IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

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No. 30899

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FILED

June 12, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

VERIZON WEST VIRGINIA, INC., ET AL.,
Petitioners Below,

EASTERN ASSOCIATED COAL CORPORATION,
Appellant,

v.

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS,
WORKERS' COMPENSATION DIVISION,
Respondent Below, Appellee

_____

No. 30900

_____

VERIZON WEST VIRGINIA, INC., ET AL.,
Petitioners Below,

WEIRTON STEEL CORPORATION,
Appellant,

v.

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS,
WORKERS' COMPENSATION DIVISION,
Respondent Below, Appellee

_____

No. 30901

_____

VERIZON WEST VIRGINIA, INC., ET AL.,
Petitioners Below,

PINE RIDGE COAL COMPANY,
Appellant,

v.

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS,
WORKERS' COMPENSATION DIVISION,
Respondent Below, Appellee

Appeal from the Circuit Court of Kanawha County
The Honorable Paul Zakaib, Jr., Judge
Civil Action No. 01-AA-1

AFFIRMED

Submitted: March 26, 2003
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Michael W. Carey
Carey, Scott and Douglas, PLLC
Phillip J. Combs
Allen, Guthrie & McHugh
Charleston, West Virginia
Attorneys for the Appellant,
Eastern Associated Coal Corporation

Ancil G. Ramey
Henry C. Bowen
Michelle E. Piziak
Steptoe & Johnson, PLLC
Charleston, West Virginia
Attorneys for the Appellant,
Weirton Steel Corporation

Sarah E. Smith
Heather G. Harlan
Bowles Rice McDavid Graff & Love, PLLC
Charleston, West Virginia
Attorneys for the Appellant,
Pine Ridge Coal Company

Darrell V. McGraw, Jr.
Attorney General
Silas B. Taylor
Senior Deputy Attorney General
Christie S. Utt
Assistant Attorney General
Randall B. Suter
Senior Counsel, WV Bureau of Employment Programs
Charleston, West Virginia
Attorneys for the Appellee

JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file dissenting opinions.

SYLLABUS

1. "Under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A, appellate review of a circuit court's affirmance of agency action is *de novo,* with any factual findings made by the lower court in connection with alleged procedural defects being reviewed under a clearly erroneous standard." *Wheeling-Pittsburgh Steel Corp. v. Rowing,* 205 W.VA. 286, 517 S.E.2d 763 (1999).

2. "'On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4[ ] and reviews questions of law presented *de novo;* findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.' Syl. pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)." *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S.E.2d 763 (1999).

3. "Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

4. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State Workmen's Compensation Com'r,* 159 W. Va. 108, 219 S.E.2d 361 (1975).

5. "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 2, *Newhart v. Pennybacker,* 120 W. Va. 774, 200 S.E. 350 (1938).

6. The Legislature, by its amendment and reenactment of West Virginia Code § 23-2-4 in 1995, intended sound actuarial, insurance industry standards and business practices be employed in the determination of workers' compensation premium rates, but clearly did not intend that language to negate the Legislature's efforts to reduce any deficit in the workers' compensation fund.

7. "Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent

properly." Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975).

8. Allocation of a portion of the amortization of discount to self-insured employers is properly included as a part of the expense of administration of the workers' compensation fund, in conformance with the rate-making provisions of Title 85, Series 9 of the West Virginia Code of State Regulations and the standards prescribed by the Legislature.

9. "The ultimate responsibility for the fiscal health of the West Virginia Workers' Compensation system rests with the Legislature. Balancing the conflicting goals of minimizing premiums while providing full and fair compensation to injured workers is the exclusive province of our publicly elected legislators. . . ." Syl. Pt. 3, in part, *Repass v. Workers' Compensation Division*, 212 W. Va. 86, 569 S.E.2d 162 (2002).

10. The formula developed by the Performance Council which allocates an amount for the amortization of the discount in assessing the workers' compensation premium tax for self-insured employers does not constitute an undue taking without compensation in violation of either the federal or state constitution.

11. The formula developed by the Performance Council which allocates an amount for the amortization of the discount in assessing the workers' compensation premium tax for self-insured employers does not violate the Due Process clause of either the federal or state constitution.

Albright, Justice:

This case involves the consolidated appeals of three employers, Eastern Associated Coal Corporation (hereinafter "EACC"), Pine Ridge Coal Company (hereinafter "Pine Ridge") and Weirton Steel Corporation (hereinafter "Weirton Steel") from the January 17, 2002, final order of the Circuit Court of Kanawha County. The final order affirmed the November 30, 2000, administrative order of the Commissioner of the Bureau of Employment Programs (hereinafter "Commissioner") which upheld the methodology used by the Bureau's Division of Workers' Compensation (hereinafter "the Division") to calculate premium rates for self-insured employers for fiscal year 1998 (hereinafter "FY 1998").[1] By way of this appeal, the employers continue to challenge the calculation of FY 1998 workers' compensation premium rates for self-insured employers on the grounds that it violates statutory, regulatory and constitutional provisions. In addition to reversal of the lower court's decision, Appellants seek: (1) adoption of Appellants' proposed findings of fact and conclusions of law as a resolution to the proceedings below; (2) an order directing the Division to comply with the Workers' Compensation Act, as interpreted by Appellants, and requiring the Division to maintain a separate surplus fund, including a second injury reserve; (3) return of overpayment of premiums due to the illegally fixed rates, including accrued interest; and (4) attorney fees and costs, with such other relief as may be found appropriate.

[1]Reference to FY 1998 means the time period of July 1, 1997 to June 30, 1998.

After careful and reflective examination of the issues presented, we affirm the order of the court below and deny all relief requested.

I. Background

To gain a clearer understanding of the issues presented through this appeal, we begin with an overview of the relevant provisions of the state's workers' compensation system. Through the establishment of the Workers' Compensation Fund (sometimes hereinafter referred to as the "Fund"), the Legislature created a state operated insurance system which provides coverage to West Virginia employers for personal injuries sustained by their employees during the course of and resulting from their employment. W. Va. Code Chapter 23. As designed by the Legislature, nearly all[2] employers in the state are required to acquire workers' compensation coverage or be subjected to the loss of certain common law defenses applicable to workplace injuries, which loss could prove to be devastating to an employer sued by injured employees. Injured employees[3] are protected by the system in that it provides an organized and predictable method by which employees receive compensation when they are incapacitated as a result of job-related diseases and workplace

[2]The few narrowly crafted exceptions to required participation in the system are defined in West Virginia Code § 23-2-1(b) and include, among others, employers of domestic services workers, employers of five or fewer full-time agricultural service employees and churches.

[3]Virtually every working West Virginian is covered by the workers' compensation system, save a few exempted by statute or who may elect to be exempted, such as business owners and partners. *See* W.Va. Code § 23-2-1(g).

injuries. Consequently, by providing protection against such significant financial losses for both employers and employees, the workers' compensation system has become a rudimentary part of the economic fabric of this state.

Employers may participate in the mandatory portions of the workers' compensation system in one of three[4] ways: (1) by subscribing to the program for coverage of all risks; (2) by subscribing for a portion of risk coverage through the program but self-insuring against other risks; or (3) by electing to self-insure against all risks. Employers obtaining coverage by subscribing to the workers' compensation system pay premiums which are based upon: their respective payrolls for or hours worked by their employees; the business or function of those employees; the loss record of the employer over the years; and the cost of administering the system. The premiums are intended by law to cover the cost of administering the system and paying the benefits provided for those suffering workplace injuries or diseases.

In lieu of subscribing to the Fund and paying premiums for risk coverage under the system, employers with the financial ability to elect to be self-insured as to all or

[4]We do not address the alternative coverage available to all employers for excess liability stemming from deliberate intention actions. *See* W. Va. Code §§ 23-4C-1 to 5.

part of their liabilities may do so under the Act.[5] Claims originating from employees of self-insured employers are processed and administered by the Division; however, the benefits due an employee for any injury for which the employer is self-insured are considered wholly the responsibility of the employer. Unlike subscribing employers for whom "charges" to their respective accounts mean simply the *potential* for higher premium payments in the future, employers self-insured for particular risks have the obligation to actually pay from their own resources any benefits due their injured employees.

Self-insured employers are required to contribute to "the expense of the administration" of the workers' compensation system by paying a portion of the premiums paid by subscribing employers. W. Va. Code § 23-2-9. Further, self-insured employers are required to post a bond with the Division, expected to be sufficient to cover claims for which the employer may later become liable but be financially unable to pay from available resources. *Id.*

In addition, state law had for some years required the Division and its predecessors to fix and collect premiums sufficient to develop a "surplus fund" to cover long-term liabilities of the system. The surplus fund was statutorily required to contain a

[5]General reference to "the Act" in this opinion is to the Workers' Compensation Act, codified as Chapter 23 of the West Virginia Code.

special component known as the "second injury reserve," often referred to as the "second injury fund." The second injury fund comes into play when

> an employee who has a definitely ascertainable physical impairment, caused by a previous occupational injury, occupational pneumoconiosis or occupational disease . . . becomes permanently and totally disabled through the combined effect of such previous injury and a second injury received in the course of and as a result of his or her employment. . . .

W. Va. Code § 23-3-1(d)(1). The policy initially underlying the second injury fund was to encourage employers to hire people who may have suffered an earlier injury. This incentive allows a second or subsequent employer subscribing to the second injury fund to be charged only with the benefits directly attributable to the second injury when a previously injured employee suffers a subsequent injury resulting in a disability; if the injury results in a life award by reason of the employee being totally disabled, the second injury fund and not the current employer is charged with the costs of the life award. In contrast, employers not subscribing to the second injury fund, electing instead to self-insure against such second injuries, are charged the entire cost of a second injury life award. The legislative directive regarding the creation of a second injury reserve within the surplus fund contemplated the existence of a reserve for the payment of at least some of the cost of any such life award to a previously injured employee who later becomes totally disabled.

As related earlier, qualifying employers may elect to fully self-insure against all workplace risks or to self-insure against specific risks. Thus, an employer may be self-

insured with respect to all general workers' compensation claims but elect to pay additional premiums to the Division for so-called second injury and catastrophe risks,[6] whereby life awards arising out of second injuries or awards of benefits arising from catastrophic events are paid by the system rather than the employer. In such instances, the otherwise self-insured employer is in the same posture as any other subscribing employer. Alternatively, an employer may elect to self-insure against second injuries[7] and catastrophic risks. If self-insured with respect to second injuries, the employer undertakes to pay all workers' compensation second injury benefits thereafter due, including life awards, whether such benefits arise solely from second injuries or a combination of a second injury and previous injuries.

The three employer Appellants in the case before us are required to participate in the workers' compensation program and have elected to self-insure their risks, albeit in somewhat different ways. EACC is self-insured for general workers' compensation

[6]Catastrophic incidents are those events where three or more employees are killed or receive extensive physical injuries defined in West Virginia Code § 23-3-1(c). Employers who obtain catastrophe coverage through the worker's compensation system have the aggregate of all medical and hospital bills and other costs as well as benefits paid from the catastrophe reserve of the surplus fund. Catastrophic events and the catastrophe reserve are mentioned in passing since they were not addressed by Appellants.

[7]Under the provisions of West Virginia Code § 23-2-9(e), self-insurance is no longer an available option to employers generally for second injury risks; only those employers enjoying second injury self-insurance status before February 2, 1995, may continue this status if they otherwise meet the statutory qualifications.

liabilities and subscribes to the Division for second injury coverage; Weirton Steel and Pine Ridge are wholly self-insured against general and second injury risks.[8] All of Appellants pay some level of premiums, the calculation of which was affected by legislative amendments enacted in the 1990's.

In 1993 and 1995, the Legislature substantially amended the Act. The 1993 amendments included the creation of a Compensation Programs Performance Council (hereinafter "Performance Council") consisting of nine members: four representing the interests of employers, four representing the interests of employees, and the Commissioner. *See* W. Va. Code § 21A-3-3.

In the 1995 amendment of the Act, the Legislature enacted a comprehensive revision of the requirements and methods for determining premiums for workers' compensation coverage and made specific changes to certain provisions concerning entitlement to benefits under the Act. W. Va. Code § 23-2-4. Because of the extensive revision in 1995 of the provisions of West Virginia Code § 23-2-4, a comparison of the statute as it appeared in 1993 versus 1995 will aid our discussion. The 1993 version of this section reads as follows:

[8]Both EACC and Pine Ridge subscribe to the catastrophe fund; it is not clear whether Weirton Steel subscribes or is self-insured for catastrophe coverage.

§ 23-2-4. Classification of industries; accounts; rate of premiums; prior notice of rate changes; exceptions.

The commissioner shall distribute into groups or classes the employments subject to this chapter, in accordance with the nature of the business and the degree of hazard incident thereto. And the commissioner shall have power, in like manner, to reclassify such industries into groups or classes at any time, and to create additional groups or classes. The commissioner may make necessary expenditures to obtain statistical and other information to establish the classes provided for in this section.

The commissioner shall keep an accurate account of all money or moneys paid or credited to the compensation fund, and of the liability incurred and disbursements made against same; and an accurate account of all money or moneys received from each individual subscriber, and of the liability incurred and disbursements made on account of injuries and death of the employees of each subscriber, and of the receipts and incurred liability of each group or class.

In compensable fatal and total permanent disability cases, other than occupational pneumoconiosis, the amount charged against the employer's account shall be such sum as is estimated to be the average incurred loss of such cases to the fund. The amount charged against the employer's account in compensable occupational pneumoconiosis claims for total permanent disability or for death shall be such sum as is estimated to be the average incurred loss of such occupational pneumoconiosis cases to the fund.

It shall be the duty of the commissioner and the compensation programs performance council to fix and maintain the lowest possible rates of premiums consistent with the maintenance of a solvent workers' compensation fund and the creation and maintenance of a reasonable surplus in each group after providing for the payment to maturity of all liability incurred by reason of injury or death to employees entitled to benefits under the provisions of this chapter. A readjustment of rates shall be made yearly on the first day of July, or at any time the same may be necessary. At such times as the commissioner elects to readjust the base rates for the various industrial classifications, the commissioner shall file a schedule of the readjusted base rates for each industrial class with the office of

the secretary of state for publication in the state register pursuant to article two [§ 29A-2-1 et seq.], chapter twenty-nine-a of this code. Such schedule shall be so filed at least thirty days prior to the first day of the quarter to which an adjustment of rates is to be applicable. At such times as the commissioner elects to readjust the individual merit rates for the subscribers to the fund, the commissioner shall provide notice of such merit rate adjustments to the affected employers at least thirty days prior to the first day of the quarter to which an adjustment of rates is to be applicable. The commissioner shall not retroactively increase or decrease rates except in instances of fraud, mistake or reliance upon incorrect information furnished by the employer. The determination of the lowest possible rates of premiums within the meaning hereof and of the existence of any surplus or deficit in the fund shall be predicated solely upon the experience and statistical data compiled from the records and files in the commissioner's office under this and prior workers' compensation laws of this state for the period from the first day of June, one thousand nine hundred thirteen, to the nearest practicable date prior to such adjustment: *Provided*, That any expected future return, in the nature of interest or income from invested funds, shall be predicated upon the average realization from investments to the credit of the compensation fund for the two years next preceding. Any reserves set up for future liabilities and any commutation of benefits shall likewise be predicated solely upon prior experience under this and preceding workers' compensation laws and upon expected realization from investments determined by the respective past periods, as aforesaid.

The commissioner and the compensation programs performance council may fix a rate of premiums applicable alike to all subscribers forming a group or class, and such rates shall be determined from the record of such group or class shown upon the books of the commissioner: *Provided*, That if any group has a sufficient number of employers with considerable difference in their degrees of hazard, the commissioner may fix a rate for each subscriber of such group, such rate to be based upon the subscriber's record on the books of the commissioner for a period not to exceed three years ending the thirty-first day of December of the year preceding

> the year in which the rate is to be effective; and the liability part of such record shall include such cases as have been acted upon by the commissioner during such three-year period, irrespective of the date the injury was received; and any subscriber in a group so rated, whose record for such period cannot be obtained, shall be given a rate based upon the subscriber's record for any part of such period as may be deemed just and equitable by the commissioner; and the commissioner shall have authority to fix a reasonable minimum and maximum for any group to which this individual method of rating is applied, and to add to the rate determined from the subscriber's record such amount as is necessary to liquidate any deficit in the schedule as to create a reasonable surplus.
>
> It shall be the duty of the commissioner, when the commissioner changes any rate, to notify every employer affected thereby of that fact and of the new rate and when the same takes effect. It shall also be the commissioner's duty to furnish each employer yearly, or more often if requested by the employer, a statement giving the name of each of the employer's employees who were paid for injury and the amounts so paid during the period covered by the statement.

1993 W. Va. Acts Reg. Sess. ch. 171.

The full text of West Virginia Code § 24-2-4, as amended and re-enacted in 1995, is as follows:

> § 23-2-4. Classification of industries; rate of premiums; authority to adopt various systems; accounts.
>
> (a) The commissioner, in conjunction with the compensation programs performance council, is authorized to establish by rule a system for determining the classification and distribution into classes of employers subject to this chapter, a system for determining rates of premium taxes applicable to employers subject to this chapter, a system of multiple policy options with criteria for subscription thereto, and criteria for an

annual employer's statement providing both benefits liability information and rate determination information.

(1) In addition, the rule shall provide for, but not be limited to:

(A) Rate adjustments by industry or individual employer, including merit rate adjustments;

(B) Notification regarding rate adjustments prior to the quarter in which the rate adjustments will be in effect;

(C) Chargeability of claims; and

(D) Such further matters that are necessary and consistent with the goals of this chapter;

(2) The rule shall be consistent with the duty of the commissioner and the compensation programs performance council to fix and maintain the lowest possible rates of premium taxes consistent with the maintenance of a solvent workers' compensation fund and the reduction of any deficit that may exist in such fund and in keeping with their fiduciary obligations to the fund;

(3) The rule shall be consistent with generally accepted accounting principles;

(4) The rule shall be consistent with classification and rate-making methodologies found in the insurance industry; and

(5) The rule shall be consistent with the principles of promoting more effective workplace health and safety programs as contained in article two-b [§§ 23-2B-1 et seq.] of this chapter.

(b) Notwithstanding any other provision of this chapter to the contrary, the compensation programs performance council may elect to premise its premium tax determination methodology on the aggregate number of hours worked by employees of the employer rather than upon the gross wages of the employer. Such an election may apply to all industrial classifications or to less than all. If this election is made, then in all instances in which this chapter refers to gross wage reports for the purpose of premium tax determination such references shall be taken to mean a report of the number of hours so worked.

(c) The rule authorized by subsection (a) of this section shall be promulgated on or before the first day of July, one thousand nine hundred ninety-six. Until the rule is finally promulgated the prior provisions of this section as found in

> chapter one hundred seventy-one of the acts of the Legislature, one thousand nine hundred ninety-three, shall remain in effect.
>
> (d) In accordance with generally accepted accounting principles, the workers' compensation division shall keep an accurate accounting of all money or moneys earned, due, and received by the workers' compensation fund, and of the liability incurred and disbursements made against the same; and an accurate account of all money or moneys earned, due and received from each individual subscriber, and of the liability incurred and disbursements made against the same.

W. Va. Code § 23-2-4 (Repl.Vol. 2002).

The major changes effected by the 1995 amendment of West Virginia Code § 23-2-4 may be separated into three categories. First, the power to fix premiums for workers' compensation coverage was vested in the Commissioner *and the Performance Council*, rather than in the Commissioner alone. Second, omitting several paragraphs of statutory direction for the establishment of such rates, the statute directed the Commissioner, *in conjunction with the Performance Council*, to establish by rule the system for determining premiums, a system of multiple policy options, and criteria for the annual employer's statement of benefit liability and rate determination information, all in accord with legislatively enumerated standards. Significantly, the rule-making power was vested in the Commissioner and Performance Council, free and clear of the usual requirements for legislative rule-making review prior to actual promulgation of the rule. *Cf.* W. Va. Code § 21A-3-7(c) *to* W. Va. Code §§ 29A-3-1 to 18. Third, the Legislature removed from its rate-making instructions the direction to fix rates sufficient for the "creation and maintenance of

a reasonable surplus in each group after providing for the payment to maturity of all liability incurred by reason of injury or death to employees entitled to benefits under the provisions of this chapter" and inserted the rate-making instruction to fix rates sufficient to effect a "reduction of any deficit that may exist in such fund and in keeping with their fiduciary obligations to the fund . . . ." W. Va. Code §§ 23-2-4 (1993), 23-2-4(a)(2) (1995).

Prior to 1995 the Legislature directed and intended that premiums would be collected sufficient to provide for the payment "to maturity" of all obligations of the Fund, together with "a reasonable surplus" for each group of employers and employees established under the system, including a second injury reserve. However, in 1995 that specific language was deleted and the legislative direction and intention was altered to require, among other things, premiums calculated to permit a "reduction of any deficit that may exist" in the Fund, in apparent realization that the Fund then had not collected premiums sufficient to provide for the payment of liabilities "to maturity," let alone sufficient to provide a reasonable surplus for each grouping developed under the system and a second injury reserve.[9] Testimony before the hearing examiner suggested that a large part of the

[9]One service publisher relates that a 1993 report by the Alliance of American Insurers noted that in 1984 all state workers' compensation funds were solvent. By the end of 1990, however, West Virginia was among six funds which had reported insolvency. CCH Workers' Compensation, Vol. 1 ¶ 5435. The evolution of the deficit is reflected in the Division's annual reports to the governor. In the FY 1990 report, a chart entitled "Operating Expense by Year" reflects that losses first exceeded gains for regular subscriber accounts in FY1985. The same chart in the FY 1995 Annual Report shows that the operating loss (continued...)

impetus for requiring the development of a plan to reduce the Fund's deficit was to improve the bond rating of the state.

In response to the 1995 legislative directives, the Commissioner and Performance Council drafted a proposed rule and proceeded to hold the necessary public hearings. In due course, the "Risk Management Rule" (hereinafter "Rule 9") was promulgated. *See* 85 W. Va. C.S.R. 9. This rule retains the concept of a surplus fund and

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[9](...continued)
continued for each year during the FY 1985 through FY 1995 period. Another chart reflecting the account balance for the second injury fund for the same period implies a similar result since it shows a consistent annual practice of transferring money to the second injury fund to maintain a fixed account balance. We further note the following percentage fluctuation in the rates charged during this period according to the actuary for the Fund as reported by Emily A. Spieler in a 1995 law review article entitled *Assessing Fairness in Workers' Compensation Reform: A Commentary on the 1995 West Virginia Workers' Compensation Legislation*:

Effective Date	Rate (brackets denote decrease)
7-1-85	[30%]
1986 through 1988	No change
1-1-89	30%
7-1-90	19%
7-1-91	15%
7-1-92	3%
7-1-93	7%
7-1-94	No change
7-1-95	12.2%

98 W. Va. L.Rev. 23, 85 n. 199 (1995).

defines it to include that portion of the workers' compensation fund set aside to cover "the catastrophe hazard, the second injury hazard, *deficit reduction*, and all other losses not otherwise specifically provided for by the Act." *Id.* at § 3.31 (emphasis supplied). In section 7 of Rule 9, the Performance Council is vested with authority to make a series of determinations consistent with its statutory duty "to fix and maintain the lowest possible rates of premium taxes consistent with the maintenance of a *solvent* workers' compensation fund and the *reduction of any deficit that may exist in such fund. . . ." Id.* at § 7.2 (emphasis supplied). The Performance Council is also authorized to include claims costs in "the methodology . . . [it employs] to assess deficit reduction costs, and such other costs pertinent to the determination of required revenues." *Id.* Further, the Performance Council is specifically authorized to "[d]etermine the amount of premium tax which is assessed to reduce any deficit that may exist in the workers' compensation fund." *Id.*

After promulgation of Rule 9, the Commissioner and the Performance Council proceeded with the process for the adoption of workers' compensation premiums for FY 1998. Following public hearings at which some adverse comments were received, most notably from self-insured employers, an additional hearing was held for further comment on the proposed FY 1998 premium tax rates. Finally, on May 23, 1997, the Performance Council adopted Resolution No. 11 in which it is essentially stated that the Performance

Council approved the FY 1998 premium tax rates as recommended by then Commissioner William F. Viewig.

A feature of Resolution No. 11 adopted by the Performance Council, which is at the heart of the controversy in the appeals before us, is the requirement that employers pay premiums increased in an amount dedicated to the "[a]mortization of [d]iscount." The term "amortization of discount" is, for purposes of this appeal, the amount directed by the Commissioner and Performance Council to be included in the FY 1998 workers' compensation premium tax rates for each employer in the state for the purpose of effecting a perceived "reduction of deficit" in the workers' compensation fund.[10] As the actuary for the workers' compensation fund testified:

> The amortization of the discount represents the amount of investment income that would have been earned on the stated liabilities at the beginning of the period, based on the assumed interest rate. . . . [A]ssuming the Division collects enough money for prospective coverage, [it] is the amount of money that has to be collected to stop the deficit from increasing just by the missing interest on the discounted liabilities.

The amortization of discount was first allocated between regular subscribers as a class and self-insureds as a class. *See* note 41 for a more detailed explanation. The allocation of the self-insured employer share of the amortization of discount among specific self-insured

[10]Resolution No. 11 and supporting documentation in the record disclose that the final calculation of premiums for FY 1998 included consideration of both the amortization of discount and a component labeled "reduction of deficit" described as a further calculation for an anticipated shortfall in investment income on current investments.

employers involved a further two-step process. The first step was based upon the number of second injury claims each self-insured employer had in a three-year period; the second step divided among active self-insured employers a share of the claims incurred by inactive self-insured employers.

Upon receipt of the Commissioner's notification of the proposed FY 1998 premium tax rates, including a calculated allocation of the "amortization of discount," Appellants[11] each timely protested the allocation of their share of the "amortization of discount" premium. Their initial protest was filed with the Commissioner as required by statute. *See* W. Va. Code § 23-2-17. The appeals were consolidated, and after hearings before a hearing examiner, the Commissioner by order dated November 30, 2000, upheld the premiums charged each of the Appellants. Appellants sought judicial review of this order in the Circuit Court of Kanawha County.[12] The circuit court in its final order of January 17, 2002, upheld the Commissioner's decision; through this appeal Appellants seek a reversal of the lower court's order.

II. Standard of Review

[11]Appellants were among the over thirty self-insured employers who sought administrative review of the FY 1998 premiums.

[12]In total, six of the initial self-insured employers protesting the premiums sought judicial review of the Commissioner's order in the circuit court.

Judicial review of the matter at hand is sought pursuant to the Administrative Procedures Act which provides that "[a]ny party adversely affected by the final judgment of the circuit court . . . may seek review thereof by appeal to the supreme court of appeals of this state . . . ." W. Va. Code § 29A-6-1 (1964) (Repl. Vol. 2002). The scope of our review of these cases is summarized in syllabus points one and two of *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S.E.2d 763 (1999), as follows:

> 1. Under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A, appellate review of a circuit court's affirmance of agency action is *de novo,* with any factual findings made by the lower court in connection with alleged procedural defects being reviewed under a clearly erroneous standard.
>
> 2. "On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4[ ] and reviews questions of law presented *de novo;* findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. pt. 1, *Muscatell v. Cline,* 196 W. Va. 588, 474 S.E.2d 518 (1996).

Of particular relevance to the issues raised by this appeal is the review standard set forth in syllabus point one of *Appalachian Power Co. v. State Tax Dept.,* 195 W. Va. 573, 466 S.E.2d 424 (1995): "Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."

III. Discussion

Appellants advance several grounds for the reversal of the lower court's affirmance of the administrative order. While not all Appellants advance the same

arguments, a fair summary of their collective positions is: (1) the Division violated statutory, regulatory and fiduciary obligations in failing to develop a surplus fund, including a second injury reserve; (2) the method adopted by rule to increase the premium tax by amortizing the discount is at variance with generally accepted accounting principles (hereinafter "GAAP") as well as insurance and actuarial standards, compliance with which is required either by the statute authorizing the rule or proper business standards; (3) the imposition by the Division of an additional or increased premium tax to amortize the discount or reduce the deficit with respect to self-insured employers contravenes prior decisions of this Court, provisions of the Act, and relevant regulations; (4) the portion of the premium tax designed to amortize the discount or reduce the deficit involves prior second injury life awards and as such is an impermissible retroactive assessment of costs; (5) the additional premium tax represents a violation of federal and state constitutional provisions prohibiting the taking of private property for public use without just compensation; and (6) the increase in premium tax violates the due process clauses of the federal and state constitutions. We consider each of these contentions in turn.

A. Failure to Maintain Surplus Fund

Appellants are substantially correct when they assert that the Division has failed to maintain a surplus fund, as described in West Virginia Code § 23-2-4, before the adoption of the 1995 amendments. While the Fund has, at least until relatively recently, had

an accumulation of assets for future payment of claims, the longstanding practice for computing premiums was not in compliance with the expressed legislative intent of building a surplus sufficient to provide for the payment to maturity of all liability incurred by reason of injury or death of covered employees, *including* a reserve for life awards in second injury cases. The Division does not dispute this point.[13]

The record further reflects that it has not been until rather recently that efforts have been made to actuarially compute the value of awards made at a given point in time with regard to the liability for future payments. The record discloses that the actuarially indicated estimate of the total of future payments due on all open claims at the time the FY 1998 rates were being determined was calculated at $6 billion and the actuarially determined present value of that sum is approximated at $2.2 billion, considerably less than the assets maintained in the Fund over a number of years. We further understand from the record that the dollar amount of the amortization of the discount is roughly $3.8 billion, which is the difference between the actuarially determined undiscounted sum of $6 billion and the discounted or present value sum of $2.2 billion. Through the FY 1998 premium tax

[13]Appearing in the record as Joint Stipulation No. 14 is the following: "The Surplus Fund, including the Second Injury Reserve, is not now, nor is the Respondent [West Virginia Bureau of Employment Programs, Workers Compensation Division] aware that it has ever been maintained as a separate account." Although physically not separated from the other assets, our review of the annual reports through 1998 reflect that separate accounting entries were maintained with regard to the second injury fund.

assessments, the Commissioner and Performance Council proposed to recoup the first annual installment[14] of this sum.[15]

Against this historical backdrop, we recognize that the fundamental issue raised through this appeal is whether Appellants and others similarly situated, be they self-insured employers as to all workers' compensation risks or not, may be required to contribute to the reduction of this actuarially determined deficit in the workers' compensation fund in the manner devised by the Legislature through its 1995 amendment and reenactment of West Virginia Code § 23-2-4, and by the Commissioner and the Performance Council both in their promulgation of Rule 9 and adoption of Resolution No. 11. In resolving this issue, we address the various arguments raised by the parties to this appeal.

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[14]The record indicates that the portion of the amortization of discount attributable to FY 1998 is $216 million.

[15]We note here that the parties sometimes characterize the annual installment of the amortization of discount as not increasing the deficit or as attempting to recover the lost investment opportunity arising from the Fund being, in the long run, about $6 billion short of being fully funded.

In any event, that portion of the $6 billion shortfall characterized as the amortization of discount is based on actuarial assumptions which essentially are educated guesses about such things as periodic asset valuations, assumed interest rates, estimated life expectancies and the like. We recognize that the conclusions drawn from such assumptions do not provide absolutely certain dollar figures.

B. GAAP and Insurance Industry and Actuarial Standards

Appellants claim that in the process of rule making and increasing the premiums to reduce the deficit, the Commissioner and Performance Council failed to comply with the legislative directive that the rule be consistent with "generally accepted accounting principles" and "classification and rate-making methodologies found in the insurance industry." W. Va. Code § 23-2-4(a)(3) and (4). The cornerstone of Appellants' argument is that insurance industry rate-making undertakes to foretell future risks rather than to recover a deficit due to inadequate rates charged in the past. While this argument has allure on first blush, it loses much of its attraction on closer examination. Common experience tells us that insurance rate-making takes into account multiple factors including an insured's past loss record, past experience with the class in which an insured is placed, past profitability of the line of insurance, investment profits, asset valuations, overall company profitability, as well as other relevant elements. Recent events in the state have heightened our awareness of the fact that if an insurer is of the opinion that a profit has not or cannot be made, the insurer may apply for weighty premium increases to satisfy these factors or elect to withdraw from a given line of insurance or elect to discontinue offering a particular type of coverage. These alternatives are obviously solutions which are not available to the Commissioner and Performance Council.

The most serious shortcoming in Appellants' argument concerning accounting principles and insurance standards is its overemphasis on the subsidiary processes rather than the primary goal of the rate-making statute. Appellants insist that the legislative requirements placed on the Performance Council and Commissioner to employ GAAP, as well as insurance industry and actuarial standards, operate to prohibit collection of any portion of the amortization of discount from self-insured employers. In light of the contrasting deficit reduction language, that reading of West Virginia Code § 23-2-4 suggests an ambiguity as to its meaning, causing us to construe the statute before it can be applied. Syl. pt. 1, *Farley v. Buckalew,* 186 W. Va. 693, 414 S.E.2d 454 (1992). In so doing, we are mindful that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State Workmen's Comp. Com'r,* 159 W. Va. 108, 219 S.E.2d 361 (1975). "'In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.' Syl. Pt. 2, *Smith v. State Workmen's Compensation* Commissioner, 159 W. Va. 108, 219 S.E.2d 361 (1975)." State *ex rel. Morgan v. Trent,* 195 W. Va. 257, 263, 465 S.E.2d 257, 263 (1995) (*quoting State ex rel. Fetters v. Hott,* 173 W. Va. 502, 318 S.E.2d 446 (1984).

A central feature of the 1995 amendment to West Virginia Code § 23-2-4(a)(2) is the Legislature's express direction to the Commissioner and Performance Council to

develop a rule which is aimed at establishing rates "consistent with the maintenance of a *solvent* workers' compensation fund and the *reduction of any deficit that may exist in such fund*. . . ." As noted earlier, the reduction of deficit language replaced language of previous enactments which required that a surplus fund be established and maintained. Surely we would be reaching an absurd result if we found that, by structuring the rule making and rate-making process around strict adherence to business and accounting principles, the Legislature intended that its own directive to correct "any deficit" be defeated. As we have long held, "[w]here a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938). This Court is required to attempt to give meaning to all of the words in a statute and not to excise or negate any language if seemingly inconsistent language can be reconciled. Syl. pt. 7, *Ex parte Watson*, 82 W. Va. 201, 95 S.E. 648 (1918). In the circumstances before us, we are satisfied that the Legislature, by its amendment and reenactment of West Virginia Code § 23-2-4 in 1995, intended sound actuarial, insurance industry standards and business practices be employed in the determination of workers' compensation premium rates, but clearly did not intend that language to negate the Legislature's efforts to reduce any deficit in the workers' compensation fund. Our conclusion is further influenced by the Legislature's seeming acquiescence to the rate-making methodology used in 1998, since further legislative amendment has not been made to these rate-making directives or the broad grant of rule-

making power to the Performance Council after the methodology was employed. *See Appalachian Power Co. v. State Tax Dept.,* 195 W. Va. 573, 593, 466 S.E.2d 424, 444 (1995).

Finally, we are satisfied that the record before us established that the Performance Council and Commissioner conformed to the legislative directives to employ appropriate business and actuarial standards in their rate-making processes. It has not been until recent times that actuarial standards and GAAP have been introduced into this state's workers' compensation rate-making process, as evidenced by the annual reports of the Division in fiscal years 1989 and 1990. In the FY 1998 rate-making process, we note specifically the extensive recourse to actuarial considerations and the reliance by the Performance Council and Commissioner on the results of the micro insurance reserve analysis process. From the record before us, we simply cannot say that the processes utilized failed to take into account all legislatively prescribed standards expressed in the 1995 amendments to the Act for the formulation of the rule or its application to the rate-making process.

Our observations are made in full recognition of the fact that actuarial standards may yield higher or lower estimates of future obligations and so-called unfunded liabilities, depending upon the assumptions underlying the estimates. These assumptions

include such variables as future returns on investments, valuation methods for investments, length of life awards, fluctuations in the average annual wage in West Virginia and other analogous factors. In the case before us, the parties did not challenge the assumptions and actuarial conclusions underpinning the calculation of the amortization of the discount. Consequently, we accept those calculations in the instant case as reasonably accurate for the purposes for which they were utilized.

C. Claim that Court Decisions and Provisions of the Act Exempt Appellants

Appellants point to several decisions of this Court[16] in which we addressed the purpose of the so-called second injury fund and held that second injury life awards must be charged to and paid by the Commissioner and not be charged to the employer. As germane as these cases may appear to be, they were decided under facts and circumstances unlike those presently before us and provide no substantive guidance in the instant case. Each of these decisions presumes the presence of a surplus fund and, by implication, the second injury reserve. Because these cases were decided well in advance of the statutory developments at issue, they do not address the critical issues giving rise to this action or the 1995 statutory amendments directing the "reduction of any deficit," and are thus inapposite. W. Va. Code § 23-2-4.

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[16]*Cardwell v. State Workmen's Compensation Com'r*, 171 W.Va. 700, 301 S.E.2d 790 (1983); *McClanahan v. Workmen's Compensation Com'r,* 158 W. Va. 161, 207 S.E.2d 184 (1974); *Gillispie v. State Workmen's Compensation Com'r,* 157 W. Va. 829, 205 S.E.2d 164 (1974).

More enlightening points are raised by Appellants regarding seemingly conflicting provisions of the Act. Appellants contend that separate sections of the Act preclude self-insured employers from being assessed amortization of discount charges as part of the deficit reduction plan because the Legislature (1) denoted the particular elements to be included in premium computations for self-insured employers,[17] and (2) provided directly and indirectly that no other charges be levied against any self-insured employers with respect to second injuries.[18] Appellants stress that their position is bolstered by the Legislature's failure to revise the Act, either in 1995 or to date, so as to unequivocally authorize or require participation of self-insured employers in the deficit reduction process.

In response, the Division contends that the authority to include self-insured employers in the deficit reduction plan is reflected in the first component of the premium tax calculation for self-insured employers in West Virginia Code § 23-2-9(b)(1), which reads: "A sum sufficient to pay the employer's proper portion of the expense of the administration of this chapter." The Division submits that, to the extent that the conflict Appellants maintain exists among various provisions of the Act, it can be resolved when West Virginia Code §§ 23-1-1(a), 23-2-5(g) are read in pari materia with West Virginia Code § 23-2-9.

[17]W.Va. Code § 23-2-9(b).

[18]W.Va. Code §§ 23-3-1(d), 23-2-9(e)(3).

At the outset, we observe that the phrase "expense of the administration of this chapter" is not, nor has it ever been,[19] defined within the Act. W. Va. Code § 23-2-9(b)(1). While historic application of the phrase to self-insured employers' premium rates has only included the routine management costs of the Division, we must look to see if the 1995 amendments to West Virginia Code § 23-2-4 regarding general rate-making authority allows the definition of the term to be broadened with respect to self-insured employer premium tax rates. There is no question that the Legislature failed in 1995 to make parallel amendments between the general rate-making section and the self-insured employer premium tax section of the Act and that this failure gives rise to ambiguity in the overall statutory scheme for such rate-making. When faced with interpreting multiple statutory provisions, this Court has maintained that:

> Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.

Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975).

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[19]The requirement that self-insured employers pay a portion of the expense of the administration of Chapter 23 first appeared in the Act in 1915. *See* 1915 W.Va. Acts Ex. Sess. ch.1, § 54.

The Division suggests that the concept of administration in West Virginia Code § 23-2-9 extends to administration of the entire chapter and should be read broadly to include all duties and obligations directed by the Act. West Virginia Code § 23-1-1(a) provides that "[t]he commissioner of the bureau of employment programs . . . has the sole responsibility for the administration of this chapter except for such matters as are entrusted to the . . . performance council." In addition to duties such as participating in the rate-making process, the Commissioner also has the obligation under Chapter 23 to make claims payments to all injured workers whose benefits are in fact not paid. Such obligation includes payment of benefits to employees of former and current subscribing employers who did not make adequate payments or have gone out of business, as well as employees of self-insured employers that are unable to pay the benefits from their resources and have not secured sufficient bonding or have gone out of business without having made adequate provision for maturing claims. *See* W. Va. Code § 23-2-5(g). According to the terms of West Virginia Code §§ 23-1-1 and 23-2-5(g), "administration of this chapter" embraces not only routine management expenses such as personnel, travel and supplies, but also provision for the payment of benefits as they mature to all qualifying injured employees. In this sense, premium taxes imposed have to include allowances for the inability of subscribing or self-insured employers to pay benefits. Consequently, barring express legislative exclusion to the contrary, the itemization of "the expense of the administration of this chapter" as a component of the workers' compensation premium tax rate that may be levied against self-insured employers may include provision for maturing benefits, which are required by law

to be paid by the Commissioner when an employer defaults or otherwise is unable to meet its obligation, as part of the cost or expense of administering Chapter 23. *See* W. Va. Code § 23-2-9(b)(1).

In arriving at this conclusion, we are mindful that our review of an agency's construction of the statute it administers as reflected in a rule promulgated by that agency is limited and this Court does not have free reign to substitute its preferred construction of the statute for that of the agency. Syl. Pt. 4, *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. at 579, 466 S.E.2d at 430. In cases where an agency's governing statute is silent or ambiguous with respect to a specific issue, this Court shows substantial deference to the agency's construction as reflected in a rule or regulation, or application thereof, unless the agency has exceeded its constitutional or statutory authority or has acted arbitrarily or capriciously. *Frymier-Halloran v. Paige,* 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995) (stating that "courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary").

Our examination of the record reveals that the hearing examiner properly found that the agency acted within the limits of statutory authority and valid reasoning. The hearing examiner specifically said that:

> The Commissioner in the administration of this chapter must, by mandate, keep a solvent fund and reduce the deficit. Thus, the Commissioner must be granted the authority pursuant to said duty of administration, to reduce the deficit. Amortization of discount is the number that keeps the deficit from growing. Thus, the administrative responsibility of keeping the deficit from growing, is represented in amortization of the discount, which was properly defined as an appropriate "expense of administration". Authority for this rationale[] is found in West Virginia Code Section[s] 23-2-4, 23-2-9 and 85 CSR 9.[20]

We are not swayed by Appellants' argument that amortization of the discount cannot be an administrative charge because it is not mentioned in the pertinent regulations addressing the components of administrative charges. Initially, we observe that the regulation[21] and underlying statute[22] on which Appellants rely were not adopted in the face of a looming and growing deficit in the overall workers' compensation fund which the Legislature chose to address in its 1995 amendments to the Act. The dominant message conveyed by the Legislature in 1995 to the Commissioner and Performance Council regarding the rate-making process was to address the workers' compensation fund deficit. The Legislature is entitled to substantial latitude in dealing with the deficit problem. Again we note that the Legislature has met in plenary session on at least five occasions since this

[20]Although the hearing examiner did not expressly reference his reliance on West Virginia Code § 23-1-1, it is clear that this statement was implicitly made with reference to the statutory responsibility imposed upon the Commissioner.

[21]85 W.Va. C.S.R. 9 § 13.13.c.A.

[22]W.Va. Code § 23-2-9.

rate-making methodology was employed and has not prohibited or otherwise altered the allocation of a portion of the amortized discount to self-insured employers. The record discloses that what constitutes the cost of administration with regard to workers' compensation systems varies from state to state and is dependent upon the duties of the administrator of the Fund. This fact, along with the recognition that there are considerable statutory and structural differences among the workers' compensation programs of the states, make it difficult to arrive at a generally accepted definition of cost of administration. Nonetheless, we find guidance in the interpretation Ohio has accorded to the phrase "cost of administration" because Ohio operates a system structured similarly to West Virginia's. In *State ex rel. Fulton Foundry & Mach. Co. v. Morse,* 140 N.E.2d 49 (Ohio App. 1956), an Ohio appellate court found that the phrase "cost of administration" in the context of its workers' compensation law means costs "incident to the duties and performance of the activities of the commission."[23] *Id.* at 55.

Additional evidence bearing on this issue was introduced through testimony before the hearing examiner that administrative charges in Kentucky and Rhode Island

[23]Although in a different context, this Court had occasion in *Contractors Ass'n of West Virginia v. West Virginia Dept. of Public Safety, Division of Public Safety,* 189 W. Va. 685, 434 S.E.2d 357 (1993), to address what constitutes administrative costs with respect to a state agency and stated: "common sense allows us to conclude that the clause 'cost of administration' in *W. Va. Const.* art. VI, § 52 means the cost of administering the *duties* of the Division of Motor Vehicles." (Emphasis supplied.) 198 W. Va. at 691, 434 S.E.2d at 363.

include expenses other than the expenses associated directly with the management of the system. Examples of such items charged as administrative expenses were assessments for a closed second injury fund and cost-of-living increases for previously injured workers. As to Kentucky's second injury fund, the actuary for the Division testified: "The fund was closed to claims . . . [where] last exposure [occurred] beyond December 12, 1996, but the fund is still in operation and accepting new claims if they are from exposures prior to that date." He went on to explain how the Kentucky statute[24] directs that monies to pay the claims, including unfunded liabilities, be obtained by stating:

> All employers in the state are assessed, the last number I saw was, nine percent of [their] premium, their Workers' Comp. premium. If they are self-insured, they are assessed nine percent of what the state says their premium would be if they were insured. . . . It is not based on actuarial principles, in that you have employers, for example, who are new to the state and had no exposure prior to 12/12/96, who must pay assessments to the Kentucky Special Fund. They did not participate in the risk pool. They get no direct benefits from the payments by the fund.

In consideration of the legislative failure to alter the practice of including the amortization of the discount as a factor in calculating the premiums of self-insured employers as well as the referenced practices of Ohio, Kentucky and Rhode Island, we find that allocation of a portion of the amortization of discount to self-insured employers is properly included as a part of the expense of administration of the workers' compensation fund, in conformance

[24]*See* Ky. Rev. Stat. Ann. § 342.122 (Michie 1997).

with the rate-making provisions of Title 85, Series 9 of the West Virginia Code of State Regulations and the standards prescribed by the Legislature.

Despite Appellants' protestations, we are not convinced that the provisions of West Virginia Code §§ 23-3-1(d) and 23-2-9(e)(3) negate such a reading. These provisions relate to limiting charges against employers for second injury life award payments to their individual employees. We reach this conclusion, as more fully developed below, based on our opinion that the methodology adopted to calculate self-insured premium taxes addressed reducing the overall deficit or unfunded liability of the entire workers' compensation system. While we cannot explain the Legislature's failure to amend these statutory provisions concurrent with the amendment and reenactment of West Virginia Code § 23-2-4(a)(2), we conclude that the failure of the Legislature to prevent the continuing assessment of the amortization of the discount factor supports our conclusion.

D. Additional Tax to Amortize the Discount as Retroactive Cost

Properly understood, the portion of the annual assessment referred to as amortization of the discount is intended to replace, in the fiscal year in which it is collected, the income potential in that year of assets not on hand because premium taxes in prior years were inadequate to meet anticipated obligations. Some portion of the additional tax has been assessed on each participating employer in the state, including employers subscribing to the

Fund as well as those which are self-insured, regardless of whether an employer has ever had benefits awarded to its employees. The additional tax may arguably be seen as an unfair assessment on employers who may not have directly contributed to the unfunded liability problem. However, clearly seen in another light, the tax to amortize the discount is a current cost to administer the Fund for the benefit of all past and present participating employers and covered employees. In this sense, the additional tax is a current cost.

Appellants' contention that it is impermissible for the additional tax to be applied to self-insured employers because it allows the Division to recoup second injury life award payments is not supported by the record. While the financial problems of the Division necessarily include the second injury fund, the additional tax to amortize the discount is not directly correlated to second injury life awards. The need to amortize the discount does not arise solely by reason of historical conditions and causes that are attributable to current and former employers classified as self-insured, but also includes such conditions and causes involving employers who are not self-insured. The overarching reality is that the workers' compensation system is a comprehensive remedy for workplace injuries and diseases which permeates virtually every employment situation in the state and under which the workers' compensation fund is ultimately responsible for every claim and benefit provided under the law. Accordingly, the Fund carries every burden dropped or avoided by *any* under-assessed, non-paying, closed, failed or bankrupt employer, save the extent to which surety bonds of

self-insured employers alleviate this burden. It is readily apparent that, given the ever-changing nature of the state's economy, much of the high-employment, high-wage industrial economy has ceased to exist, but the workers' compensation fund has not kept pace with those changes.

Status as a self-insured employer is a privilege by which a qualifying employer is excused from payment of the full premium tax based upon the employer's representation that a sufficient bond is being posted to defray all future obligations of the Fund which result from that employer's activities. It is telling that the Legislature chose not to exclude self-insured employers from the directive that rates be fixed to maintain a solvent workers' compensation fund and to reduce any deficit in that Fund by specifying that the "system for determining rates of premium taxes [be] applicable to *employers subject to this chapter*." W. Va. Code § 23-2-4(a) (emphasis added). It is reasonable to conclude that the Legislature thus intended that part of the cost associated with an employer maintaining the privilege to self-insure was inclusion of such employers in the deficit reduction plan. This conclusion is further supported by the evidence in this case which indicates that over a lengthy period of time self-insured employer security bond requirements have not been stringently enforced, resulting in expanded liability being placed on the Fund for these unsecured obligations.[25]

[25]The bankruptcy action filed on May 19, 2003, by Weirton Steel in the United States Bankruptcy Court for the Northern District of West Virginia supplies a timely and pertinent example. As stated in a motion filed by Weirton Steel in that action, "The State (continued...)

While the Legislature cannot at any point in time forecast which employers operating in the state may in the future be under-assessed, non-paying, closed, failed or bankrupt employers, it would be improper for this Court to attempt to curb the reasonable discretion of the Legislature to address the consequences of some employers inevitably falling into these classifications.

The need to increase premium taxes has been influenced by numerous factors. As previously mentioned, under-assessed, non-paying, closed, failed or bankrupt employers contribute to the financial situation under discussion. The reduction or capping of premium rates which has occurred on occasion, presumably for the purpose of encouraging economic development or of fostering the continuation of existing businesses, also has exacerbated the financial problems of the system.[26] The practice of capping premiums, which was used in determining the FY 1998 rates according to Resolution No. 11, not only has financial implications but also obviously diminishes the correlation between the premiums charged

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[25](...continued)
of West Virginia has calculated, on an actuarial basis, Weirton's security obligation to the [Workers' Compensation] Fund in the amount of approximately $7,109,144 for prospective liability and approximately $40,470,515 for retrospective liability. Frontier Insurance Company has issued a surety bond in the amount of $10,629,496 on behalf of Weirton for the benefit of the State of West Virginia and the Fund. Notwithstanding the security deficit, the State of West Virginia has determined that Weirton is eligible to participate in the State's workers' compensation self-insurance program."

[26]Either reductions in premiums or capping of premiums has occurred in the past at the behest of at least three recent governors.

and the job-related injury experience of the employer. Benefits payable under particular court decisions may well not have been anticipated in fixing rates in particular years. Likewise, escalating health care costs, especially in recent years, may not have been anticipated in fixing rates at a level necessary to secure future benefit payments. Certainly, fluctuations in the valuation of assets and in rates of return on those assets are considerable factors. Although not exhaustive, the enumerated conditions are sufficient to demonstrate that many employers, subscribing or self-insured, may not have made any direct contribution to the Funds' financial woes. Despite that appearance, the record simply does not support the conclusion that self-insured employers must be excluded from the obligation to address the deficit. Whether by reason of artificially reduced or capped premiums, business closures, reduced bonding requirements or other causes, self-insured employers – like other employers whose employees may have made little or no call on the resources of the Fund – may reasonably be called upon to assist in the reduction of the deficit, represented in this case as the amortization of discount. The stark reality is that the future health of the Fund is at stake, posing a significant threat to the interests of all employers and employees in the state. We continue to recognize as we did in syllabus point three of *Repass v. Workers' Compensation Division,* 212 W. Va. 86, 569 S.E.2d 162 (2002), that:

> The ultimate responsibility for the fiscal health of the West Virginia Workers' Compensation system rests with the Legislature. Balancing the conflicting goals of minimizing premiums while providing full and fair compensation to injured workers is the exclusive province of our publicly elected legislators. . . .

As this Court aptly summarized in *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 731, 474 S.E.2d 906, 911(1996):

> [T]his Court is not concerned with the legislative policy which motivated the enactment of . . . [the 1995 amendments to the workers' compensation act], nor do we "sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation." *Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986).

In our view, the imposition on all employers of additional premium taxes to amortize the discount does not represent a prohibited retroactive charge imposed upon self-insured or other employers subject to the Act. As we recognized over fifty years ago in *Hereford v. Meek*, 132 W. Va. 373, 52 S.E.2d 740 (1949):

> Though the Legislature, in enacting . . . [an] amendment may not have realized or foreseen the result of its action . . ., it is presumed to be familiar with "all existing law". . . applicable to the subject matter . . . . If its exercise of . . . power cause[s] an undesirable result, the remedy lies with the Legislature, whose action has produced it, and not the courts. The question of dealing with the situation in a more satisfactory or desirable manner is a matter of policy which calls for legislative, not judicial, action.

Id. at 388, 52 S.E.2d at 748 (internal citation omitted).

Having fully addressed the non-constitutional challenges involving the premium costs at issue, we now consider Appellants' arguments that the inclusion of the

amortization of the discount factor amounts to an unlawful taking and is in violation of their substantive rights of due process.

E. Unlawful Taking

Appellants maintain that the challenged premium assessments are an impermissible taking in violation of both the federal and state constitutions. *See* U.S. Const. amend. V; W.Va. Const. art. III, § 9.[27] According to Appellants, the Division's actions in charging them additional costs for the purpose of amortizing the discount constitute a regulatory "taking" without just compensation. *See id.* As support for this argument, Appellants rely primarily on the decisions reached by the United States Supreme Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) and the Fifth Circuit Court of Appeals in *U.S. Fidelity & Guaranty Co. v. McKeithen*, 226 F.3d 412 (5th Cir. 2000). Neither *Eastern Enterprises* nor *McKeithen*, however, compel the conclusion that the additional premium costs at issue constitute an unconstitutional taking.

1. *Eastern Enterprises*

[27]The federal constitution provides that: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Similarly, the West Virginia Constitution mandates that: "Private property shall not be taken or damaged for public use, without just compensation[.]" W.Va. Const. art. III, § 9.

At issue in *Eastern Enterprises* was the application of certain provisions of the Coal Industry Retiree Health Benefit Act ("Coal Act")[28] that assigned retired coal miners to former coal operators under a complex funding formula designed to address the provision of health benefits to so called "orphan" retirees.[29] 524 U.S. at 511-16. Admittedly, the *Eastern Enterprises* decision does, in the four-justice plurality section of the sharply divided opinion, contain a discussion of regulatory takings. *See* 524 U.S. at 522-38. Critically, however, because Justice Kennedy concurred *only* in the result reached by the plurality – the unconstitutionality of the Coal Act as applied to Eastern – and *not* in the plurality's reasoning that an unconstitutional taking resulted, the value of the Takings Clause analysis has come under considerable and well-deserved scrutiny. Based on the fact that Justice Kennedy found the Coal Act unconstitutional solely on substantive due process grounds,[30] there is uniform agreement regarding the limited reach of the *Eastern Enterprises* decision: "[T]he only binding aspect of *Eastern Enterprises* is its specific result – holding the Coal Act unconstitutional as applied to Eastern Enterprises." *Assn. of Bituminous Contrs., Inc. v.*

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[28]*See* 26 U.S.C. §§ 9701 to 9722 (1992).

[29]The "orphaning" resulted when the coal employers for whom these retired employees last worked prior to their retirement were no longer contributing to the system due to their withdrawal from the business of coal mining. The assignment of specific employees to an employer was based on the fact that those employees were at some point in the employee's career in the assigned employer's workforce.

[30]This conclusion was based upon concerns rooted in the severe retroactivity of the provisions of the Coal Act under scrutiny. *See Eastern Enterprises,* 524 U.S. at 547-50 (Kennedy, J., concurring in judgment, dissenting in part).

Apfel, 156 F.3d 1246, 1255 (D.C. Cir. 1998); *accord Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 39 (2000) (stating that "no part of the plurality's reasoning constitutes binding precedent"); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 658 (3d Cir. 1999) (noting that the "splintered" decision in *Eastern Enterprises* "makes it difficult to distill a guiding principle"); *Asarco Inc. v. Dept. of Ecology*, 43 P.3d 471, 476 n. 9 (Wash. 2002) (observing that "[t]he federal courts applying *Eastern Enterprises* in subsequent cases have overwhelmingly found it did not articulate binding principles of law"); John Decker Bristow, student author, *Eastern Enterprises v. Apfel: Is the Court One Step Closer to Unraveling the Takings and Due Process Clauses?*, 77 N.C. L. Rev. 1525, 1526-27 (1999) (commenting that "the actual holding in *Eastern Enterprises* is quite narrow").[31]

In similar fashion, the Fourth Circuit Court of Appeals has recognized that "*Eastern Enterprises* does not stand for the legal proposition that the Eastern assignments under the Coal Act contravene the Takings Clause."[32] *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 237 n.17 (4th Cir. 2002). Given the high court's lack of consensus, the Fourth

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[31]The student author posits that when Justice Kennedy's separate opinion is read along with Justice Breyer's dissent, five justices arguably concur that "because the Coal Act was a purely economic regulation, the appropriate analysis was provided by the Due Process Clause and not the Takings Clause." Bristow, *supra*, 77 N.C. L. Rev. at 1527.

[32]The Court in Asarco observed that "the concurrence [Justice Kennedy] and four dissenters in *Eastern Enterprises* were persuaded no taking had occurred because a specific property right or interest in a particular piece of property was not at stake." 43 P.3d at 486.

Circuit resolved that it would "apply *Eastern Enterprises* only to coal operators that stand in a position substantially identical to that of Eastern."[33] *Ibid.*; *accord Unity Real Estate*, 178 F.3d at 659. To determine whether the A.T. Massey Coal operators were in a position "substantially identical" to that of the Eastern operators, the Fourth Circuit sought to identify those "factors that were critical to both the plurality and Justice Kennedy in their respective determinations" that requiring Eastern, as a former coal operator, to be responsible for funding health benefits for certain retired miners was unconstitutional. 305 F.3d at 237.

In finding the allocation of retroactive responsibility[34] for health benefits unconstitutional in *Eastern Enterprises*, both the plurality and Justice Kennedy placed significance on the fact that "[n]ot until 1974 . . . could lifetime medical benefits . . . have been viewed [by the affected coal miners] as promised." 524 U.S. at 535; *accord* 524 U.S. at 550 (Kennedy, J., concurring in judgment, dissenting in part). Because Eastern had left the coal industry in 1965, it had never been a signatory to any national bituminous coal wage agreement that carried the implied promise of lifetime health benefits for miners. *See* 524

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[33]The Fourth Circuit, applying the rule of *Marks v. U.S.*, 430 U.S. 188 (1977), examined the *Eastern Enterprises* decision to determine whether a "common denominator" could be identified between the concurrence of Justice Kennedy and the plurality for the purpose of determining a controlling holding. After completing the *Marks* analysis, the court concluded that there was "no theoretical overlap between the rationales employed" by the respective judicial authors. *Massanari*, 305 F.3d at 236-37.

[34]The retroactive reach of the benefits at issue in *Eastern Enterprises* was thirty to fifty years as Eastern was assigned funding responsibility for its employment of coal miners between the years of 1946 and 1965. *See* 524 U.S. at 501.

U.S. at 530-32; 524 U.S. at 550 (Kennedy, J., concurring in judgment, dissenting in part) (observing that expectation of lifetime health benefits "was created by promises and agreements made long after Eastern left the coal business"). Consequently, "Eastern could not have contemplated liability for the provision of lifetime benefits to the widows of deceased miners" before 1974, when it was no longer in the business of coal mining.[35] 524 U.S. at 531.

Recognizing the substantial amount of Eastern's liability ($50-$100 million), the plurality in *Eastern Enterprises*, observed that "[t]he distance into the past the Act reaches back to impose a liability on Eastern and the magnitude of that liability raise substantial questions of fairness." 524 U.S. at 534. Refraining from second guessing the wisdom of Congress' decision to enact the Coal Act, however, the plurality reasoned:

> That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable; complex problems of that sort typically call for a legislative solution. *When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised.*

[35]The high court dismissed as irrelevant the fact that Eastern's wholly-owned subsidiary continued mining until 1987, observing that "Eastern's liability under the Act bears no relationship to its ownership of EACC." 524 U.S. at 530.

524 U.S. at 537 (emphasis supplied).

Applying principles of substantive due process[36] rather than the Takings Clause, Justice Kennedy similarly concluded that the retroactive reach of the Coal Act was unconstitutional. In contrast to economic legislation that is limited to a prospective application and which "carries with it the presumption of constitutionality," Justice Kennedy remarked upon "our legal tradition's disfavor of retroactive economic legislation." 524 U.S. at 547-48 (Kennedy, J., concurring in judgment, dissenting in part). Characterizing the Coal Act's imposition of liability on employers based on events that took place thirty-five years ago as "severe retroactive legislation" and noting that such legislation was of "unprecedented scope" in its reach, Justice Kennedy determined that the specific circumstances present in *Eastern Enterprises*[37] were egregious and presented that "rare instance[] in which even such a permissive standard [deferential review accorded to substantive due process challenges of economic legislation] has been violated." 524 U.S. at 549-550 (Kennedy, J., concurring in judgment, dissenting in part).

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[36]In analyzing legislation under substantive due process principles, the inquiry is whether the legislature, in enacting the retroactive law, acted in an arbitrary and irrational way. 524 U.S. at 547 (Kennedy, J., concurring in judgment, dissenting in part) (citing *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976)).

[37]Those circumstances included the lack of Eastern's responsibility for the former employees' expectation of lifetime health benefits and for the resulting chaos in the funding mechanism caused by numerous employers exiting the coal business.

Distilling its analysis of the factors common to both the plurality and Justice Kennedy's concurrence, the Fourth Circuit determined that, for purposes of applying the *Eastern Enterprises* decision, "a coal operator stands in a position 'substantially identical' to that of Eastern if it had no connection to the 1974 or subsequent NBCWAs [national bituminous coal wage agreements]." 305 F.3d at 237. While the Massey plaintiffs argued that since they never signed the 1974 or subsequent national bituminous coal wage agreements they were in the same position as Eastern, the Fourth Circuit disagreed, citing the "related persons" status of the Massey plaintiffs with respect to signatory coal operators under the Coal Act. Based upon the clear Congressional intention to treat "related persons" "as though . . .[each member of a controlled group of corporations] had employed every miner who worked for any member of the group," the Fourth Circuit determined that the non-signatory status of the plaintiff Massey companies to either the 1974 or any subsequent national bituminous coal wage agreement did not prevent the application of the Coal Act provisions. *Id*. at 239. In finding that the Massey plaintiffs were not in a "substantially identical" situation to that presented in *Eastern Enterprises,* the Fourth Circuit noted that, just as the United States Supreme Court recognized its obligation to defer to the Congressional statutory definitions in *Eastern Enterprises,*[38] it was similarly required to rely on Congress'

[38]In rejecting the contention that Eastern's subsidiary's post-1974 signatory status to relevant wage agreements were sufficient to attach liability under the Coal Act, the United States Supreme Court stated that "the Act assigns Eastern responsibility for benefits relating to miners that Eastern itself, not EACC [its subsidiary], employed, while EACC would be assigned the responsibility for any miners that it had employed." 524 U.S. at 530 (continued...)

decision to designate "'related persons' as a single legal entity under the Coal Act." *Id.* at 240.

2. *McKeithen Decision*

In *McKeithen*, various provisions of a Louisiana statute that addressed funding of the state's second injury fund were challenged as unconstitutional under the Takings Clause, the Contracts Clause, and the Equal Protection Clause of the United States Constitution. 226 F.3d 412. Pursuant to the challenged legislation, insurers that had withdrawn from the Louisiana insurance market or substantially reduced their underwriting in the state were subjected to the second injury fund's assessment formula, which was expressly made retroactive to policies written before the legislation's enactment. *Id.* at 415. The Fifth Circuit concluded that the legislation constituted an unlawful taking, relying on the analysis employed by the plurality in *Eastern Enterprises.*[39] In reviewing the Louisiana legislation to "evaluat[e] . . . the 'justice and fairness' of the government action," the Fifth Circuit framed its analysis by using three factors that the plurality in *Eastern Enterprises* used

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[38](...continued)
(citing 26 U.S.C. § 9706(a)).

[39]Essentially dismissing Justice Kennedy's fundamental objection to the application of a Takings Clause analysis to economic legislation by stating that his concerns that a specific property interest must be identified "would be muted–or mooted–here," the Fifth Circuit reasoned that because "Justice Kennedy's due process analysis focuses on retroactivity . . . [it] is essentially harmonious with the reasoning of the other four justices." 226 F.3d at 420.

to perform its analysis: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with reasonable investment-backed expectations; and (3) the character of the government action. 226 F.2d at 416 (citing *Eastern Enterprises*, 524 U.S. at 523).

In analyzing the economic impact of the challenged legislation, the Fifth Circuit explained that the legislation "impose[d] a considerable, novel financial burden on the plaintiffs." 226 F.3d at 416. Prior to the legislation's enactment, "insurers paid a net amount of zero for claims made on the Second Injury Fund and collected SIF premiums from their insureds only to pass-through the SIF assessments." *Id.* at 416-17. Under the provisions of the challenged act, insurers were assessed charges "based on benefits paid under insurance policies written before the law's effective date." 226 F.3d at 417. The Court in *McKeithen* noted that the plaintiff insurers who were no longer in the business of providing such insurance benefits, as contrasted to active insurers, had "no means to recoup the charge" and characterized the $50 million in retroactively assessed costs as "substantial." *Ibid.* Of further importance to the Fifth Circuit in evaluating the economic impact of the Louisiana legislation was the fact that the "newly-created liability reflect[ed] no proportionality to the plaintiffs' experience with the SIF." *Ibid.* In marked contrast to serving as a payment intermediary for twenty years, receiving no net benefits and incurring no net costs, the plaintiff insurers were

now required under the challenged act to make "significant net contributions to the fund." *Ibid.*

Focusing on the retroactive reach of the costs assessed to the insurers – a reach of twenty years – the Fifth Circuit quickly determined that the cost-neutrality basis of the prior funding scheme had been dismantled. The Court in *McKeithen* then examined whether the plaintiff insurers could have foreseen either an alteration in the premium-based assessments or the retroactive imposition of a benefits-based method of assessing premiums. 226 F.3d at 418. The Court opined:

> While plaintiffs might have been on notice that there could be a change away from premium-based assessments, there was no evidence that the plaintiffs should have suspected abandonment of cost-neutrality. There was no evidence that the cost of financing the SIF was ever intended to be borne by insurers, that there existed any rationale or policy for imposing the cost on insurers, or that the state was contemplating shifting the burden of funding onto insurers.

Ibid. (footnote omitted). On the issue of whether the plaintiff insurers had sufficient notice of the challenged legislation, the court observed in *McKeithen*: "There are no indications in the law itself, in the legislative history, or in the record of this case that the SIF was financially insecure, or that employers were having trouble bearing the costs of operating the SIF." 226 F.3d at 419.

Rejecting the district court's analysis that the questioned legislation was merely "'a rational attempt by the state to impose the costs inherent in a certain type of business activity on those that have profited from the fruits of the business in question,'" the Fifth Circuit explained that the plaintiff insurers, as contrasted to the employers, did not benefit from the prior second injury funding scheme. *Ibid.* Describing the nature of the government action at issue as "unusual," in that the Legislature failed to "identify[] a compelling problem, such as the financial insecurity of the SIF," the Fifth Circuit determined that the challenged legislation had "'single[d] out certain [parties] to bear a burden that is substantial in amount, based on the [parties'] conduct far in the past, and unrelated to any commitment that the [parties] made or to any injury they caused. . . .'" *Ibid.* (quoting *Eastern Enterprises,* 524 U.S. at 537).

In concluding that the Louisiana statute constituted a taking, the Fifth Circuit reasoned:

> Act 188 as applied to plaintiffs' pre-enactment contracts retroactively imposes a heavy economic burden on those who could not reasonably anticipate the liability. *The extent of the liability is disproportionate to the plaintiffs' experience with the SIF, and the legislation is unnecessary to substantially advance a legitimate state interest.*

226 F.3d at 420 (emphasis supplied).

3. Applicability of Takings Clause Analysis

With minimal application of the analysis employed in *Eastern Enterprises* and *McKeithen*, Appellants conclude that those decisions support their collective position that the assessment of premium rates which include an amount for amortizing the discount constitutes an unlawful taking. Preferring to focus on various broadly-worded statements that appear in those decisions, Appellants overlook the glaring distinctions between the facts presented in this case and those at issue in *Eastern Enterprises* and *McKeithen.* These factual distinctions are critical as the United States Supreme Court has recognized that the issue of whether compensation is compelled in the instance of "'economic injuries caused by public action' . . . is essentially ad hoc and fact intensive." *Eastern Enterprises*, 524 U.S. at 523 (quoting *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979)). Disregarding the critical distinctions between their authority and the case *sub judice*, Appellants reason, in rather summary fashion, that the three factor test[40] used by the plurality in *Eastern Enterprises* to analyze issues of regulatory takings necessarily results in the conclusion that the Division's actions are in violation of the Takings Clause. We disagree.

As an initial matter, we observe that both *Eastern Enterprises* and *McKeithen* involved premium assessments with a severe retroactive reach. In the former case it was thirty-five to fifty years and in the latter it was twenty years. As we explained above in

[40]Those factors are: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with reasonable investment-backed expectations; and (3) the character of the government action. *Eastern Enterprises*, 524 U.S. at 523.

refuting Appellant's contention that the additional component of the premium tax is a retroactive cost, the portion of the premium reflecting the amortization of the discount is a current cost deemed necessary to keep the fund afloat, rather than an assessment solely correlated to second injury life awards. Moreover, the mere fact that the quantity of an employer's second injury life awards is a component in the complex formula devised to address the remedial issue of the funding deficit does not render the premium assessment formula unconstitutional. *See, e.g., Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1975) (upholding imposition of retroactive cost-spreading scheme for black lung benefits legislation among employers who had profited from fruits of affected employees' labor against due process challenge); *see also McKeithen*, 226 F.3d at 419 (suggesting that financial insecurity of second injury fund or inability of employers to solely bear costs of fund would be relevant factors concerning issue of assessing retroactive premiums). Unlike the methodology employed to calculate premiums in *Eastern Enterprises*, where the assessment was directly and specifically tied to the employment of individuals several decades earlier, the premium assessment at issue here has no far reaching retroactive effect. Even assuming some retroactive effect of the premium assessment under consideration, retroactivity alone does not render a statute unconstitutional. *See Unity Real Estate*, 178 F.3d. at 671 (stating that "[w]here Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively"). And, because the premium assessment was calculated based in terms of reducing the Fund's deficit as a whole, rather than being directly

correlated to the second injury fund, Appellants fail in their attempt to convince us that the costs under scrutiny qualify as severely retroactive under the reasoning of the plurality opinion in *Eastern Enterprises* and *McKeithen*.

Another significant difference between *Eastern Enterprises* and *McKeithen* and this case, which we have already touched upon, arises from the concern that substantially all employers in this state, not just self-insured employers or subscribers to the second injury fund, are subject to the inclusion of the amortization of the discount factor in their premiums. What was critical to the plurality in *Eastern Enterprises* and the Fifth Circuit in *McKeithen* was the singling out of certain entities for cost assessments. *See* 524 U.S. at 537; 226 F.3d at 419. Had only self-insured employers been charged a premium which contained an amortization of the discount factor, serious issues of fairness would undoubtedly be raised. In contrast to the scenarios presented in *Eastern Enterprises* and *McKeithen*, the Performance Council did not single out any one type of employer in its distribution of premium costs. Appellants have simply not demonstrated that the premiums assessments of which they complain are disproportionate to their experience with the Fund.[41] *See Eastern Enterprises*,

[41]For fiscal year 1998, the total amount of amortization of the discount attributable to both regular subscribers and self-insured employers was $216 million; $46 million of that amount was allocated to self-insured employers. Self-insured employers were thus allotted 21% of the amortization factor for fiscal year 1998. That percentage of collective responsibility for self-insured employers was determined based on the use of a comparison of micro insurance reserve analysis ("MIRA") case reserves between regular subscribers and self-insured employers for *all* of the Fund's liabilities. In arguing below that (continued...)

524 U.S. at 523 (recognizing that "party challenging governmental action as an unconstitutional taking bears a substantial burden").

Of importance to the plurality in *Eastern Enterprises* and the Fifth Circuit in *McKeithen* were the related issues of investment-backed expectations and forseeability. In *Eastern Enterprises*, the plurality focused on the fact that Eastern could not have contemplated the imposition of liability for lifetime health benefits for coal miners due to its departure from the coal mining business almost ten years prior to the time when such an industry wide agreement was reached. Similarly, in *McKeithen* the Fifth Circuit emphasized that the insurers, who had always operated solely as payment conduits, had no basis for anticipating a change in the funding formula that would have involved the assessment of premiums against them. The appellate court emphasized that "there was no pattern of conduct on the state's part that could have given the plaintiffs sufficient notice that cost-neutrality would end." *McKeithen*, 226 F.3d at 419. In stark contrast to both of those cases, Appellants have been on notice beginning in 1993 when the workers' compensation statutes were rewritten and then in 1995 when the statutes were substantially rewritten, and arguably

[41](...continued)
their percentage of responsibility should have only been 14%, Appellants' expert was purportedly basing his analysis on second injury claims only. Yet, the MIRA analysis employed was based on all liabilities of the Fund and not just second injury liabilities.

sooner,[42] that the Fund was facing the possibility of serious financial infirmity. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226-27 (1986) (upholding retroactive legislation based on fact that employers were continuously aware during entire period of retroactivity that Congress was studying funding mechanism for multiemployer pension plans and that statutory withdrawal liability might be required). Consequently, Appellants cannot seriously posit that an increase in premiums that would force them to bear some of the financial burden of keeping the Fund afloat was not foreseeable.

As opposed to the findings by the plurality in *Eastern Enterprises* and the court in *McKeithen*, the nature of the government action at issue in this case is not "unusual." *See* 524 U.S. at 537; 226 F.3d at 419. Unlike the concerns raised by the plurality in *Eastern Enterprises* that Congress had "single[d] out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused," the government action at issue here is prototypical in that the Legislature, through the efforts of the Performance Council, took action in response to the compelling state interest of keeping the Fund afloat and the related interest of preventing a lowering of the state's bond ratings. 524 U.S. at 537.

[42]From our review of the annual reports pertaining to the workers' compensation fund, it is clear that beginning in 1985 the Fund was experiencing serious financial losses. With the first utilization of actuarial reports in 1989, it was apparent the Fund had a significant unfunded liability. An initial actuarial report compiled in June 1989 estimated the deficit at $316.1 million and a later report produced in December 1989 revised that figure to $355 million.

There can be no question that the financial insecurity of the Fund – a compelling state interest – is the driving force behind implementing, as part of the premium costs, an amortization of the discount factor. In clear contrast to the lack of commitment by the employers in *Eastern Enterprises* and the insurers in *McKeithen*, Appellants made an implicit commitment to their employees to pay all fairly and reasonably assessed premiums as a means of enabling their employees to receive the benefits to which they are entitled under the workers' compensation statutes.[43] And, as discussed above, Appellants are unable to succeed on a disproportionality argument, as they, along with other non-excluded employers, were assessed premium increases that included the amortization of the discount factor.[44]

Further evidence of the fact that Appellants do not stand in shoes comparable to the plaintiffs in either *Eastern Enterprises* or *McKeithen* is shown by their collective inability to demonstrate that: (a) they could not have reasonably anticipated an increase in premium costs due to the well-known financial situation of the fund; (b) their assessment is disproportional to their experience with the Fund; and (c) that the legislative action taken in

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[43]Like it or not, a collective responsibility among all non-excluded employers is inherent to the workers' compensation scheme. Obviously, when participating employers depart from the system or self-insured employers fail to meet their bond requirements, the Fund, as a whole is affected. Because the workers' compensation scheme contemplates the availability of continuing funds to pay for the claims of entitled employees, Appellants, along with all other non-excluded employers, have a corporate responsibility for the Fund's solvency.

[44]*See supra* note 41.

implementing the costs at issue was "unnecessary to substantially advance a legitimate state interest." *McKeithen*, 226 F.3d at 420 (citing *Eastern Enterprises*, 524 U.S. at 528-29). Upon careful and thorough review of the applicable authority, we find that the formula developed by the Performance Council which allocates an amount for the amortization of the discount in assessing the workers' compensation premium tax for self-insured employers does not constitute an undue taking without compensation in violation of either the federal or state constitution.

F. Substantive Due Process Violation

Appellants argue that the premium tax increase violates the due process clauses of the federal and state constitutions on the grounds that there is no rational basis underlying the legislative measures at issue. *See* U.S. Const. amend. XIV; W.Va. Const. art. III, § 10. In making this argument, Appellants overlook the fact that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery*, 428 U.S. at 15; *see also Eastern Enterprises*, 524 U.S. at 528 (recognizing that "Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties").

Challenges to economic legislation based on substantive due process are examined under a deferential standard of review. *Concrete Pipe & Products v. Constr. Laborers Pension Trust*, 508 U.S. 602, 639 (1993) (citing *Usery*, 428 U.S. at 19). Understandably, the high level of deference that is accorded to legislative actions aimed at addressing economic problems results from a recognition that lawmakers are uniquely charged with responsibility for passing laws designed to cure such serious social concerns. Consequently, courts are unwilling, as a rule, to second guess the wisdom of cost-spreading mechanisms adopted in connection with a particular legislative act, provided that such legislation can be viewed as a rational means of addressing the economic problem at issue. *See Usery*, 428 U.S. at 19 ("It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.").

The decision of the Performance Council, operating under recognized principles of legislative power delegation,[45] to spread the costs of amortizing the discount between all employers is a determination which is similarly entitled to deference. *See Usery*, 428 U.S. at 18 (stating that "it is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators, including new entrants and farsighted early operators

[45]We outright reject the contention raised by Pine Ridge that the Performance Council exceeded the powers conferred upon it by the Legislature, noting that the Legislature provided the Council with sufficient guidance for the performance of its duties. *See* Syl. Pt. 3, *Quesenberry v. Estep*, 142 W.Va. 426, 95 S.E.2d 832 (1956).

who might have taken steps to minimize black lung dangers, or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health"). In repeatedly remonstrating their lack of responsibility for the financial condition of the Fund, what Appellants overlook is the collective responsibility of self-insured employers as a class for unpaid benefits and their concomitant interest and role in preventing the insolvency of the Fund. Moreover, the critical issue is whether the methodology chosen for assessing the additional premiums costs at issue here is a rational means of addressing the Fund's plight, and not identifying who caused the problem.

In upholding the payment of health benefits under the Coal Act against due process challenges raised by employers who had been signatories to coal agreements in 1978 but who had been out of the industry for eleven years, the Third Circuit declared that "[e]ssentially, the Act is Congress's attempt to do equity." *Unity Real Estate,* 178 F.3d at 673. As with any piece of economic legislation that seeks in a comprehensive fashion to address a serious financial obligation, there will always be challenges predicated on fairness. Given the entitlement of deference accorded to such legislation, however, we can only set aside the premium funding mechanism at issue here if we conclude that the adopted funding structure was arbitrary and irrational. It is clear to this Court that the methodology employed to calculate the amortization of the discount factor involved a detailed effort to identify all relevant factors that contributed to the Fund's financial situation. That process, which was

grounded in recognized insurance principles and correlated to the experience of the various differing types of employers with the Fund, appears reasonable. While we cannot make this declaration with the preciseness of a mathematical formula, our reviewing obligation does not require such exactness: "[U]nder the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means." *Concrete Pipe*, 508 U.S. at 639.

Based on our opinion that the Performance Council was clearly charged with responsibility for setting premium rates that included costs necessary to maintain a solvent workers' compensation fund *and* to reduce the deficit, we cannot conclude that the mechanism by which the Performance Council opted to address the serious and well-known financial situation of the Fund was either arbitrary or irrational. *See* W.Va. Code § 23-2-4(a)(2). Like Congress's actions in enacting the Coal Act, the Performance Council was simply "attempt[ing] to do equity." *Unity Real Estate*, 178 F.3d at 673. And, as the United States Supreme Court observed in *Usery*, the issue of whether a cost-spreading mechanism other than the one legislatively chosen "would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Usery*, 428 U.S. at 19. Consequently, we determine that the formula developed by the Performance Council which allocates an amount for the amortization of the discount in assessing the workers'

compensation premium tax for self-insured employers does not violate the Due Process clause of either the federal or state constitution.

Finding no merit in the arguments raised by Appellants, we affirm the January 17, 2002, final order of the Circuit Court of Kanawha County and deny all relief requested. Specifically, we decline to enter the requested order to compel the Commissioner to meet fiduciary obligations of the Act, past or present, deferring in the circumstances to the current efforts of the executive and legislative branches to address such workers' compensation issues in plenary fashion. In consideration of the compelling circumstances, we hereby direct the entry of the necessary order and the issuance forthwith of the mandate pertaining to this decision.

Affirmed.