OPINION NO. 2008-016

Syllabus:

2008-016

The Administrator of Workers' Compensation does not have the discretionary authority to charge the additional reimbursement payments due to hospitals under *Ohio Hospital Association v. BWC*, 10th Dist. No. 06AP-471, 2007-Ohio-1499, 2007 Ohio App. LEXIS 1370 (Mar. 30, 2007), to the surplus fund account within the State Insurance Fund.

To: William J. Lhota, Chairman, Bureau of Workers' Compensation Board of Directors, Columbus, Ohio
By: Marc Dann, Attorney General, May 14, 2008

We have received your request, submitted on behalf of the Bureau of Workers' Compensation Board of Directors, for a formal opinion on a question related to the decision in *Ohio Hospital Association v. BWC*, 10th Dist. No. 06AP-471, 2007-Ohio-1499, 2007 Ohio App. LEXIS 1370 (Mar. 30, 2007). In that case, Ohio's Tenth District Court of Appeals upheld the invalidation of a hospital reimbursement rate implemented by the Bureau of Workers' Compensation (BWC) in October of 2005. As a result, the BWC is preparing to make approximately $80 million in additional reimbursement payments to hospitals. Your question is as follows:

> Does the Administrator of the Ohio Bureau of Workers' Compensation have the discretionary authority to charge the additional reimbursement payments to the hospitals, as a result of the resolution of *Ohio Hospital Association v. BWC*, to the Surplus Fund?

For the reasons discussed below, we conclude that the Administrator of Workers' Compensation does not have the discretionary authority to charge the additional reimbursement payments due to hospitals under *Ohio Hospital Association v. BWC*, 10th Dist. No. 06AP-471, 2007-Ohio-1499, 2007 Ohio App. LEXIS 1370 (Mar. 30, 2007), to the surplus fund account within the State Insurance Fund.

Payments at Issue Under Ohio Hospital Association v. BWC

Ohio Hospital Association v. BWC concerned payments made by the BWC under its Health Partnership Program (HPP) to reimburse health care providers for the treatment of injured workers. *See* R.C. 4121.44-.441; 10A Ohio Admin. Code Chapter 4123-6. In 2005, the BWC decided to institute a new fee plan that decreased the reimbursement rates for HPP providers. The BWC notified the providers of the changes, published the changes in a provider bulletin, and incorporated the changes in a manual that was distributed to the providers. On the day before the plan was to go into effect, the appellee providers filed a declaratory judgment action against the BWC, alleging that that the new fee plan had not been properly adopted because rates could be changed only through the promulgation of a rule under R.C. Chapter 119, and requested injunctive relief to enjoin the BWC from reimbursing the providers at the decreased reimbursement rates. *Ohio Hospital Association v. BWC* at ¶2-4.

The trial court found, and the Tenth District Court of Appeals affirmed, that the BWC could change rates only through the promulgation of a rule under R.C. Chapter 119, so the plan for decreased rates had not been properly adopted. *Ohio Hospital Association v. BWC* at ¶5, 12-13, 23. An injunction was granted, with the appellate court stating, in part, that "if the bureau had agreed to cease enforcement of the invalid plan, injunctive relief would not have been necessary. However, it is evident from the record and the trial court's comments that the bureau continues to enforce the new plan and apparently intends to continue such enforcement in the future, despite the trial court's opinion that the new reimbursement fees were invalidly promulgated." *Ohio Hospital Association v. BWC* at ¶26.

Thus, over a substantial period of time, the BWC reimbursed HPP providers at decreased rates that were not properly promulgated by rule. The amounts that the BWC is preparing to pay as a result of *Ohio Hospital Association v. BWC* are the amounts by which the reimbursements were underpaid—that is, "the difference between the reimbursement under the old rates and the amount received under the new rates." *Ohio Hospital Association v. BWC* at ¶30.

Surplus Fund Account Within the State Insurance Fund

In order to address your question, it is necessary to review the structure of the State Insurance Fund and the surplus fund. The State Insurance Fund is established under Ohio Const. art. II, § 35, which authorizes the enactment of laws creating a system of compulsory employer contributions to a state fund "[f]or the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment." Under Ohio Const. art. II, § 35, the fund must be administered by the state.

Legislation enacted by the General Assembly provides for the creation of the State Insurance Fund, consisting of the "public fund" and the "private fund," each of which contains an account known as the surplus fund. R.C. 4123.30; R.C. 4123.34(B). As explained in 1980 Op. Att'y Gen. No. 80-072 (syllabus, paragraph 1), the surplus fund "is an account within the state insurance fund rather than a separate and distinct fund."[1] For this reason, we use the terms "surplus fund" and "surplus fund account" interchangeably. The Treasurer of State is custodian of the State Insurance Fund, and moneys are deposited and disbursed in accordance with R.C. 4123.42 and R.C. 4123.43. *See* 1980 Op. Att'y Gen. No. 80-072, at 2-287.

It is the duty of the Bureau of Workers' Compensation Board of Directors and the Administrator of Workers' Compensation "to safeguard and maintain the solvency of the state insurance fund." R.C. 4123.34. The Administrator, with the advice and consent of the Bureau of Workers' Compensation Board of Directors, "shall adopt rules with respect to the collection, maintenance, and disbursements of the state insurance fund." R.C. 4123.32. *See State ex rel. United Auto Aerospace & Agricultural Implement Workers of America v. BWC*, 95 Ohio St. 3d 408, 2002-Ohio-2491, 768 N.E.2d 1129.

The Administrator is given the following responsibility in R.C. 4123.34:

> The administrator, in the exercise of the powers and discretion conferred upon the administrator in section 4123.29 of the Revised Code [to classify occupations or industries and fix premium rates], shall fix and maintain, with the advice and consent of the board, for each class of occupation or industry, *the lowest possible rates of premium consistent with the maintenance of a solvent insurance fund and the creation and maintenance of a reasonable surplus*, after the payment of legitimate claims for injury, occupational disease, and death that the administrator authorizes to be paid from the state insurance fund for the benefit of injured, diseased, and the dependents of killed employees. (Emphasis added.)

See also R.C. 4123.29(A)(2) (the Administrator, subject to the approval of the Bureau of Workers' Compensation Board of Directors, shall fix the rates of premiums of the various classifications "at a level that assures the solvency of the fund"). In addition to establishing basic premium rates for all employers within a particular classification, the Administrator is authorized to apply a system of calculating merit rates that considers the experience of a particular employer, while observing the basic principles of workers' compensation insurance. R.C. 4123.34(C); *see* 10A Ohio Admin. Code 4123-17-03(A) ("[a]n employer's premium rates shall be the manual basic rates . . . for each of its classifications except as modified by its experience rating").

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[1] In addition to analyzing the nature of the surplus fund, 1980 Op. Att'y Gen. No. 80-072 cited various statutes expressly providing for certain expenditures to be made from the surplus fund. *See* 1980 Op. Att'y Gen. No. 80-072, at 2-286 n.3. The 1980 opinion did not consider whether or under what circumstances charges could be made to the surplus fund in the absence of express statutory authorization.

With regard to the surplus fund, R.C. 4123.34 states, in part:

> (B) Ten per cent of the money paid into the state insurance fund shall be set aside for the creation of a surplus *until the surplus amounts to the sum of one hundred thousand dollars*, after which time, *whenever necessary* in the judgment of the administrator *to guarantee a solvent state insurance fund, a sum* not exceeding five per cent of all the money paid into the state insurance fund *shall be credited to the surplus fund*. (Emphasis added.)

See also State ex. rel. First Nat'l Supermarkets, Inc. v. Industrial Comm'n, 70 Ohio St. 3d 582, 584, 639 N.E.2d 1185 (1994) (self-insured employers also contribute to the surplus fund).

The provisions of R.C. Chapter 4123 quoted above indicate that the surplus fund was established to provide a source of uncommitted reserve moneys to assure the solvency of the State Insurance Fund. *See* Philip J. Fulton, *Ohio Workers' Compensation Law* § 14.2 (2d ed. 1998) (''[t]he surplus fund is . . . a safety reserve in the maintenance of solvent insurance funds from which benefits are payable''). *See generally* 1986 Op. Att'y Gen. No. 86-056, at 2-307 (discussing surplus moneys retained by a municipal corporation as a reserve for waterworks purposes).

Statutorily Mandated Expenditures from the Surplus Fund

The surplus fund account within the State Insurance Fund is not merely retained as a source of uncommitted funds. Rather, various statutes specify that certain types of payments must be made from the surplus fund. *See* 1980 Op. Att'y Gen. No. 80-072, at 2-288 (''[t]here is no statutory authority to expend funds other than surplus account funds for such purposes''); note 1, *supra*.

For example, the surplus fund is used to pay ''the expense of providing rehabilitation services, counseling, training, and living maintenance payments,'' R.C. 4121.66(A); certain benefits in the case of a second injury, R.C. 4123.35(D); payments of compensation or medical benefits, or both, when it is determined in a final administrative or judicial action that they should not have been made, R.C. 4123.512(H); the cost of an artificial appliance or its repair, R.C. 4123.57(C); and the costs of certain medical evaluations for occupational diseases, R.C. 4123.68. *See also, e.g.,* R.C. 4123.46(A)(2) (providing surplus fund moneys for off-duty peace officers, firefighters, and emergency medical personnel who are injured or killed while responding to emergencies); 10A Ohio Admin. Code 4123-6-39, -7-28(A) (payments for purchase or repair of an artificial appliance are made from the surplus fund); 10A Ohio Admin. Code 4123-18-08 (payments for rehabilitation services and living maintenance are made from the surplus fund).

In these and other instances, statutes and rules prescribe the manner in which the payment is to be made, to which source it is charged, and whether the amount is to be recouped in any way. For example, R.C. 4123.35(J) provides that portions of the surplus fund are to be used, respectively, for reimbursement for persons with disabilities, for rehabilitation costs, and for reimbursement of payments that should

not have been made. There is express authority to impose assessments against the employers who use such portions of the funds and to exclude from the assessments self-insuring employers who have opted to make direct payments instead of participating in the surplus fund. R.C. 4123.35(J); *see also, e.g.,* R.C. 4123.34(B) (''[t]he administrator, from time to time, may determine whether the surplus fund has such a deficit [in the portion that is used for reimbursement to self-insuring employers for all expenses other than reimbursement for persons with disabilities] and may assess all self-insuring employers who participated in the portion of the surplus fund during the accrual of the deficit and who during that time period have not made the election under [R.C. 4121.66(D) to make direct payments] the amount the administrator determines necessary to reduce the deficit''); R.C. 4123.343(G); R.C. 4123.35(J); R.C. 4123.512(H) (a self-insuring employer shall deduct the amount of surplus fund payments from the paid compensation reported, or may elect to opt out and receive no money or credit from the surplus fund and not be required to pay amounts into the surplus fund on account of R.C. 4123.512; ''[i]n the event the employer is a state risk, the amount shall not be charged to the employer's experience, and the administrator shall adjust the employer's account accordingly''); 10A Ohio Admin. Code 4121-3-18(A)(17), (B)(2) (in an administrative appeal, if a claim is denied after payments were made, the payments ''shall be charged to the statutory surplus fund''; in a court appeal, if the claimant obtains a judgment when the right to participate in the fund was contested, the Administrator shall pay the attorney fee for the claimant's attorney and the employer shall be billed for the fee by the accounts section); 10A Ohio Admin. Code 4123-17-50(C) (excluding certain catastrophe costs from the experience of a classification or an employer).

With regard to reimbursement for persons with disabilities, R.C. 4123.343(B) states that, under prescribed circumstances, ''all or such portion as the administrator determines of the compensation and benefits paid in any claim arising'' from the employment of persons with disabilities ''shall be charged to and paid from the statutory surplus fund created under [R.C. 4123.34] and only the portion remaining shall be merit-rated or otherwise treated as part of the accident or occupational disease experience of the employer.'' *See also* R.C. 4123.63 (compensation attributable to injury or disease suffered while in the military service). R.C. 4123.35(J)(2) provides that the Administrator ''may determine the total assessment for the handicapped portion of the surplus fund in accordance with sound actuarial principles.''

Under R.C. 4123.75, when a claim is filed by an employee of a noncomplying employer, ''[p]ayment of the claim shall be made promptly from the statutory surplus fund.'' However, recovery must be sought from the employer and if recovery is obtained, amounts paid from the surplus fund are repaid, with any balance going into the State Insurance Fund. R.C. 4123.75. Similarly, if federal moneys are provided to compensate for benefits granted from the surplus fund because of military injuries or disease, those moneys are credited to the surplus fund. R.C. 4123.63.

The provisions of statute and rule governing specific expenditures from the

surplus fund thus are explicit and detailed. No such specific provisions apply to the proposed expenditures to which your question relates.

Discretionary Use of the Surplus Fund

Your request refers to a treatise written by former BWC Administrator James Young and asks whether the analysis set forth in that treatise provides the Administrator with discretionary authority to charge the payments in question to the surplus fund. The treatise reads in part as follows:

> Reference has been made earlier to the existence of surplus within the State Insurance Fund. All surplus credits are generally spoken of as the Surplus Fund even though *the surplus does not exist as one separate fund.* There is a widespread misconception concerning the nature of surplus. In the ordinary sense, it would mean the excess of net income over fixed charges and liabilities. In the compensation program, it does not connote an undivided profit or a fund being held without specific purpose. *Surplus in the compensation program is uncommitted reserve, and it exists to maintain the solvency of the fund.* Premium requirements are computed upon the experience of the past, but that experience does not reveal the entire picture. There are unforeseen contingencies which can develop, and a safety factor must exist in order that the fund can absorb those contingencies. This was the purpose in creating a surplus. Since its creation, certain foreseeable charges have been added as an obligation of surplus but they do not change its basic nature. *There are three sources of demands upon surplus. The first group is statutory in origin, the second is discretionary with the [Industrial] Commission, and the third arises from unforeseen factors outside the control of the agencies.*

James L. Young, *Young's Workmen's Compensation Law of Ohio* § 15.10 (2d ed. 1971) (emphasis added).[2]

As previously discussed, the statutorily-prescribed uses of the surplus fund do not provide for payment from the surplus fund of amounts to be paid under *Ohio Hospital Association v. BWC*. Therefore, it is necessary to consider whether the Administrator has discretionary authority to take action to charge the *Ohio Hospital Association* payments to the surplus fund. Our research has disclosed no statute or rule granting the Administrator authority to charge these payments to the surplus fund on the basis of discretion, and we find no inherent or implied authority for the

[2] The statutes governing workers' compensation have been amended in many respects since 1971 and the Administrator now performs many functions previously performed by the Industrial Commission. *See, e.g.,* R.C. 4121.121 (the Administrator of Workers' Compensation administers and manages the BWC); 1989-1990 Ohio Laws, Part II, 3197, 3198 (Am. Sub. H.B. 222, eff. Nov. 3, 1989) (*inter alia*, transferring powers and duties of the Industrial Commission to the BWC). In general, however, the provisions governing the surplus fund are sufficiently similar to those in existence in 1971 for Young's analysis to be of interest.

Administrator to take such action. *See generally* R.C. 4121.44-.441; R.C. 4123.32; R.C. 4123.34; *cf.* R.C. 4123.66(A) (the Administrator is expressly given discretion to disburse and pay from the State Insurance Fund ''the amounts for medical, nurse, and hospital services and medicine as the administrator deems proper''); 2005 Op. Att'y Gen. No. 2005-008, at 2-83 (authority of Administrator under HPP).

With regard to discretionary authority, Young's treatise states:

> In addition to . . . statutory charges against surplus, the [Industrial] Commission makes *discretionary charges in certain situations.* This is reserved generally for cases *where a direct charge to an employer's risk would be a gross inequity.* An example of this would be the case of an employe who had worked for a number of foundries and became totally disabled from silicosis after a few days of employment with the current employer. The Commission's policy of charging such claims to the last employer would work an extreme hardship and it has in the past occasionally charged the cost of such a claim to surplus. It is the *discretionary application of the surplus charge which attracts the employer, and conveys a misconception of the character of surplus. It appears to be an available and unused source of relief.* When a surplus charge is made, it has the same impact as a direct charge to a risk's experience. The only difference is in who bears the impact. *There is no specific statutory authority for the exercise of discretionary charges to surplus; it must be implied from all of the statutory provisions relating to basic and merit rating.* In practice, the Bureau makes no charges against the Surplus Fund.

James L. Young, *Young's Workmen's Compensation Law of Ohio* § 15.12 (2d ed. 1971) (emphasis added). The essence of this analysis is that in the past the Industrial Commission occasionally charged a claim to surplus upon a determination that charging the claim to a particular employer would work an extreme hardship. The analysis indicates that there is no specific statutory authority to take an action of this sort, but that authority may be implied from all the statutory provisions relating to basic and merit rating.

That the Industrial Commission, on occasion prior to 1971, may have charged to the surplus fund some claims in which it detected inequities does not establish that the authority to take this action existed, or that it exists now. We seriously question the proposition that there is implied authority for the Administrator to take discretionary action on a case-by-case basis to make charges to the surplus fund with no specific statutory authority. In fact, Young's treatise states that the discretionary application of the surplus charge ''conveys a misconception of the character of surplus,'' making it appear to be an available and unused source of relief, which as discussed more fully below, is not the accepted characterization of surplus. James L. Young, *Young's Workmen's Compensation Law of Ohio* § 15.12 (2d ed. 1971).

Further, even if the authority to make discretionary charges against the surplus fund does exist, it does not appear that it could reasonably be applied to the

facts you have described. The payment of moneys to health care providers for the treatment of injured workers is governed by specific provisions of law that establish who bears responsibility for providing the moneys. R.C. 4123.34(A) requires the Administrator to "keep an account of the money received from each individual employer and the amount of losses incurred against the state insurance fund on account of injuries, occupational disease, and death of the employees of the employer." Thus, by statutory prescription, the Administrator must account for any payments made for health care of the employees of a particular employer. The fact that moneys are paid under a judicial decision does not modify this requirement.

With regard to charging amounts applicable to a particular employer to that employer's experience, R.C. 4123.511 states, in part:

> (J) The administrator *shall charge* the compensation payments made in accordance with division (H) of this section or *medical benefits payments* made in accordance with division (I) of this section [medical benefits under R.C. Chapters 4121, 4123, 4127, or 4131] *to an employer's experience* immediately after the employer has exhausted the employer's administrative appeals as provided in this section or has waived the employer's right to an administrative appeal under division (B) of this section, subject to the adjustment specified in division (H) of [R.C. 4123.512]. (Emphasis added.)

Hence, it is mandatory for medical payments for a particular employee to be charged to the employer's experience. *See* R.C. 4123.34(C); 10A Ohio Admin. Code 4123-17-03.

R.C. 4123.511(J) specifies the time at which the charge should be made as immediately after the administrative appeals phase, subject to the adjustment specified in R.C. 4123.512(H), which states that payments are not stayed during an appeal or court case and if it is found that payments should not have been made the amount is charged to the surplus fund. No provision specifically addresses amounts that are found to have been underpaid. However, if amounts become due later in the process, the mandate to charge them to the employer's experience would appear to apply at that time. *See, e.g.,* 10A Ohio Admin. Code 4123-3-10(B) ("[m]edical awards shall be paid by the bureau within the time limits set forth in rule 4123-6-12 of the Administrative Code"); 10A Ohio Admin. Code 4123-6-09(A) ("[t]he bureau shall not make medical payments in a disallowed claim or for conditions not allowed in a claim until permitted to do so under the provisions of [R.C. 4123.511] or except as provided by the rehabilitation rules of Chapter 4123-18 of the Administrative Code"). *See generally State ex rel. Diversey Corp. v. BWC*, 10th Dist. No. 03AP-343, 2004-Ohio-1626, 2004 Ohio App. LEXIS 1431, at ¶19 (Mar. 31, 2004) (where the right to reimbursement from the surplus fund exists under R.C. 4123.512(H) for payments that should not have been made, it does not matter whether the administrative or judicial decision involved a "straight line" appeal or arose through subsequent proceedings), *dismissed,* 103 Ohio St. 3d 1415, 2004-Ohio-4300, 813 N.E.2d 897.

The amounts to be paid under *Ohio Hospital Association v. BWC* are due to

particular HPP providers to reimburse them for costs of treatment provided to injured workers. The charges that will be paid are directly related to claims filed by the employees of particular employers. Although the total amount to be paid is substantial, the amounts paid can be allocated to particular providers, to particular workers, and to the particular employers of those workers. The Administrator is not authorized to disregard provisions of law establishing applicable procedures and simply charge all payments made under *Ohio Hospital Association v. BWC* to the surplus fund.

There is no apparent inequity in charging payments under *Ohio Hospital Association v. BWC* to the State Insurance Fund in the normal manner. It is true in the instant case that the Bureau (not each employer) was responsible for underpaying the amounts due, that there has been judicial action prescribing these payments, and that there has been a delay in charging the amounts due, but these factors do not remove the obligation of the Administrator to follow the accounting procedures established by law. It is also true that charging employer's risks with additional health care costs for services provided in prior years may change their situation, but the fairness of the action is clear. The portion of the health care costs paid previously was charged to the employers, and the judicial decision merely increases the amount due for health care. It is reasonable and fair for the additional costs of providing health care to be charged to the employers of the affected employees, notwithstanding that the underpayments resulted from action by the Bureau.

If payments were charged to the surplus fund, the fund would be replenished by payments from all the employers, so the effect would be to spread the cost among all employers, instead of having it charged to the employers of the employees who actually received the health care benefits. That result would result in an apparent inequity to employers who did not have any employees affected by the *Ohio Hospital Association* case.[3] The need to balance equities among employers raises additional questions about the validity of the conclusion that there exists in any situation the

[3] Young's treatise explains this effect as follows:

The level of surplus is a matter of opinion. In recent years, it has been maintained at a level approximately equal to twenty percent of one year of premium contribution. Surplus is not static; it varies from hour to hour. A claim which does not draw benefits to the anticipated extent, increases surplus. A claim which has a higher cost than anticipated, depletes surplus. Charges to surplus are recouped in the rate-making process. Surplus charges appear as a part of a classification's raw losses in the computation of the basic rate. The surplus charges which emanate from a particular classification are returned to that classification. *The effect of a surplus charge is to relieve the risk of the employer who would normally be charged with the cost and to spread that cost over all of the employers in the classification.* They each help share the burden that would ordinarily have been borne by the employer who produced the loss. A surplus charge is no more than removing a particular cost from merit rating. Surplus charges should concern only the merit rated employer from the standpoint of advantage. For him, a surplus charge takes a liability out of his merit rate computation. The non-merit rated employer has no adjustment for his

implied authority for the Administrator to take discretionary action to make charges to the surplus fund in the absence of specific statutory authority.

In addition, any use of the surplus fund account for discretionary charges reduces the amounts in the surplus fund that are available to assure the solvency of the State Insurance Fund. Hence, to the extent that there may be authority to use the surplus fund for discretionary charges, that authority should be exercised sparingly and its use is not justified in the situation here under consideration. *See generally* 1989 Op. Att'y Gen. No. 89-033 (syllabus, paragraph 3) (those given the statutory duty of preserving and safeguarding the State Insurance Fund have a fiduciary responsibility "to adhere to certain standards of judgment and care when making decisions or taking actions that may affect the financial integrity and soundness of the state insurance fund").

Use of the Surplus Fund to Assure Solvency of the State Insurance Fund

As previously discussed, the surplus fund was established to provide a source of moneys to assure the solvency of the State Insurance Fund. In ordinary usage, surplus funds are maintained so that a source of moneys is available if unexpected shortages arise. In the event of unforeseen factors, it may be appropriate to make expenditures from the surplus fund or to transfer moneys from the surplus fund account to another account in the State Insurance Fund. *See, e.g.,* R.C. 4123.30; R.C. 4123.34. *See generally* 1986 Op. Att'y Gen. No. 86-056 (municipal waterworks moneys and surpluses); 1975 Op. Att'y Gen. No. 75-087 (temporary transfers of surplus moneys from one fund to another). We are not aware of any statutes or rules that prescribe the circumstances or manner in which such an expenditure or transfer may be made. *Cf.* 10A Ohio Admin. Code 4123-17-10 (describing circumstances in which the Administrator "shall have the discretion and authority to determine whether there is an excess surplus of premium; whether to return the excess surplus to employers; . . . and any other issues involving cash refunds or reduction of premiums due to an excess surplus of earned premium").[4]

You have not indicated that any shortage of moneys in other accounts

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individual experience. With or without a surplus chargeoff, he bears the same proportionate share of the classification's costs. If there was no merit rating plan, there would be no need for surplus charges as far as the individual employers would be concerned. *The substance of the surplus provision is not found in the discretionary charge which appeals to the merit rated employer; it is in the safety factor that surplus presents in the maintenance of solvent funds from which to pay benefits.*

James L. Young, *Young's Workmen's Compensation Law of Ohio* § 15.14 (2d ed. 1971) (emphasis added).

[4] With regard to use of the surplus fund to assure solvency of the State Insurance Fund, Young's treatise states:

The third source of surplus charges represents *the type of contingency contemplated in the creation of the surplus factor. There is always the possibility that claim costs will develop at a greater rate than shown by past experience and, should this occur, surplus exists to absorb the additional cost.* An unanticipated

requires the use of moneys in the surplus fund to pay the amounts at issue under *Ohio Hospital Association v. BWC.* Accordingly, it does not appear that the use of surplus funds in this manner would be appropriate in the circumstances you have described.

Conclusion

For the reasons discussed above, it is my opinion and you are advised that the Administrator of Workers' Compensation does not have the discretionary authority to charge the additional reimbursement payments due to hospitals under *Ohio Hospital Association v. BWC*, 10th Dist. No. 06AP-471, 2007-Ohio-1499, 2007 Ohio App. LEXIS 1370 (Mar. 30, 2007), to the surplus fund account within the State Insurance Fund.

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increase in the level of compensation benefits can also present a demand which can be met only from surplus. The statutes require the premium contribution rates to be revised annually on July 1. Such rates are in effect for one year from that date. As occurred in 1959, the legislature may not have fixed the compensation benefit level by the time that the premium rates must be adopted. If the level as set by the legislature is higher than the level considered by the actuary, the fund must operate for approximately eight months after the effective date of the new benefit schedule before the rates can be revised to take the higher level into consideration. In such a case, surplus provides the additional funds that are needed. The estimated cost of a permanent total disability claim is based upon the life expectancy of the claimant. If he outlives the predicted period, the extra cost of the claim is a demand upon surplus. In fixing premium rates, the actuary must anticipate the amount of payroll to which the rate will be applied. Should an unanticipated economic depression reduce the anticipated payroll, the established premium rates would not produce the amount of premium to pay the claims incurred. In such a case, surplus would provide the amount required. It is from the sense of this third category, *the true purpose of surplus*, that *the definition of surplus as uncommitted reserve* evolves.

James L. Young, *Young's Workmen's Compensation Law of Ohio* § 15.13 (2d ed. 1971) (emphasis added); *see also* note 3, *supra.*