is acceptance by the commission. Claims of subcontractors, materialmen and laborers may be filed as soon as the service or supplies are furnished by them; therefore, the action or non-action of the Commission becomes immaterial for the purpose of computing the statutory period within which subcontractors, materialmen and laborers must file notice of claim against bondsmen.

January 20, 1934.

We acknowledge receipt of yours of December 27 to which is attached a copy of your usual highway contract and a letter from Messrs. Grubb & Rockwood, attorneys-at-law of Kalispell, Montana. You request an opinion from this office on the following matter:

"1. Is it, or is it not, necessary for the Highway Commission at a regular or special meeting to take affirmative action with respect to the acceptance of our contracts, said action to be made of record in the minutes of said meeting?

"2. In case the first question is answered in the affirmative, shall the action taken by the Highway Commission be as of the date that acceptance was made by the engineer acting under the delegated authority of the Highway Commission when the acceptance was considered?"

Letter of Messrs. Grubb & Rockwood is as follows:

"We are enclosing herewith a formal demand requesting the State Highway Commission to affirmatively accept both of the Douglas contracts on which Kirkpatrick Brothers are unpaid, and are asking that this be done in open meeting with due minute entry of the same. Chapter 20 of the 1931 Session Laws provides that the subcontractor, etc., has 15 days 'from and after the completion of the contract with an acceptance of the **work** by the **affirmative** action of the board, council, commission, * * *.' within which to file his notice.

"Our position is that the law contemplates affirmative action by the Board itself so that the minutes will show the acceptance and thus there will be public record showing that the Board has accepted the work. As you know, I read the minutes and find no affirmative action of any kind on the part of the board in reference to this work and Mr. Whipps also advises that the Board itself does not accept the contracts and that there is no record in the minutes pertaining to such an acceptance and that it is not a custom of the board in any instance, to so accept the work.

"If the Highway Commission will take action on this, we shall then file our fifteen day notice whereupon we will have laid a foundation to commence a suit on the bond. We cannot see that such action would be detrimental in any way to the Highway Commission and it would be extremely helpful to us in suing for this money. We believe that the courts will construe this law in favor of the subcontractors and materialmen as strictly as they can possibly do so, inasmuch as this is a very stringent law in limitation of the rights of subcontractors and materialmen against the bonds.

"Under our theory of the case, we have no suit on the bond at all until we have filed our statutory notice within fifteen days after Board affirmatively accepts the work. As the matter now stands, there is no affirmative acceptance by the Board that is a matter of record or otherwise, and consequently, we have not as yet the right to file the notice and it would be impossible for us to allege a compliance with the statute in order to sue on the bond. In case the Highway Commission will not voluntarily take this affirmative action as requested, we do not know how we can sue on the bond until we first institute an action in mandamus to compel the Board to take this affirmative action, and as stated above, we do not see how the Board could be injured in any way by voluntarily doing this and this voluntary action could not change the rights of the parties from what they now are, but it would eliminate an extra suit for us. * * *."

That part of Chapter 20, Laws of 1931, pertinent to the question involved is as follows: "Provided, that such persons shall not have any right of action on such bond for any sum whatever, unless within fifteen (15) days from and after the completion of the contract with an acceptance of the work, by the affirmative action of the board, council, commission, trustees, officer or body acting for the state, county or municipality or other public body, city, town or district, the laborer, mechanic or sub-contractor, or materialman or person claiming to have supplied provender, materials, provisions of goods for the prosecution of such work, or the making of such improvement, shall present to and file with such board, council, commission, trustees or body acting for the state,

county or municipality or other public body, city, town or district, a notice in writing in substance as follows: * * *."

Our Supreme Court has not interpreted this section of our statute, but the State of Washington has a similar statute which provides: "That such persons (materialmen and laborers) shall not have any right of action on such bond * * * unless within thirty days from and after the completion of the contract with an acceptance of the work by the board * * * the * * * person claiming to have supplied materials * * * shall present and file with such board * * * a notice in writing * * *." An amendment to this section in 1915 requires acceptance by "affirmative action" of the board or commission.

In Wheeler-Osgood Co. v. Fidelity & Deposit Co., 139 Pac. 53, the "Board of Public Control" of the state entered into a contract with a construction company to erect a building for the insane of the state. The defendant was surety on the contractor's bond. The State Board of Control selected an architect to supervise the construction of the building, who was authorized to accept the building on completion. On December 6, the architect issued his final certificate certifying to the completion of the work. The Board made no minute entry on its record accepting and approving the report of the architect, but on December 23, the Board authorized a warrant to be issued in final payment of the contract price. On January 13 following, the plaintiff filed his claim with the Board for material furnished contractors. The claim being disallowed and the contractor being insolvent, the suit followed.

In this action the question arose as to when the contract was accepted—whether on December 6 when the architect issued his certificate, or on December 23 when the Board made final payment on the contract. The Court held that **the architect was the agent of the Board and his action bound the Board as to the completion of the work and the thirty days provided by statute in which claims might be filed began to run from that date.** In the course of the opinion the Court said: "We think it must be held, considering all the terms of the contract, that the final certificate of the architect constituted an acceptance on the part of the Board, in the absence of any showing of fraud, collusion, bad faith or mistake."

The above decision was followed in Denny-Renton Clay & Coal Co. v. National Surety Co., 160 Pac. 1, and again in Union High School District, etc., v. Pac. Northwest Const. Co., 269 Pac. 809. In the latter case the Court held the architect's final certificate was conclusive as between the parties.

Both our statute and the statute of the State of Washington contain practically the same phraseology in regard to "affirmative" action by the Board in the acceptance of contracts, and the same phraseology in regard to time that claims may be filed with the Board or Commission, except that our statute provides for only fifteen days, while the State of Washington statute provides for thirty days. In regard to the "affirmative" action by the Board or Commission, the Supreme Court of the State of Washington in the case of Denny-Renton C. & C. Co. v. Nat'l. Surety Co., 160 Pac. 1, used the following language: "The action of the Council in ordering the complete estimate of ninety per cent paid as certified by the engineer was the only action of the council ever taken directly upon this certificate of completion. That action necessarily implied an acceptance of the work as then completed and certified. **If affirmative action be held now necessary, we think that this was such an affirmative recognition of the work as completed as to constitute an acceptance.** * * * Even aside from any affirmative action on the part of the City Council this case is controlled by our decision in the case of Wheeler-Osgood Co. v. Fidelity & Deposit Co., 139 Pac. 53. In that case we held that, because the contract gave the architect control of the work and provided for the payment on the architect's certificate, an acceptance by the architect was an acceptance by the Board of Control, in that the contract itself, by reason of the broad powers which it gave to the architect, made him the Board's agent to accept the work * * *."

We think the cases cited above clearly establish the fact that the engineer in the instant case was the agent of the Commission and that his acceptance was binding on the Commission and the State and that the fifteen days allowed for the filing of claims would

expire at the end of fifteen days after the acceptance by the engineer in charge.

It is contended by Messrs. Grubb & Rockwood that unless there is some affirmative action by the Commission shown on its records, that it is inconvenient if not practically impossible to tell when the fifteen days begin to run, but it does not seem to us that this is a material question here.

Sub-contractors or materialmen may file their notice of claim when their sub-contracts are completed, or the material furnished, without waiting for the completion of the contract between the State and the general contractor. (Cascade Lumber Co. v. Aetna Indemnity Co., 106 Pac. 158; Washington Monumental & Cut Stone Co. v. Murphy et al, 142 Pac. 665; Denny-Renton C. & C. Co. v. Nat'l. Surety Co., supra.)

In referring to the clause in the statute where it is provided that "unless within thirty days from and after the completion of the contract and acceptance of the work," which is contained in the statute of the State of Washington and is also in ours, the Supreme Court of that state, in the case of Cascade Lumber Co. v. Aetna Indemnity Co., supra, having under consideration the contention of the defendant in that case that the notice of claim was filed prematurely, used the following language: "We are of the opinion that the statute only fixes the time after which the notices may not be filed. The words 'from and after' as here used, indicate when the time begins to run and when it ends, for the purposes of computation only; that is, the time began to run, and included the day the work was completed. These words do not indicate that the notice must be filed after completion of the work, and before the expiration of thirty days, as contended by appellant. The object of the statute is notice to the surety that the claimant intends to hold the surety. Notice given before the completion of the work would be as effective for that purpose as notice given after the completion thereof. The statute was not intended as a trap, and, unless the words used clearly show an intention that the notice shall be filed at a certain time, it should be construed so as to effect its object with fairness. In this case we are of the opinion that the statute does not prevent the filing of a notice prior to the time of the completion of the work, and that the first notice was therefore not premature."

Under the ruling in these cases of the State of Washington, based on a law practically the same as ours, and containing the reference to affirmative action by the Board, a sub-contractor or materialman or laborer may file his claim as soon as his work is completed and need not wait until fifteen days after the general contractor has completed his work. Such being the rule established in those cases, which we think would be followed by our Supreme Court, there is no reason why the sub-contractor, materialman or laborer could not file his claim as soon as his work is completed.

Following the rule laid down in the cases cited our conclusions are:

1. That the acceptance of your engineer in charge of particular work is acceptance by the Commission;

2. That claims of subcontractors, materialmen and laborers may be filed as soon as the services or supplies are furnished by them and such filing need not be deferred until the general contract is completed but must be filed before the expiration of fifteen days after the engineer in charge issues his final certificate of acceptance.

We think this covers your two questions. An entry in your minute record would be advisable if it were practical, but the commission is required to meet but once each month and the fifteen days provided by statute might come and go before the commission held a meeting. Under the rule laid down in the cases cited, those who have claims they desire to file need not wait for affirmative action of the commission to do so. The action or non-action of the commission thus becomes immaterial in the matter that gave rise to your questions.

This opinion is for your guidance.

The controversy between the clients of Messrs, Grubb & Rockwood and the contractor and his surety is a matter in which the state is not directly concerned and their controversy will have to be determined by the courts.