Opinion No. 154.

Hail Insurance—Application for Hail Insurance—Insurance, Hail—State Board of Hail Insurance, Powers, Duties and Authority.

Held: It is the authority and duty of the State Board of Hail Insurance to investigate all claims for loss presented to it and to determine from the facts whether the policy of insurance under which the claim is made was in full force and effect at the time of the loss. If a policy of insurance was not in effect at the time of the loss, the board has no authority to allow a claim for loss thereunder.

May 16, 1946.

Mr. E. K. Bowman, Chairman
State Board of Hail Insurance
State Capitol
Helena, Montana

Dear Mr. Bowman:

You have requested my opinion asking if the State Board of Hail Insurance acted correctly in cancelling an application for hail insurance and denying a claim for loss thereunder, under the following facts:

> The applicant prepared, signed and mailed his application for insurance on the regular prescribed form, at Sidney, Richland County, Montana, on the 14th day of July, 1945. The application covered growing crops subject to hail insurance on land owned by applicant and situated in McCone County. The application was received through the mail in the office of the County Assessor of McCone County on the morning of July 17, 1945, and on that date accepted by him and receipt and policy mailed to applicant. At about the hour of seven o'clock in the evening of July 17, 1945, a hail storm destroyed the crop covered by this application. Appraisal of the loss was made and reported as a total loss, with exception of forty acres appraised at 90%. Applicant filed proof and claim of loss. The board cancelled the application and denied the claim on the ground that the insurance was not in force and effect at the time the loss occurred.

Section 350, Revised Codes of Montana, 1935, creates the State Board of Hail Insurance and outlines its powers and duties. It provides among other things that the board shall prepare forms to be furnished the several public officials having duties to perform in connection with the provisions of the act. It requires the county assessor of every county, at the time in which the regular assessments of property are made, to submit to each farmer engaged in growing crops subject to injury or destruction by hail, forms of application on which the farmer shall signify whether or not he desires to become subject to the provisions of the law. Each farmer who desires to become subject to the act is required to file in the office of the county assessor the application, properly filled out, not later than August 15th, and from the filing thereof "shall be chargeable with the tax on lands growing crops subject to injury or destruction by hail, hereinafter provided for, and shall share in the protection and benefits under the hail insurance provisions of the Act." This section then provides:

> "Such application for hail insurance shall be in full force and effect at noon the day following the acceptance of the same by the county assessor . . ."

While hail insurance, like any other insurance, is governed by the law of contracts, inasmuch as the insurance provided in this instance is under statute, the provisions of the statute must govern. All of the provisions of the statutes must be complied with before an applicant is entitled to any benefits thereunder. The board, being a creature of the statute, has only such powers as are given it or those necessarily implied.

It is my understanding that, as the facts before the board showed the application was not received or accepted by the assessor until a few hours before the loss, the board, in view of the provisions of Section 350 quoted above, denied the claim and cancelled the loss.

Under the statutes here involved, it is the duty of the board to investigate all claims for loss filed with it, and if all the provisions of the statute have been complied with, to allow the loss. The board's action therefore must depend upon the facts in each particular case.

The statute requires the applicant for insurance to file his application with the assessor of the county wherein the land on which the crops covered are situated. This is a duty placed upon the applicant. He may use whatever means he desires in order to accomplish this duty. He may deliver the application personally, by personal agent, or by mail. However, it is clear, that until the application is actually filed, no duty devolves upon the county assessor. The statute then requires the county assessor either to reject or accept the application. If the application meets the provisions of the statute, the assessor must accept it. From the time of acceptance, then, the period required to elapse begins to run; that is, the insurance is not in force until noon of the day following the acceptance of the application.

It appears from the facts that there was an unusual delay in transmitting the application in this case. As to the cause of such delay, the facts are conflicting. The application shows it was signed and dated at Sidney, Richland County, on the 14th day of July, 1945, at two o'clock P. M. Applicant claims he placed the application in the mail that date. The mail for Glendive closes at one fifty-five P. M. The mail first goes to Glendive, and is then transferred to the carrier for Circle, McCone County. July 14th was on a Saturday. If the application got into the mail on Saturday, July 14, it would reach Glendive that night and asuming no mail delivery on Sunday, it should have reached the assessor at Circle on the morning of July 16. In this event, the application could have been accepted on July 16 and the insurance would have been in effect at noon on the following day, July 17. The hail storm which destroyed the crop covered by this application occurred about seven P. M. July 17.

Applicant, in a letter to the board, dated July 18, 1945, giving notice of the loss, stated, "Application for insurance in the amount of $5.00 an acre (164 a) was forwarded to the assessor's office in Circle, Montana on July 12, 1945." In a letter written by the applicant and dated September 30, 1945, he stated, "On Friday, July 13th, I had a talk with our local assessor about the state hail insurance. He informed

me that my insurance would be in effect twenty-four hours after I sent out the application. He gave me a blank which I filled in, dated July 14th, and I definitely posted the letter to Mr. Moline, the McCone County Assessor, at one-thirty Saturday afternoon, July 14th. This mail gets to Glendive at four thirty that afternoon. There is no mail service to Circle on Sunday, so the application could not get to Circle until Monday morning, July 16th. I can see no reason why it should not reach Circle, on Monday morning."

The Deputy County Assessor of McCone County, who handled this application, in a letter to the board dated December 22, 1945, speaking of the time the application was received, stated, "It was received in this office Tuesday morning, July 17th. Our policies are always dated the day the applications are received. It was written that morning and mailed before the mail left for Glendive. However, the mail service is not the best between Sidney and Circle and since it was late in the year and in the hail season I do not believe it is the fault of this office as we acted on this as soon as was humanly possible to do so. I wrote applications and policies for people on July 16th and they were hailed out at the same time but had the extra 24 hours to go on." And in a letter dated February 14, 1946, the Deputy Assessor states, "The Circle-Glendive mail arrives by mail truck at about 9:00 or 9:30 o'clock A. M. every day except Sunday. The first class mail is sorted at once and since this office has a private box the mail is never called for at the window. July is a quiet month in our office, and my work was merely to keep the office open and write the hail insurance policies. I could not say exactly what time Mr. Moline brought the mail the morning of July 17th, (Tuesday) but I do know that we noticed this letter in particular because it had taken so long to arrive here. The mail leaves for Glendive at 11:00 o'clock A. M. the same day it arrives, and I had time to write this policy and take it to the post office myself so it would catch the mail going out."

In passing on claims of this nature, where there is a doubt as to whether or not the insurance was in full force and effect at the time of the loss, the board is placed somewhat in the position of a jury and must determine that question from the facts in each case. It is not for the Attorney General in this instance to say what the true facts are or to form a judgment for the board.

The statute here is clear and unambiguous in providing that the application is not in force and effect until noon of the day following the acceptance of the application by the assessor. The board, of course, would have no authority to make payment of a loss under an application which was not in force and effect at the time of the loss.

The hail insurance law does not apply automatically. In order to make it effective, and before any crop is covered under its provisions, certain acts are required to be done both by the public officers charged with duties thereunder and by the farmer whose crop is to be protected.

In North and South Dakota the hail insurance law requires the county assessor of each county at the time of assessment of property, to make a return of the number of tillable acres in every tract, parcel or subdivision of land subject to taxation together with the name of the person in whose name the land is taxed and the number of acres of such land, if any, in crop, or to be sowed or planted to crop, during such year, and to return such assessment list to the county auditor on or before the 1st day of June. (Section 9, Chapter 232, Laws of 1923.) It is further provided that if any assessor shall neglect to list any land or list it improperly, the owner or tenant may list such land with the county auditor prior to June 10. (Sec. 189b11 Supp. to the Comp. Laws, 1913.) It is also provided that if the listing is not corrected, that shown by the assessor shall govern.

In the case of McEwan, et al. v. The State of North Dakota, 61 N. D. 173, 237 N. W. 306, the owner listed his land with the assesosr on the 10th day of May, showing a description of the land and that 300 acres were in crop. The assessor, in returning the listing, showed but 30 acres in crop. This was not corrected by the owner prior to June 10th as provided by the statute. On July 18th the crop on said land was totally destroyed by hail. The loss was reported and adjusted at the sum of $2100. Payment of the claim

was refused on the ground that only 30 acres were listed. The Supreme Court of North Dakota, in upholding the disallowance of the claim by the state board, said:

"The state hail insurance law does not apply automatically; it can only be secured by complying with the statute.

"In the instant case the assessor listed the land improperly, and the plaintiff on or before the 10th day of June could have filed an affidavit correcting the crop listing affidavit. This he neglected to do, and since the crop listing affidavit was not corrected, and the statute specifically provides that the number of acres as shown by the assessor in the column provided for that purpose shall govern, it is binding on the plaintiff and upon the officers whose duty it is to administer the law . . ."

Bossen V. Olsness
48 N. D. 68, 182 N. W. 1013
Schmitz v. Olsness
58 N. D. 604, 226 N. W. 629
Fillback v. Van Camp
47 S. D. 407, 199 N. W. 246
Hoeck v. Van Camp
48 S. D. 628, 205 N. W. 624
State v. Helgerson
52 S. D. 367, 217 N. W. 638

While the Montana hail insurance law has been in effect since 1917, there has been only one case before our Supreme Court involving the provisions of this law. Crosby v. State Board of Hail Insurance, 113 Mont. 470, 129 Pac. (2d) 99.

In the Crosby case, supra, the question involved the effect of the arbitration statute. It was contended the arbitration provision was a condition precedent to suit. Plaintiff, the claimant, contended that by appearing and answering to the complaint, the state board had waived the requirement for arbitration. The court said:

"The powers of the board are purely statutory and even though it be said that it attempted to waive the requirement for arbitration, such waiver would be of no effect since it would be beyond the power of the board to do so under the statute."

It would appear from this decision that our Court would adopt a strict interpretation of the provisions of this law. Therefore, it would make no difference what caused the delay in filing and accepting the application in this case. Under the statute, Section 350, Revised Codes of Montana, 1935, the insurance is not in full force and effect until noon of the day following the acceptance of the application

As heretofore pointed out, it is the duty of the county assessor to accept the application, provided it is in proper form and meets the requirement of the statute. It may be said it is, likewise, his duty to act promptly. However, there is a presumption of law that official duty has been performed. Section 10606, Revised Codes of Montana, 1935. In discussing this presumption, our Supreme Court, in the case of State ex rel. Brown v. District Court, 72 Mont. 213, 232 Pac. 201, at page 218 of the Montana Report said:

"One of the presumptions declared by section 10606, Revised Codes of 1921, is 'that official duty has been regularly performed.' While this is a disputable presumption, it has the effect of evidence (sec. 10600 Rev. Codes, 1921; Cooper v. Romney, 49 Mont. 119, Ann. Cas. 1916A 596, 141 Pac. 289) and is satisfactory if not contradicted. (Sec. 10606, supra). The rule in reference to this presumption is stated in Throop on Public Officers, section 558, as follows: 'And the presumption is always in favor of the correct performance of his duty by an officer; and every intendment will be made in support of such presumption. So it will always be presumed that in any official act, or act purporting to be official the officer has not exceeded his authority."

And the Court quotes from this authority further as follows:

"The presumption is that no official person, acting under oath of office, will do aught which it is against his official duty to do, or will omit to do aught which his official duty requires should be done."

Under the facts of the instant case, it will be presumed the County Assessor of McCone County acted promptly upon receipt of the application. This presumption would prevail in the absence of evidence to the contrary. The

County Assessor states the application was received in the mail on the morning of the 17th of July and the same was accepted and the policy written and returned to the applicant by return mail on the same day. There was no contradicting evidence before the board on this point. On the other hand, applicant states the application was deposited in the mail at Sidney at 1:30 P. M., on the 14th. The mail goes to Glendive that same day, which was in this case, on Saturday. There is no mail delivery between Glendive and Circle on Sunday, hence, this mail would stay in the post office at Glendive during Sunday. In the regular course, the mail containing this application, should have gone to Circle on Monday morning the 16th. If it did, the assessor could have accepted the application, on that date. In this event, the insurance would have been in full force and effect at the time of the loss on the 17th. Likewise, there was no contradicting evidence on this point before the board. However, the board was authorized to pass upon the facts before it. This it did and in doing so determined the facts against the applicant. In the absence of any showing of fraud or bad faith on the part of the board, such determination is binding. I cannot say the board was not justified under the evidence before it in making the decision it did. It may be that a jury would arrive at a different conclusion on the same facts.

There is no question the applicant acted in good faith, and was justified in adopting the mail as the means of transmitting his application to the Assessor of McCone County. However, in doing so, he assumed the responsibility of the application reaching the Assessor on time to be accepted and the insurance in force when his loss occurred.

Applicant stated in one of his letters that the County Assessor of Richland County informed him the insurance would be in effect twenty-four hours after he sent out his application. This statement, however, would not be binding on the board for the reason that it is contrary to the specific provision of the statute.

It is therefore my opinion the board acted within its authority investigating the facts of this case and from such facts determining whether or not the insurance was in effect at the time of the loss. Its determination in this respect, in the absence of proof of fraud or bad faith, is binding until otherwise determined by a court.

I do not intend by this opinion to say whether or not, if the same facts were presented to a court or jury, a different result would occur.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General