

**OPINION NO. 80-072****Syllabus:**

1. The Bureau of Workers' Compensation surplus fund created pursuant to R.C. 4123.34(B) is an account within the state insurance fund rather than a separate and distinct fund.

2. The surplus created pursuant to R.C. 4123.34(B) must be maintained and accounted for as two separate accounts, a "public surplus account" within the "public fund" and a "private surplus account" within the "private fund."
3. Although surplus account moneys may be commingled with other state insurance fund moneys for purposes of deposit and investment, a separate and accurate account of all credits to, and disbursements from, the surplus accounts, as well as an accurate account of the balances in the surplus accounts, must be maintained.

**To: Raymond A. Connor, Administrator, Bureau of Workers' Compensation, Columbus, Ohio**

**By: William J. Brown, Attorney General, November 12, 1980**

I have before me your request for an opinion regarding whether the Bureau of Workers' Compensation surplus fund should be accounted for as a separate and independent fund or whether the surplus fund should be accounted for as an individual account within the state insurance fund.

Ohio Const. art. II, §35 authorizes the passage of laws establishing a state insurance 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." R.C. 4123.30 establishes the state insurance fund and provides for the payment of compensation from such fund. R.C. 4123.30 provides, in pertinent part, as follows:

Money contributed by the employers mentioned in division (B)(1) of section 4123.01 of the Revised Code constitutes the "public fund" and the money contributed by employers mentioned in division (B)(2) of such section constitutes the "private fund". Each such fund shall be collected, distributed, and its solvency maintained without regard to or reliance upon the other. Whenever in sections 4123.01 to 4123.94, inclusive, of the Revised Code, reference is made to the state insurance fund, such reference is to such two separate funds but such two separate funds and the net premiums contributed thereto by employers after adjustments and dividends, . . . constitute a trust fund for the benefit of employers and employees mentioned in sections 4123.01, 4123.03, and 4123.73 of the Revised Code for the payment of compensation, medical services, examinations, recommendations and determinations, nursing and hospital services, medicine, rehabilitation, death benefits, funeral expenses, and like benefits for loss sustained on account of injury, disease, or death provided for by sections 4123.01 to 4123.94, inclusive, of the Revised Code, and for no other purpose. This section does not prevent the deposit or investment of all such moneys intermingled for such purpose but such funds shall be separate and distinct for all other purposes, and the rights and duties created in sections 4123.01 to 4123.94, inclusive, of the Revised Code, shall be construed to have been made with respect to two separate funds and so as to maintain and continue such funds separately except for deposit or investment. Disbursements shall not be made on account of injury, disease, or death of employees of employers who contribute to one of such funds unless the moneys to the credit of such fund are sufficient therefor and no such disbursements shall be made for moneys or credits paid or credited to the other fund. (Emphasis added.)

The state insurance fund created pursuant to R.C. 4123.30 is required to be accounted for as if it were two separate and distinct funds, the "public fund," comprised of contributions made by public employers. and the "private fund,"

comprised of contributions made by private employers.<sup>1</sup> R.C. 4123.30 expressly requires that each fund be administered without regard to, or reliance upon, the other fund, and expressly prohibits the payment of compensation from a fund other than the fund to which the employer of the employee to be compensated contributed.

R.C. 4123.34 requires that a surplus be created and maintained from the money contributed to the state insurance fund. R.C. 4123.34 provides, in pertinent part, as follows:

(B) Ten per cent of the money paid into the state insurance fund shall be set aside for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars, after which time, whenever necessary in the judgment of the commission 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 such surplus fund. A revision of basic rates shall be made annually on the first day of July.

Pursuant to R.C. 4123.34, a percentage, to be determined by the Industrial Commission, of all moneys paid into the state insurance fund, is credited to the surplus "fund." Thus, both employers whose employees are compensated from the state insurance fund and employers who are self-insurers contribute to the surplus "fund."<sup>2</sup>

As previously discussed, R.C. 4123.30 requires the state insurance fund to be maintained and accounted for as if it were two separate and distinct funds; money contributed by public employers must be deposited in the "public fund," whereas money contributed by private employers must be deposited in the "private fund." Since the surplus is funded by a percentage of all moneys paid into the state insurance fund, and since the state insurance fund must be maintained as if it were two separate and distinct funds, your inquiry additionally involves the question of whether the surplus "fund" must be accounted for as two separate surplus accounts or funds.

There is no clear indication in the language of R.C. 4123.34 as to whether the intent was for the surplus to be an account or accounts within the state insurance fund or a separate and distinct fund or funds. The fact that the term "surplus fund" is employed in R.C. 4123.34(B), in requiring that money paid into the state insurance fund be credited to surplus, is not determinative of the legislative intent.

<sup>1</sup>Pursuant to R.C. 4123.01(B)(1) and R.C. 4123.30, a public employer is "[t]he state, including state hospitals, each county, municipal corporation, township, school district, and hospital owned by a political subdivision or subdivisions other than the state."

Pursuant to R.C. 4123.01(B)(2) and R.C. 4123.30, a private employer is:

[e]very person, firm, and private corporation, including any public service corporation, that (a) has in service one or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, or (b) is bound by any such contract of hire or by any other written contract, to pay into the insurance fund the premiums provided by Chapter 4123. of the Revised Code.

<sup>2</sup>A percentage of the premiums paid into the state insurance fund by employers whose employees are compensated from the state insurance fund is credited to the surplus "fund." A percentage of the premium rate which would be assessed against self-insuring employers had such employers not been granted permission to be self-insuring employers is paid by such employers into the state insurance fund to the credit of the surplus "fund." R.C. 4123.35.

In R.C. 4123.34(D) the term "fund" is employed to describe the "premium payment security fund," which, by statute, is "an account of the state insurance fund." R.C. 4123.34(D). Thus, it appears that the terms "fund" and "account" are used somewhat interchangeably in R.C. Chapter 4123. The legislative intent, therefore, cannot be determined solely on the basis of the term employed. Consequently, the legislative intent must be determined from a construction of the statutes providing for the administration of the surplus "fund."

In making such a determination, the fact that Ohio Const. art. II, §35 expressly authorizes the creation of only two funds, the state insurance fund and the fund for the investigation of industrial accidents, is of significance. The courts, construing the provisions of R.C. 4123.34 and R.C. 4123.35 in light of this constitutional provision, have held that the legislative intent was for there to be only one fund for the compensation of workers, the state insurance fund. Reinholz v. Industrial Commission, 96 Ohio St. 457, 119 N.E. 129 (1917) (construing G.C. 1465-54, the predecessor to R.C. 4123.34, and G.C. 1465-69, the predecessor to R.C. 4123.35). See also State ex rel. Turner v. Industrial Commission, 145 Ohio St. 608, 62 N.E. 2d 336 (1945); 1943 Op. Att'y Gen. No. 5753, p. 1. Pursuant to such an analysis, the court in Reinholz concluded that the statutory surplus fund, is merely a part of, or an account within, the general insurance fund.

The statutory scheme provided in R.C. Chapter 4123 for the deposit and disbursement of state insurance fund moneys supports the conclusion reached by the courts that the surplus is an account within the state insurance fund, rather than a separate and distinct fund. R.C. 4123.42 and R.C. 4123.43 expressly provide for the deposit and the disbursement of money belonging to the state insurance fund. R.C. 4123.42 provides, in this regard, as follows:

The treasurer of state shall be custodian of the state insurance fund, the occupational disease fund, and the fund for the investigation of industrial accidents and diseases and all disbursements from such funds shall be paid by him upon vouchers authorized by the industrial commission and signed by any two members of the commission.  
(Emphasis added.)

R.C. 4123.43 provides that "[t]he treasurer of state may deposit any portion of the state insurance fund not needed for immediate use in the same manner as and subject to all the laws with respect to the deposit of state funds by the treasurer of state" (emphasis added).

There is no statute, however, which expressly provides for the deposit of money belonging to the surplus created pursuant to R.C. 4123.34(B). Moreover, although there is specific statutory authorization to expend funds belonging to the surplus,<sup>3</sup> there is no statute which provides the procedure to be utilized in making such disbursements.

It would be unreasonable to conclude that the General Assembly, in providing for the creation of a "fund," the surplus, and for the expenditure of money from that "fund," failed to enact appropriate statutes governing the deposit and the manner of disbursement of money from such "fund." On the other hand, since R.C. 4123.42 and R.C. 4123.43 are applicable, by their express terms, to the "state

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<sup>3</sup>R.C. 4123.343(B) (benefits paid in claim arising from employment of handicapped persons shall be paid from the surplus fund); R.C. 4123.35 (additional compensation to employee of self-insurer to be paid out of the surplus); R.C. 4123.519 (compensation paid prior to a reversal by the appellate court shall be charged to the surplus fund); R.C. 4123.57(D) (cost of artificial appliance for injured employee shall be paid out of the surplus); R.C. 4123.75 (claims against noncomplying employers shall be paid from the surplus fund).

insurance fund," it cannot be presumed that R.C. 4123.42 and 4123.43 were intended to apply to other totally distinct and independent funds. If, however, the surplus is an account within the state insurance fund, rather than a separate and distinct fund, the surplus is encompassed within the term "state insurance fund," as used in R.C. 4123.42 and R.C. 4123.43, and, thus, is governed by the deposit and disbursement provisions of R.C. 4123.42 and R.C. 4123.43. A reasonable construction of the statutes, therefore, leads to the conclusion that the General Assembly intended for the surplus created pursuant to R.C. 4123.34(B) to be an account within the state insurance fund, and, as such, to be governed by the provisions of R.C. 4123.42 and R.C. 4123.43.

In light of the provisions of Ohio Const. art. II, §35 and the provisions of R.C. 4123.42 and R.C. 4123.43, it is my opinion that the surplus created pursuant to R.C. 4123.34(B) is an account within the state insurance fund rather than a separate and distinct fund.

Having determined that the surplus is an account within the state insurance fund, I turn now to a discussion of whether, as previously mentioned, the surplus must be accounted for as two separate accounts.

R.C. 4123.30 provides that "[w]hen in sections 4123.01 to 4123.94, inclusive, of the Revised Code, reference is made to the state insurance fund, such reference is to such two separate funds [the 'public fund' and the 'private fund']". R.C. 4123.34(B) provides that "a sum not exceeding five per cent of all money paid into the state insurance fund shall be credited to such surplus fund" (emphasis added). Pursuant to R.C. 4123.30, the term "state insurance fund," as used in R.C. 4123.34(B), must be construed to mean two separate funds, the "public fund" and the "private fund." A construction of the language of R.C. 4123.34(B) in light of R.C. 4123.30, therefore, leads to the conclusion that two separate surplus accounts must be maintained, a "public surplus account" within the "public fund" and a "private surplus account" within the "private fund."

The fact that R.C. 4123.30 expressly requires that the solvency of the "public fund" and the "private fund" be maintained "without regard to or reliance upon the other [fund]," further supports the conclusion that two separate surplus accounts must be maintained. The express purpose of the surplus created pursuant to R.C. 4123.34(B) is to "guarantee a solvent state insurance fund." Clearly, if the solvency of the two funds is to be independently guaranteed, two separate surplus accounts must be maintained.

Of further significance to a determination that two separate surplus accounts must be maintained is the fact that R.C. 4123.30 prohibits the disbursement of money from one fund on account of injury, disease or death of an employee whose employer contributes to the other fund.

The funds credited to the surplus fund originate as contributions by employers to the "public fund" or the "private fund." Since various statutes authorize the expenditure of surplus account funds for the compensation of employees, if employer contributions are commingled in one surplus account, contributions made to one fund may eventually inure to the benefit of employees whose employers contribute to the other fund. The plain language of R.C. 4123.30 expressly prohibits such an expenditure of funds. See 1943 Op. Att'y Gen. No. 6559, p. 715, 726 (construing G.C. 1465-59, now R.C. 4123.30, and G.C. 1465-54, now R.C. 4123.34; money contributed by a city transit system, which is a public employer, to be credited to the surplus fund should not "be commingled with the assets of the private surplus fund which finally, either directly or indirectly, inure to the benefit of private employers").

Consequently, in light of the plain language of R.C. 4123.30 and R.C. 4123.34, it is my opinion that the surplus must be maintained and accounted for as two separate accounts, a "public surplus account" within the "public fund" and a "private surplus account" within the "private fund."

It is my understanding from telephone conversations with Ms. Helen Haignere, Director of the Bureau's Accounts Section, that the Bureau is also concerned with whether a complete and accurate account of all credits to and disbursements from the surplus account must be maintained.

Since the surplus accounts are accounts of the state insurance fund, surplus account funds may be deposited and invested with other state insurance fund moneys. See R.C. 4123.30 (the "public fund" and the "private fund" may be intermingled for the sole purpose of deposit and investment). It is clear from the language of R.C. 4123.01-.94, however, that a separate and accurate account of all credits to, and disbursements from, the surplus accounts, as well as an accurate account of the balances in the surplus accounts, must be maintained.

Various statutes, as previously mentioned, expressly provide for the payment of certain expenses from the surplus accounts. See R.C. 4123.343(B); R.C. 4123.35; R.C. 4123.519; R.C. 4123.57(D); R.C. 4123.75. There is no statutory authority to expend funds other than surplus account funds for such purposes. Therefore, in order to comply with these statutes, an accurate account of the balances in the surplus accounts must be maintained, and all expenditures which are required to be paid from the surplus accounts must be deducted, when paid, from the account balances. Failure to accurately account for such expenditures as having been paid from the surplus accounts may result in the expenditure of other state insurance fund moneys, which have been deposited with surplus account moneys, for expenses which are required to be paid from the surplus accounts.

Of further significance to a determination that a separate and accurate account of all transactions involving the surplus accounts must be kept is the language of R.C. 4123.34(B). R.C. 4123.34(B) provides that "[w]henever necessary in the judgment of the commission to guarantee a solvent state insurance fund, a sum not exceeding five per cent of all money paid into the state insurance fund shall be credited to such surplus fund" (emphasis added). Clearly, it would be difficult for the commission to accurately determine the amount needed to be credited to the surplus accounts to guarantee a solvent state insurance fund without knowing the current balances in the surplus accounts. Consequently, it must be concluded that any accounting system employed by the Bureau must provide a means by which all funds required to be credited to the surplus accounts and all expenses required to be paid from the surplus accounts are accurately accounted for and reflected in the surplus account balances.

In conclusion, it is my opinion, and you are so advised, that:

1. The Bureau of Workers' Compensation surplus fund created pursuant to R.C. 4123.34(B) is an account within the state insurance fund rather than a separate and distinct fund.
2. The surplus created pursuant to R.C. 4123.34(B) must be maintained and accounted for as two separate accounts, a "public surplus account" within the "public fund" and a "private surplus account" within the "private fund."
3. Although surplus account moneys may be commingled with other state insurance fund moneys for purposes of deposit and investment, a separate and accurate account of all credits to, and disbursements from, the surplus accounts, as well as an accurate account of the balances in the surplus accounts, must be maintained.