UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	BKY 4-91-4581
MUNSINGWEAR, Debtor.	MEMORANDUM ORDER SUSTAINING OBJECTION TO PRIORITY OF CLAIM NUMBER 641

At Minneapolis, Minnesota, March 6, 1992.

The above-entitled matter came on for hearing before the undersigned on the 28th day of January, 1992, on the debtor's objection to several claims, including the claim of the Oklahoma State Insurance Fund (claim number 641). Appearances were as follows: John C. Nuckles on behalf of the debtor, and Rodney Hayes on behalf of the Oklahoma State Insurance Fund.

FACTUAL BACKGROUND

The facts are not disputed. On or about October 1, 1990, Munsingwear, Inc. made written application to the Oklahoma State Insurance Fund (the"State Fund") for workers' compensation insurance covering Munsingwear's Oklahoma operations for the period between January 1, 1990 and January 1, 1991. A policy was issued, and at the end of the policy period Munsingwear's records were audited by the State Fund to determine the proper premium for the period. The audit established a total premium of $56,289. Munsingwear was credited for payments of $24,157, a prompt payment discount of $926, and a premium volume discount of $5,577, leaving a premium balance due of $25,629.

The State Fund filed claim number 641 in this bankruptcy case in the amount of $25,629, the unpaid premium balance, and asserted that the claim had priority as an excise tax under section

507(a)(7)(E) of the Bankruptcy Code. Munsingwear filed the present objection to the State Fund's claim disputing the State Fund's assertion of priority status. Munsingwear does not otherwise object to the claim.

DISCUSSION

The question of whether workers' compensation insurance premiums qualify for priority status as excise taxes under section 507(a)(7)(E) was addressed by Judge Kressel in the case of In re Smith Jones, Inc., 36 B.R. 408 (Bankr. D. Minn. 1984). In Smith Jones, Judge Kressel found that the state had established an insurance fund which was entirely funded by collection of premiums from employers. The state insurance fund was established in lieu of allowing private workers' compensation insurance carriers to operate in the state, and employer participation in the fund was mandatory. Smith Jones, 36 B.R. at 409. Judge Kressel determined that the premium payments were not excise taxes as contemplated by section 507(a)(7)(E) because the funds were clearly treated as insurance premiums rather than taxes: they were calculated on the basis of insurance principles, collected by the state in its assumed role as insurance carrier, and distributed to a very limited class of beneficiaries rather than to the general state revenue. Id. at 410-11.

Under the authority of Smith Jones, I would find that the premium payments in the present case similarly are not entitled to priority as excise taxes. The State Fund is designed to be competitive with private workers' compensation insurance carriers

which are allowed to operate in the state, and the State Fund operates as an insurer, collecting premiums and paying claims to employees of those employers who choose to insure through the State Fund. Okla. Stat. tit. 85, § 131.

The State Fund, however, urges me to reject the reasoning of Smith Jones and adopt the approach taken by the Fourth Circuit Court of Appeals in New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund, 886 F.2d 714 (4th Cir. 1989). In New Neighborhoods, the Fourth Circuit acknowledged Judge Kressel's approach but instead relied on case law interpreting the former Bankruptcy Act and held that a payment was a excise tax if payment was compelled by the state and if it served a public purpose. New Neighborhoods, 886 F.2d at 718 (citing City of New York v. Feiring, 313 U.S. 283, 285 (1941)). The court held that payments to the West Virginia Workers' Compensation Fund qualified for priority as excise taxes finding that: (1) payment was compelled by the state because participation in the workers' compensation system is compulsory for employers and is compelled by the state, and (2) the workers' compensation system serves a public purpose because it allocates to employers the cost of supporting injured employees who otherwise might require public support.

The State Fund argues that under the New Neighborhoods analysis, Munsingwear's debt to the Oklahoma State Insurance Fund similarly qualifies as an excise tax. The State Fund relies on an unpublished opinion and order in In re Kesler, 87-01366-SN5 (Bankr. E.D.N.C., Jan. 22, 1990), wherein the Bankruptcy Court for the

Eastern District of North Carolina applied New Neighborhoods and concluded that payments owing to the Oklahoma State Insurance Fund were excise taxes under section 507(a)(7)(E). Like the Fourth Circuit in New Neighborhoods, the Kesler court rested its decision on its findings that employer participation in the workers' compensation scheme is mandatory and that the scheme relieves the general public of the burden of supporting the individuals receiving compensation thereunder. See Kesler, at 5-6.

I disagree with the State Fund's argument and with the court's analysis in Kesler. While the New Neighborhoods court relied on mandatory participation in concluding that payments were compelled by the state, it did so based on the particular provisions of the workers' compensation scheme before it. The Fourth Circuit observed:

> While some states require employers to carry insurance (if they can obtain the same) through private insurance carriers in order to fund compensation claims, West Virginia requires an employer to fund payment of benefits either by subscribing to the Fund or by electing to obtain from the West Virginia State Compensation Commissioner (Commissioner) authority to opt-out of the Fund and to become a self-insurer as an employer sufficiently financially responsible to ensure payment of compensation to injured employees or their dependents.

New Neighborhoods, 886 F.2d at 716. Furthermore, the court found that the requirements for an employer to select the opt-out provision were very strict and that the Commissioner could force a self-insured employer to participate in the Fund for any failure to comply. Id. at 716. Since employer participation in the

workers' compensation scheme was mandatory, the Fourth Circuit was clearly correct in finding that payment to the Fund was compelled by the state.

The Oklahoma workers' compensation scheme, by contrast, allows employers to select from four different insurance options, none of which requires payment of premiums to the State Fund. Those options are (1) to obtain insurance through an insurance carrier, (2) to obtain guaranty insurance, (3) to employ a scheme of compensation or benefits in lieu of workers' compensation, or (4) to choose self-insured or group pool insurance for those employers with the financial ability to do so. These final two options are subject to approval by the Workers' Compensation Administrator. Okla. Stat. tit. 85, § 61. Failure to secure insurance subjects the employer to civil and criminal penalties. Okla. Stat. tit. 85, § 63-63.3. However, there is apparently no provision which would allow the Administrator to compel an employer to obtain insurance through the State Fund. On the contrary, the State Fund is simply established for the purpose of providing the same type of workers' compensation insurance that can be obtained elsewhere. Far from requiring mandatory payments to the State Fund, the statute creating the State Fund expressly states that the State Fund is designed to be competitive with private insurance carriers. Okla. Stat. tit. 85, § 131. Thus, while it may be true that carriage of workers' compensation insurance is mandatory for employers in Oklahoma and that obtaining such insurance is compelled by the state, any payments to the State Fund are entirely optional and

such payment cannot be construed as being compelled by the state. See In re Metro Transportation Co., 117 B.R. 143, 154 (Bankr. E.D. Pa. 1990). Since payment is not compelled by the state, the State Fund's claim is not for an excise tax and does not qualify for priority treatment.

In summary, the New Neighborhoods case held that a state's claim for workers' compensation insurance premiums could receive priority status as an excise tax where the state has compelled payment and if the payment serves a public purpose. The workers' compensation scheme in New Neighborhoods required that premiums be paid to the state fund. There was only a very narrow opt-out provision and the state had the power to compel payment to the fund if the requirements of the opt-out provision were not met. Thus by requiring mandatory participation by employers in such a scheme, the state is compelling such employers to make payments to the state fund. However, in the present workers' compensation scheme employers are given numerous insurance options and the State Fund is merely set up to provide insurance along with the private insurers; the state does not compel employers to insure through the State Fund. Even though participation in such a workers' compensation system is mandatory on employers, any payments made to the state are optional and thus such payments are not excise taxes entitled to priority under section 507(a)(7)(E).

ACCORDINGLY IT IS HEREBY ORDERED:

Munsingwear's objection to the priority status of the State Insurance Fund's claim, claim no. 641, is SUSTAINED, and such claim

is DISALLOWED as a priority claim. Given that Munsingwear does not object to the amount of the claim, claim number 641 is ALLOWED as a general unsecured claim in the amount of $25,629.

Nancy C. Dreher
United States Bankruptcy Judge