

OPINION
65-499

May 3, 1965 (OPINION)

Mr. Owen T. Owen

Chairman

Workmen's Compensation Bureau

RE: Workmen's Compensation - Overcharge for Premium - Refunds

This is in response to your letter in which you ask for opinion whether or not in view of the decision handed down by the North Dakota Supreme Court in North Dakota Workmen's Compensation Bureau v. S.A. Healy Co., 109 N.W.2d. 249, refunds or credits can be made where overcharges occur in the following situations:

1. Closed accounts of unearned premium due riskholders;
2. On 'voids and amends' as a result of an error in the computation or error in rates resulting in overcharge of premium;
3. Error in computation resulting from improper classification;
4. On credits resulting from an audit;
5. On overpayment of settlement sheet statement or premium advice."

You also call our attention to Rule XIX of the North Dakota Workmen's Compensation Bureau pertaining to rates and computation of of premium, which provides that should an overcharge exists, due credit will promptly be given in the form of a refund or credit on the next subsequent adjustment. This rule is in harmony with the provisions of chapter 65-04 of the North Dakota Century Code. The method of operation employed by the Bureau requires the payment of premium on anticipated payroll expenditure for the ensuing twelve-month period on an estimate basis. The rate is determined by the description of the work to be performed. The very nature of such operation compels the payment of the premium on anticipated work and estimated payroll expenditure.

The Court recognized this procedure in State ex rel., Johnson v. Hughes Electric Co., 51 N.D. 45 on page no. 50, where it amongst other things said: "* * * * This (premium) charge was a conditional one fixed by the bureau in the initial rating of each concern to be refunded in whole or in part or not at all, at the end of the year, depending upon the accident experience of the particular employer during the first year of insurance with the bureau. * * * *" This statement embraced more than just the advance premium but also included the merit rating system which the Bureau is to employ under

the provisions of section 65-04-17.

It is further observed that section 65-04-04 of the North Dakota Century Code provides that the employer is to pay to the Bureau the premiums in the amount as determined and fixed by the rates and classifications established by the Bureau. In conjunction with this, section 65-04-05 provides that the employer is to file an estimated payroll report and classification of his employment for twelve months in advance. Section 65-04-16 pertaining to the same subject matter provides as follows:

ADJUSTMENT OF PREMIUM PAID ON ESTIMATED PAYROLL. In the event that the amount of premium collected from any employer at the beginning of any premium period is ascertained and calculated by using as a basis the estimated expenditures for wages for the period of time covered by such premium payment, an adjustment of the amount of such premiums shall be made at the end of said period, and the actual expenditure of wages for said period."

Section 65-04-19 of the North Dakota Century Code provides that the Bureau is to determine the premium for the twelve succeeding months from the date of expiration of the insurance period on an estimated basis. It is further observed that other statutory provisions within chapter 65-04 provide that the premiums may be aid in installments by furnishing a surety bond guaranteeing the payment. Section 65-04-13 provides for an audit of books, records and payrolls of the employer.

All of these sections and related sections clearly illustrate that the Bureau is to employ a system whereby the employer pays a premium on an estimate basis on a rate classification assigned to the work which the employer anticipates to perform during the ensuing twelve-month period. It further illustrates that the anticipated premium is considered "unearned premium" and is money advanced in the form of guaranteeing the payment of earned premium when it is so established. The premium based on anticipated payroll or estimated payroll is "unearned premium" and is money that is received by the Bureau in trust. It is money that is conditionally received by the Bureau. The condition is that the actual payroll and work or job classification will develop a premium in an amount equal to or greater than the advanced payment. Except for the minimum charge, all advance payments are considered "unearned premium" and theoretically are held in trust until the true or earned premium is determined. The true or earned premium can be determined by various means. Such determination can be the result of an audit, reclassification, filing of actual payroll report and any other method employed by the Bureau as permitted by statute, including the application of experience or merit rating.

If the Bureau were not to use the advance billing method or demand the "unearned premiums" in advance, the alternative would be to wait until the premium has been determined according to payroll, classification and experience or merit rating and then bill the employer for the earned premium at the expiration of the insurance period. With little vision or foresight, it can be readily seen that such system would be disastrous. It would be like insuring after the fact.

The request for an opinion apparently indicates that there is some apprehension as to whether or not the advance premiums are considered public moneys, as the term is used in Section 186 of the North Dakota Constitution. The North Dakota Supreme Court has said in *State ex rel. Stearns v. Olson*, 43 N.D. 619, 175 N.W. 714, that the workmen's compensation fund while deposited with the state treasurer "is a special fund, and not a public fund." This case, however, does not indicate that the workmen's compensation fund is not subject to the provisions of Section 186 of the North Dakota Constitution. We are satisfied that the answer to your question does not require a determination whether or not the workmen's compensation funds are public moneys or not. For that matter we are assuming that the workmen's compensation fund is subject to the provisions of Section 186 of the North Dakota Constitution and will continue to do so until the North Dakota Supreme Court will rule to the contrary.

Now as to the case of *Workmen's Compensation v. Healy*, 109 N.W.2d., 249, the Court definitely stated that the premiums collected by the Workmen's Compensation Bureau constitute public money within the meaning of Section 186 of the North Dakota Constitution. The Court stated:

It is clear that moneys collected by the Workmen's Compensation Bureau pursuant to its established premium rates are public moneys within the meaning of Section 186 of the Constitution. They must be deposited with the state treasurer and can be disbursed only pursuant to an appropriation contained in that section or made by the legislature. There being no appropriation for refunds the Bureau is powerless to make them. Moreover, there is no statutory provision authorizing or directing the Bureau to hold any hearing on an application for refund. The holding of such a hearing by the Bureau would be an idle act. The court erred in ordering that a hearing be held. Its order is therefore reversed."

The language of the Court must be construed in light of the subject matter before the Court. In the cited case the employer paid the premium pursuant to the established rate on an actual payroll and pursuant to the experience or merit rating established for such employer. The premium was paid on the going rate for the classification of the employment in effect at the time. The cited case did not involve advanced premiums or unearned premiums nor did the application for refund pertain to a change in premium as a result of audit or reclassification. It pertained solely to the earned premium which was paid. The application for refund pertained only to earned premium paid. The conclusion of the Court that such premium constitutes public money within the meaning of Section 186 of the North Dakota Constitution was well-founded.

The question at hand is readily distinguishable from the question involved in the Healy case. In the instant situation we are not concerned with earned premiums but rather with unearned premiums. As pointed out earlier herein, the unearned premiums are held in trust conditioned and contingent upon the happening or development of certain factors. It is also observed that the Healy case is completely silent as to advance premium or payments which are, in

reality, unearned premiums.

The Healy case established primarily that the Bureau has no authority to conduct or hold hearings for the refund of earned premiums and that no appropriation exists for refunding earned premiums under Section 186 of the North Dakota Constitution. We do not believe that the North Dakota Supreme Court intended that the decision of the Healy case in itself or the extension thereof should apply to unearned premiums. Inasmuch as the statutory provisions provide for advance premium, it would appear that such statutory provisions will continue to apply until the Court specifically declares those statutes invalid or as being in contravention of the North Dakota Constitution, more specifically Section 186. The Court did not comment on the statutory provisions, consequently we deem same to be valid.

It is therefore our opinion that refunds of unearned premiums resulting from any of the five enumerated situations can be made or credit can be given to the employer and that such practice would not be in contravention of Section 186 of the North Dakota Constitution, nor would it be contrary to the decision of the Healy case cited herein.

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