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COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2007-SC-000058

ERNIE FLETCHER and BRADFORD L. COWGILL, in their Official capacities

APPELLANTS/CROSS-APPELLEES

v.

HAYDON BRIDGE COMPANY, INC.; GREATER LOUISVILLE AUTO DEALERS ASSOCIATION; KENTUCKY AUTOMOBILE DEALERS ASSOCIATION; M&M CARTAGE CO., INC.; SPRINGFIELD LAUNDRY & DRY CLEANERS, INC. AND USHER TRANSPORT, INC.

APPELLEES/CROSS-APPELLANTS

And

KENTUCKY WORKERS' COMPENSATION FUNDING COMMISSION

APPELLEE

DIRECT APPEAL FROM FRANKLIN CIRCUIT COURT (Hon. Wingate)
No. 03-CI-01547

BRIEF OF APPELLEES/CROSS-APPELLANTS HAYDON BRIDGE COMPANY, INC.; GREATER LOUISVILLE AUTO DEALERS ASSOCIATION; KENTUCKY AUTOMOBILE DEALERS ASSOCIATION; M&M CARTAGE CO., INC.; SPRINGFIELD LAUNDRY & DRY CLEANERS, INC.; AND USHER TRANSPORT, INC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via ordinary mail, postage prepaid, this 21st of December, 2007, upon Hon. Thomas Wingate, Courthouse, 214 St. Clair St., Frankfort, KY 40601; Christopher W. Brooker, Esq., Wyatt, Tarrant & Combs, 500 West Jefferson Street, Suite 2800, Louisville, KY 40202; and Frank Dickerson, Esq., Kentucky Workers' Compensation Funding Commission, 42 Millcreek Park, P.O. Box 1128, Frankfort, KY 40602-1128. Counsel for Appellees/Cross-Appellants states that he has returned the record to the Court Clerk.

Mark D. Guilfoyle

STATEMENT CONCERNING ORAL ARGUMENT

Throughout their Brief, Appellants portray this case as one that can be resolved easily through a straightforward application of Armstrong v. Collins. To the contrary, while Armstrong is clearly applicable to this case, the issues now before the Court involve a set of facts quite distinct from those resolved in Armstrong. This case involves actions by both the Governor and the General Assembly to raid dedicated and restricted workers' compensation trust funds and to increase workers' compensation assessments on all Kentucky employers. For the legislature's part, these ground-shaking actions were effected by ***amending*** the entire statutory framework of Kentucky's workers' compensation laws through the use of two little words in a budget bill, *viz.*, "notwithstanding KRS 342.122." These actions fly in the face of Sections 15 and 51 of the Kentucky Constitution (the subject of this appeal) and directly contravene Section 180 of the Kentucky Constitution (the subject of Appellees/Cross-Appellants' cross-appeal). Appellees/Cross-Appellants agree with Appellants that oral argument will assist the Court in deciding the important constitutional questions presented by this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

I. INTRODUCTION

The lynchpin of the circuit court's Opinion and Order, declaring unconstitutional the transfer to the General Fund of the appropriations at issue, is found in the following sentence:

> In this case, with two words "notwithstanding KRS 342.122," the Legislature has undertaken to alter the entire statutory framework of the workers' compensation reform of 1996.

(Opinion and Order at 5)[1] As the trial court made clear, that "entire statutory framework" is by no means contained in KRS 342.122, but rather is set forth in a complex of inter-related statutes. Moreover, the trial court correctly observed that the General Assembly failed to even mention in the relevant Budget Bills the statutes comprising the "entire statutory framework." In reference to these two Budget Bills, the circuit court observed:

> No mention is made . . . of KRS 342.1227 which prohibits the transfer or loan of funds statutorily dedicated to the payment of injured workers' claims to any other agency or purpose.

(*Id.* at 5-6) Judge Graham further observed:

> No mention is made of the provisions of KRS 42.4582(2) and KRS 42.4585(3) requiring that the $19 million in coal severance tax funds dedicated to the Workers' Compensation Funding Commission ("WCFC") must be credited to that Commission's BRF before any funding from coal severance tax revenues is allocated to economic development projects.

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[1] Franklin Circuit Judge William Graham authored both the Opinion and Order in the case below and the earlier circuit court opinion which this Court substantially affirmed in Commonwealth ex rel. Armstrong v. Collins, 709 S.W.2d 437 (Ky. 1986). Ironically, the sole issue on which Judge Graham was reversed in Armstrong -- the issue whether the legislature may suspend appropriations related to private contributions -- is one of the dispositive issues in the case at hand. *See* 709 S.W.2d at 446-47. In all other respects, Armstrong affirmed Judge Graham's analysis of Sections 15 and 51 of the Constitution, the same Sections he addressed in his Opinion now on review.

(*Id.* at 6) Finally, the circuit court accurately noted that the statutes at issue expressly prohibit the legislative actions at issue herein:

> The Workers' Compensation reform legislation, of which KRS 342.122 is only a part, dedicates $19 million of coal severance tax receipts to the WCFC for payment of claims, and expressly prohibits the transfer or loaning of such funds to other areas of government. Neither Budget Bill mentions these other statutes.

(*Id.*) (citing in a footnote KRS 42.4582(2), KRS 42.4585, KRS 342.122(1)(c) and KRS 342.1227) Notwithstanding the failure to mention these various other laws, there can be little doubt that the legislature's suspension of one discrete provision of the law radically altered the entire statutory scheme for assuring the solvency of the trust fund at issue herein.

A. Sections 15 and 51 of the Constitution

The crux of this appeal -- in relation to Sections 15 and 51 of the Kentucky Constitution -- lies in determining what effect the singular and undisputed suspension of KRS 342.122 had on the whole statutory framework. The court below ruled that by suspending KRS 342.122, the legislature had "undertaken *to alter* the entire statutory framework . . . ." (Opinion and Order at 5) (emphasis added). While the verb "alter" does not appear in either Section 15 (which uses only "suspend") or in Section 51 (which applies only when a law is "revised, amended, extended or conferred"), the trial court properly employed the verb "alter" in order to denote the permanent change in the statutory framework effected by the legislative actions under review.

Can the argument be sustained that the legislature complied with Section 15 by expressly suspending KRS 342.122 and thereby impliedly suspending the entire statutory framework? Such an argument is not sustainable for several reasons. First,

there is no constitutional or statutory authority for implied suspensions. To the contrary, Section 15 requires the "exercise" of the power to suspend.[2] Second, Armstrong made clear that the legislature cannot "suspend" transfers of funds which "relate to" appropriations of private contributions. Armstrong v. Collins, 709 S.W.2d 437, 447 (Ky. 1986). Thus, Armstrong specifically declared off limits diversions from various retirement systems and the Workers' Claims Special Fund in KRS 342.122! (*Id.* fn. 11) (*See infra* at 20-25)[3] Third, no appeal was taken in Armstrong of the trial court's invalidation of certain transfers of funds "because they were not 'germane' to appropriations within the aegis of Kentucky Constitution Section 51." 709 S.W.2d at 439 and fn.7. In this case, the General Assembly attempted to "suspend" some laws (without mentioning them!) that are not germane to appropriations and hence cannot be suspended. (*See infra* at 25-28) Fourth, the parties agree that there can be no suspension if the change effected is permanent. (*See* Appellants' Brief at 18) In this case, the suspension of KRS 342.122 *permanently* shifted liability for a self-executing appropriation of $19 million from the Commonwealth to private employers. (*See infra* at 28-31) Finally, the legislature's actions have perpetrated a fraud by surreptitiously passing a tax increase on all Kentucky employers. This Court has long recognized that

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[2] "No power to suspend laws shall be exercised unless by the General Assembly or its authority."

[3] In 1987, one year after Armstrong, upon transferring the private funds held in the Special Fund to the Benefit Reserve Fund ("BRF"), the legislature made it abundantly clear that BRF funds were thenceforth to be held in trust (KRS 342.1223(2)(a) and (b)). And BRF funds could not thereafter be transferred to the Commonwealth. KRS 342.1227(2). Consistent with Armstrong's rationale, according trust status to the BRF in 1987 should make BRF monies all the more impervious to legislative transfer into the General Fund -- not unlike retirement monies declared off limits in Armstrong.

Section 51 was designed to prevent such abusive legislative practices. (*See infra* at 31-37)

If not a suspension, then, did the legislature "repeal" the entire statutory framework? Hardly. All of the statutes listed as having been "altered" by the trial court are still on the books. Indeed, the suspension of KRS 342.122 was itself limited to the two-year budget period. The suspension was temporary, not a permanent repeal. In this regard, the parties agree that repeals are not subject to Section 51's publication requirements. (*Cf.* Appellants' Brief at 25-26) Appellants quite bizarrely argue, though, that the trial court held "that Section 51's publication command applies to the 'repeal' of statutes." (Appellants' Brief at 25) No one could fairly derive that conclusion from the Opinion and Order at issue.

So, if neither a suspension nor a repeal, what was the effect on the entire statutory framework? The only possibility left is to conclude that the suspension of KRS 342.122 "amended" (or "revised") those laws not mentioned in the Budget Bills. The parties agree on the distinction between a "suspension" under Section 15 and an "amendment" under Section 51. Appellants said it thusly:

> If the change [in the law] is temporary, it is a "suspension" or a "modification." If it is permanent, it is an 'amendment," "revision," or "extension."

Appellants' Brief at 18) [4] Again, the effect of suspending the $19 million credit to the BRF was to ***permanently*** shift that liability from the Commonwealth to private employers. Private employers have coughed up an additional $19 million per year over

[4] Again, for some strange reason, Appellants wrongly characterize Appellees/Cross-Appellants' argument as maintaining that "suspension" and "amendment" "mean the same thing." (Appellants' Brief at 22) The two cannot be equated.

the last six years. And that money is long gone absent relief in this case. Clearly, the suspension of KRS 342.122 effected a permanent "amendment" of the entire workers' compensation statutory framework. And any such amendment is subject to the publication requirement of Section 51.[5]

In the end it is Appellants who effectively equate "suspension" with "amendment." The exception to Section 51's publication requirement is for "suspension." Appellants' lone hope therefore is to have the effect on several workers' compensation statutes, not even mentioned in the Budget Bills, characterized as suspensions rather than amendments. That is how the exception swallows the whole of Section 51 as described by the trial court.[6] (Opinion and Order at 6) Only if Appellants prevail in characterizing "amendments" as "suspensions" can they escape Section 51's publication requirement.

B. Section 180 of the Kentucky Constitution

By way of introduction, Appellees/Cross-Appellants' cross-appeal relates to Section 180 of the Kentucky Constitution. It provides in part:

> Every act enacted by the General Assembly . . . levying a tax, shall specify distinctly the purpose for which said tax is

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[5] Furthermore, as the offending 2003 Budget Bill is titled "an Act relating to appropriations and revenue measures . . ." the titling requirement of Section 51 is likewise violated since the 2003 Budget Bill relates to two subjects. The Bill (1) appropriates money to finance state government and (2) raises revenue by fixing the employers' special fund assessment rate at 11.5% -- a tax increase "by any other name" in the words of the trial court. (Opinion and Order at 10) The trial court further observed how Appellants had conceded that the rate increase was a "side effect of the suspension." (*Id.*) No kidding.

[6] With an "insider's knowledge" of the limits set out in Armstrong (a case emanating from his court), Judge Graham hit the nail on the head when he observed that Appellants' position in the case at hand swallows Section 51 whole. (*See* Opinion and Order at 6)

> levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose.

KRS 342.122(1)(c), of course, directs the Department of Revenue to credit annually $19 million in coal severance tax receipts to the BRF. The coal severance tax is levied and collected in order to fund the BRF (as well as to fund other "purposes").[7]

Below, the circuit court ruled that KRS 342.122(1)(c) was enacted 16 years after the enactment of KRS 143.090(4) -- the original coal severance tax statute -- and, further, that the original enactment included the license to use coal severance tax monies, in part, "to supplement the General Fund." (Opinion and Order at 3) The circuit court thus rejected Appellees/Cross-Appellants' Section 180 argument. But the court went on to set forth two ways in which the General Assembly could have properly dedicated coal severance tax monies to the BRF:

> Had the legislature chosen, KRS Chapter 143 could have been amended at that time [in 1996] to include the BRF fund as the sole purpose of the coal tax severance fund. It was not. Further, the legislature could have created a scheme whereby the coal tax severance revenue was a direct appropriation into the BRF. The legislature did not choose that path either. (*Id.*)

Respectfully disagreeing, the legislature did in fact create a scheme whereby coal severance tax receipts were made a "direct appropriation" into the BRF -- through the enactment in 1996 of KRS 342.122(1)(c). Having made such a "direct appropriation," it is patently violative of Section 180 to redirect tax monies so dedicated to another purpose.

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[7] A flow chart showing the statutorily required allocations of coal severance tax receipts is attached as **Appendix A**. The $19 million allocation to the BRF is a mandatory credit which comes "off the top." *See* KRS 42.4582(2) and KRS 42.4585. Appellants thus mistakenly state that the BRF gets funding "from the General Fund." (Appellants' Brief at 4)

II. THE WORKERS' COMPENSATION SPECIAL FUND STATUTORY FRAMEWORK

As the foregoing introduction makes clear, this appeal cannot be decided without a full appreciation for the workers' compensation Special Fund statutory framework at issue in this case, in particular the sweeping reforms of 1987 and 1996. Appellees/Cross-Appellants, like all Kentucky employers, pay a "special fund assessment" on all workers' compensation premiums. In their Brief, Appellants give short shrift to the Special Fund statutory scheme. (*See* Appellants' Brief at 2-4) The rest of the story follows.

Known as the "Subsequent Injury Fund" when it was created by the General Assembly in 1946, the Special Fund's role was narrowly defined to compensate for a pre-existing partial disability when a covered employee suffers a work related injury. Yocum v. Jackson, 554 S.W.2d 891 (Ky. App. 1977). Occupational diseases, including coal workers' pneumoconiosis, were excluded from Special Fund coverage. (1946 Ky. Acts, See c 23, § 1, effective June 20, 1946)

Handicapped veterans returning from World War II were at risk for enhanced disability from a work related injury which exacerbated the effects of a pre-existing condition. The Subsequent Injury Fund was established as a social measure to encourage employment of veterans with prior disabilities and to enhance compensation from the combined effects of a work related injury and a pre-existing condition. "The enlarged or enhanced disability caused by reason of the second injury additive is paid by the Special Fund, with the cost distributed over Kentucky industry as a whole." *Workers' Compensation in Kentucky*, 2nd Edition, Sec. 1.41 (UK Office of Continuing Legal Education, 1996).

Liabilities of the Special Fund escalated in spurts over five decades, triggered by legislative changes that incrementally apportioned to the Special Fund a higher percentage of total workers' compensation awards. The State operated the system on a pay-as-you-go basis, collecting just enough money annually to pay injured workers a year at a time. This resulted in an unfunded liability, first calculated to be $1.7 billion in 1987. The history of the Special Fund unfolds in several stages.

Coverage was expanded in 1960 to include "a dormant non-disabling disease condition which was aroused or brought into disabling reality by reason of a subsequent compensable injury by accident or an occupational disease." (1960 Ky. Acts, c. 147, Sec. 9) Its name was changed to "Special Fund" in 1964. (1964 Ky. Acts, c. 192, Sec. 11) This Court construed the role of the Special Fund narrowly in those years, holding, for example, that the Special Fund was not liable for the rigors of aging. Young v. City Bus Co., 450 S.W.2d 510, 515 (Ky. 1969).

Sweeping changes by the 1972 General Assembly expanded Special Fund coverage to a stream of benefits which led to a flood of unfunded liabilities exceeding $2.5 billion in 1996. First, for all black lung claims filed after January 1, 1973, Special Fund liability was fixed at 75% against the Fund and 25% against the employer. Maggard v. International Harvestor Co., 508 S.W.2d 777 (Ky. 1974); 1972 Ky. Acts, c. 78. Second, a subtle amendment to KRS 342.120 declared that the Special Fund is liable for "a dormant, non-disabling disease ***or*** condition." (Previously, just "disease condition.") (1972 Ky. Acts c. 78, Sec. 17) That subtle change broadened the liabilities from pre-existing ***diseases*** to both pre-existing diseases and ***pre-existing conditions***. The latter was eventually extended to arthritis, heart attacks, neuroses and cumulative

trauma. *Workers' Compensation in Kentucky*, 2nd Edition, Sec. 4.3-4.6 (UK Office of Continuing Legal Education, 1996).

Duration of black lung benefits was extended from 425 weeks to the lifetime of the claimant by the 1976 General Assembly. (1976 Ky. Acts, c. 160, Sec. 9) Benefits for total disability awards, including black lung, were raised from 66-2/3% of the average weekly wage to 100% of the average weekly wage by the 1980 General Assembly. (1980 Ky. Acts., c. 104, Sec. 15) By 1987, following the 1976 and 1980 enactments, black lung benefit awards, produced a huge unfunded liability.

The Kentucky Reinsurance Association ("KRA") was the first agency created by the General Assembly to manage the Special Fund's liabilities. The KRA was established in 1982 as a statutory corporate entity to provide a means for assuming the liabilities of the Special Fund. (1982 Ky. Acts, c 278, §§ 16, 17 and 19) Soon after the KRA was created, the General Assembly unsuccessfully attempted to confiscate a major portion of its assets in the 1984 biennial budget. Specifically, Special Fund collections of $3,980,000, nearly 30% of KRA funds, were transferred to the General Fund in the 1984-86 budget. That transfer, of course, was an eerie harbinger of the $19 million transfer at issue in this case. The General Assembly's attempt to redirect KRA funds into the General Fund was the subject of this Court's opinion in Thompson v. Kentucky Reinsurance Association, 710 S.W.2d 854 (Ky. 1986). In Thompson, this Court invalidated the transfer, ruling that the assets of KRA are "private funds . . . and are to be used for one purpose -- one purpose only -- *viz.*, to pay for the liabilities of the Special Fund." (*Id.* at 858)

By 1987, the KRA's management of the Special Fund had utterly failed. As this Court recounted in a 1994 decision, by 1987 there was "rising concern that the cost of

workman's compensation and the increasing liability of the Special Fund would deter industrial development and encourage existing industries to depart the state." Kentucky Harlan Coal Co. v. Holmes, 872 S.W.2d 446, 449 (Ky. 1994).[8]

A. The 1987 Reforms

In response, in the first extraordinary session of the 1987 General Assembly, the General Assembly took significant action. First, the General Assembly created Appellee Kentucky Workers' Compensation Funding Commission ("KWCFC") as a new agency to replace the KRA, which was abolished. (1987 Ky. Acts, ex s, c 1 § 63). Second, the legislature transferred Special Fund assets to the newly-created Benefit Reserve Fund ("BRF"), describing the Constitutional implications of such a transfer as follows:

> As the Constitution of the Commonwealth of Kentucky requires that funds collected for a specific purpose by a public entity be expended only for such public purpose, the General Assembly does hereby transfer, sixty (60) days following passage of this Act and approval by the Governor, the liabilities and all funds, records, and property in the possession of the Kentucky Reinsurance Association to the Kentucky Workers' Compensation Funding Commission.

(*Id.* § 74).

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[8] In Kentucky Harlan Coal, this Court related the following background:

> Approximately 78% of the Special Fund's liability in the five years preceding July 1987, was attributable to the coal industry. More than 95% of the Special Fund's liability for occupational disease is attributable to coal workers' pneumoconiosis (black lung). Approximately 30% of the Special Fund's liability for traumatic injury is attributable to the coal industry. Finally, the failure to prefund and invest the sums necessary to meet Special Fund liabilities had produced an unpredictability and undue burden on all employers, as it was their annual assessments that were used to meet the Special Fund's liabilities.

872 S.W.2d at 449.

Finally, in a move that has major implications for the case at hand, the General Assembly in 1987 added several layers of protection to BRF funds that go well beyond even this Court's holding in Thompson that Special Fund assets are "private funds" that can only be used to pay for the liabilities of the Special Fund. ***The General Assembly conferred trust status on BRF funds***. Specifically, it made clear that the KWCFC holds BRF funds as a "fiduciary . . . in exercising its powers over the funds . . . ." KRS 342.1223(2)(b). The General Assembly also directed that the KWCFC shall "hold, administer, invest, and reinvest the [BRF] funds . . . separate and apart from all 'state funds' or 'public funds,' as defined in KRS Chapter 446." KRS 342.1223(2)(a). Next, the General Assembly made clear that BRF funds shall not:

> (1) Be loaned to the Commonwealth or any instrumentality or agency thereof;
>
> (2) Be subject to transfer to the Commonwealth or any agency or instrumentality thereof, except for purposes specifically authorized by this Chapter; [or]
>
> (3) Be expended for any other purpose than one authorized by this Chapter.

KRS 342.1227. Finally, KRS 342.1229 makes clear that BRF trust funds shall be used exclusively for paying current liabilities of the Special Fund and administering all elements of the state's workers' compensation program, with any excess deposited in the BRF and invested in compliance with the investment policies of the KWCFC. All of these trust protections survive to the present day.

As noted, unfunded liability of the Special Fund was $1.7 billion when BRF was established in 1987, according to an actuarial analysis.[9] (1987 Ky. Acts, ex s, c 1 § 75).

[9] No reserves were available to pay awards before 1987. The system operated on a pay-as-you-go basis, with little if any cash carry-over from quarter to quarter.

New Special Fund claims determined in 1987 were growing in excess of $200 million per year. Kentucky Harlan Coal, *supra,* 872 S.W. 2d at 449. Yet, total collections for the Special Fund in fiscal year 1986-87 were only $86,334,107. Going forward, the KWCFC met its responsibilities to establish annual assessment rates, pay old and new Special Fund claims, and pay all costs of administering workers' compensation in Kentucky, accumulating a BRF balance of $373,377,214 at fiscal year ended June 30, 1996. (*See* the Cash Flow Summary of BRF, beginning balance FY 1997, Supplemental Record, p. 46, a copy of which is attached hereto as **Appendix B**.) New Special Fund claims, however, continued to grow at a faster rate than the BRF balance. Thus, the undiscounted liabilities of KWCFC as of June 30, 1996 were actuarially rated at a staggering $2.6 billion. By 1996 high costs and Special Fund deficits were boiling over, again requiring drastic measures by the General Assembly .

B. The 1996 Reforms

Those drastic changes in workers' compensation funding were made during the 1996 first extraordinary session of the Kentucky General Assembly. First, liability for all new injuries and occupational diseases was shifted from the Special Fund to Kentucky employers. KRS 342.120(2). The new law called for Special Fund assessments on employers at the rate of 9%. (*See* KRS 342.122(1)(a))[10] Second, Special Fund assessments on coal operators for black lung liabilities were eliminated and replaced by the annual transfer of $19 million in coal severance tax revenues to the BRF. (KRS 342.122 as amended by 1996 Ky. Acts, ex s l, c l, Sec. 4.) Third, coal severance tax

[10] The assessment rate is established each year, based on investment experience and investment policy, by the KWCFC. KRS 342.122(1)(b). The rate is assessed such that, when added to the coal severance tax transfer, it produces "enough revenue to amortize ***on a level basis*** the unfunded liability of the Special Fund." (*Id.*) (emphasis added)

transfers to BRF were directed to be made by the Department of Revenue as the first priority, before other statutory or general fund transfers. (*Id.* Sec.76-77, codified at KRS 42.4582 and 42.4585) Finally, the legislation directed the governor to include the $19 million transfer to BRF in his executive budget recommendation submitted to each biennial budget session of the General Assembly. (*Id.* Sec. 45, codified at KRS 48.112) It is these provisions which comprise the "statutory framework" that Judge Graham concluded in the case at hand were amended improperly by the Governor and General Assembly.

III. THE UNCONSTITUTIONAL ACTIONS OF THE GOVERNOR AND GENERAL ASSEMBLY.

KRS 48.112(1) and (2) require the Governor of Kentucky to include within his budget recommendation $19 million for each year of the biennium as an appropriation to the Benefit Reserve Fund. These are the monies which are levied under KRS 143.020, the coal severance tax statute. Governor Paul Patton followed these directives in 1998 and 2000 when he recommended the $19 million annual credits to the BRF in his budget recommendations for the 1998-2000 and the 2000-2002 biennial budgets. In turn, the General Assembly accepted the Governor's recommendations, providing for the $19 million credits in the Budget Bills for those two-year budget cycles.

As mandated, quarterly payments in the amount of $4,750,000 each in coal severance revenues were credited to the BRF through the first quarter of the state's fiscal year beginning July 1, 2001. However, on September 7, 2001, Governor Patton signed a General Fund Budget Reduction Order (02-01), countermanding the self-executing credit required by KRS 342.122(1)(c). That order conformed with Part VI of the biennial budget of 2000-02, which called for ratable reductions in government

spending. However, the coal severance tax credits to the BRF were not ratably reduced -- they were completely canceled. The Governor's order included the following:

Authorized Purpose	**Budget Appropriation**	**Revised Appropriation**	**Difference**
BRF	$19,000,00	$4,750,000	$14,250,000
Local Government Economic Assistance Fund (LGEAF)	$28,996,400	$28,996,400	$ 0
Local Government Economic Development Fund (LGEDF)	$36,708,600	$36,708,600	$ 0

Thus, Governor Patton's budget reduction order eliminated the the mandatory credits after the first quarterly credit of $4,750,000 was made for the first quarter of the 2001-02 fiscal year. The remaining three quarterly credits for fiscal year 2001-02 (totaling $14,250,000) were stricken entirely from the budget under the Governor's plan. It is beyond cavil that the Governor was without any statutory or constitutional authority to suspend the self-executing appropriation of coal severance tax monies to the BRF.

Next, during the regular session of the General Assembly in 2002, Governor Patton failed to make the required budget recommendation for the $19 million credits in the 2002-2004 biennial budget. The Governor's failure to do so directly contravened KRS 48.112. In turn, the General Assembly made history by failing to enact a biennial budget during the 2002 regular session. Instead, the Governor's budget recommendation made during the 2002 General Assembly was treated as the *de facto* budget for fiscal year 2002-2003. The Governor made his budget request an "emergency spending plan" that made no provision for the required $19 million that was

required to be credited under KRS 342.122(1)(c) to the BRF.[11] Again, there is absolutely no statutory or constitutional authority for these unprecedented actions by the Governor.

Finally, during the 2003 regular session of the General Assembly, the General Assembly enacted a 2002-2004 biennial budget. That budget canceled the appropriation of $19 million annually to the BRF "notwithstanding KRS 342.122(1)(c)," and it fixed the employer assessment rate at 11.5% for the biennium "notwithstanding KRS 342.122(1)(b)." (2003 Ky. Acts, c 156, p. 337) Effectively, the General Assembly ratified, by unconstitutional means, the Governor's emergency spending plan, which was void *ab initio*.

This case also involves three other improper transfers of BRF trust funds to the General Fund in both the 2000-2002 biennial budget and the 2002-2004 biennial budget. BRF trust funds improperly transferred are as follows:

(1) $1,648,500 to finance a portion of the Mines and Minerals budget in the 2000-02 biennial budget. (2000 Ky. Acts, c. 549, p. 1757)

(2) $1.7 million to finance a portion of the Mines and Minerals budget in the 2002-04 biennial budget. (2003 Ky. Acts, c. 156, p. 337)

(3) $5 million transferred to the General Fund in the 2002-04 biennial budget. (2003 Ky. Acts, c. 156, p. 394)

Like the $19 million in General Fund transfers, these also were transfers of funds out of a dedicated and restricted trust containing private funds.

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[11] Of course, pursuant to Section 230 of the Kentucky Constitution, in the absence of the General Assembly enacting a budget, there is no authority for the Governor to take money from the state treasury except for necessary government expenditures and for self-executing statutes such as KRS 342.122(1)(c).

IV. THE ALLOCATION OF COAL SEVERANCE TAX REVENUES.

How coal severance tax revenues are allocated bears directly on the cross-appeal in this case, implicating Section 180 of the Constitution. A severance tax on mined coal was imposed for the first time by the 1972 General Assembly. The tax was levied at 4% of the gross value of all coal severed, except that the minimum tax was applied at $0.30 per ton. The Department of Revenue, which administers the tax, was directed to credit all coal severance tax to the General Fund. (1972 Ky. Acts, c. 62, Part II, Sec. 9)

Throughout the history of the tax, the General Assembly has more than once committed substantial amounts of the money collected to benefit the coal-mining regions of the State. A development fund for coal-producing counties was first established in 1974. (1974 Ky. Acts, c. 262, Sec. 2) Maintenance of roads and bridges is one of the major purposes for which a part of the severance tax was allocated to the counties. Clay Co. v. Leslie Co., 531 S.W. 2d 524 (Ky. 1975).

This program was replaced and expanded by the 1980 General Assembly, which established the Local Government Economic Assistance Fund. This Fund created coal severance tax grants to maintain the coal haul road system. It also established other grants to local governments to improve the environment for new industry and to improve the quality of life for the residents. (1980 Ky. Acts, c. 394, pp. 1238-1242, codified as KRS 42.450 and 42.455) Further modification of the program occurred in 1992, when the General Assembly reestablished the Local Government Economic Assistance Fund in KRS 42.4585 and established the Local Government Economic Development Fund in KRS 42.4582. (1992 Ky. Acts, c. 107, Sec. 5)

Finally, as a part of the 1996 Workers' Compensation Reform, the General Assembly initiated the annual transfer of $19 million in coal severance tax revenues,

collected pursuant to KRS 143.020, to be paid directly to the BRF before any of the purposes named in the specifying provisions of KRS 143.090. (1996 Ky. Acts, exs. 1, c. 1, Sec. 4) Thus the 1996 Act specified that the Economic Assistance and Economic Development transfers "shall be made only after the quarterly installment of the annual $19 million allocation of coal severance tax revenues has been credited to the Benefit Reserve Fund within the Kentucky Workers' Compensation Funding Commission as required by KRS 342.122." (*Id.*, Secs. 76 and 77) Other amendments to the coal severance tax act include Resource Recovery Road Bond payments (1996 Ky. Acts, c. 84, p. 166), Energy Research Project payments (1980 Ky. Acts, c. 298, p. 1020), osteopathic scholarships (1998 Acts, c. 256, p. 824), and pharmacy scholarships (2006 Ky. Acts, c. 252, Part XXIV).

ARGUMENT

I. GOVERNOR PATTON HAD NO AUTHORITY TO TERMINATE THE AUTOMATIC CREDITING OF COAL SEVERANCE TAX REVENUES TO THE BRF, AND THE GENERAL ASSEMBLY HAD NO AUTHORITY TO RATIFY THE GOVERNOR'S ACTIONS.

In Fletcher v. Commonwealth, 163 S.W.3d 852 (Ky. 2005), this Court made clear that "[t]here are statutes that mandate appropriations even in the absence of a budget bill." (*Id.* at 865) Those statutes are referred to as "self-executing appropriations." (*Id.* at 866) The Fletcher opinion cited several statutes in this category, including KRS 44.100 (Board of Claims awards); KRS 45A.275 (court judgments against the Commonwealth up to $500,000 on a contract claim); and KRS 61.565(1) (retirement system contributions). (*Id.* at 865) The Court continued:

> There are others -- but they are substantially less than legion. In those instances, the General Assembly has already made the necessary appropriations.

(*Id.*) Most certainly, KRS 342.122(1)(c) is one of those "less than legion" statutes in which the General Assembly "has already made the necessary appropriations," specifically by requiring the "off the top" crediting of $19 million annually from coal severance tax revenues to the BRF trust.

In the case at bar, Governor Patton in the Fall of 2001 issued a budget reduction plan that ignored the self-executing appropriation contained in 342.122(1)(c). Subsequently, when Governor Patton presented his budget request to the 2002 General Assembly, he violated KRS 48.112 by failing to make the required budget recommendation for the $19 million credit to the BRF. Subsequently, the Governor converted his budget recommendation into an emergency spending plan, failing again to make provision for the required $19 million credit to the BRF.

The circuit court below devoted little attention to Governor Patton's actions, stating that the issues relating to gubernatorial powers were addressed and resolved in the Fletcher case. (Opinion and Order at 2) Fletcher, of course, holds that the Governor has no "emergency" power to suspend statutes, as Section 15 of the Kentucky Constitution makes clear that the power to suspend resides solely with the General Assembly. With particular relevance to the case at bar, the Fletcher opinion also ruled that "the suspension of any statutes by the Governor's public service continuation plan was unconstitutional and invalid *ab initio*." 163 S.W.3d at 872.[12] ***Thus, Governor Patton's actions in this case are void ab initio.***

[12] Appellees/Cross-Appellants' Complaint in this case, filed before Governor Patton left office, sought injunctive relief "directing that the special fund assessments and coal severance tax revenues taken under the Governor's budget reduction plan or Budget Bill enacted by the General Assembly, be restored to KWCFC." R., p. 31. The relief sought is identical to the ruling against Governor Fletcher in the Fletcher decision. 163 S.W.3d at 871-72; R., p. 32.

Appellants weakly contend that Governor Patton suspended the automatic credits to the BRF in FY 2001-2002 and 2002-2003 because "the Governor must implement budget reductions to balance the budget. KRS 48.130(5)." (Appellants' Brief at 5) However, any deviation from statutory authority or any expanded emergency power does not accrue to a Governor when a "severe budget shortfall" occurs. The "non-delegation doctrine" restricts delegation of spending authority to the executive department, even in emergencies, except by specific authority of the General Assembly. *See* Board of Trustees v. Attorney General, 132 S.W.3d 770, 781-85 (Ky. 2003).[13] When the General Assembly has placed a function, power or duty in one place, there is no authority for the Governor to move it elsewhere. Brown v. Barkley, 628 S.W.2d 616, 623 (Ky. 1982). In short, discretion was simply not granted to Governor Patton to decide whether or not to credit the BRF trust with coal severance tax revenues. Established jurisprudence applies the non-delegation doctrine to protect against unnecessary and uncontrolled discretionary power. Miller v. Covington Development Authority, 539 S.W.2d 1, 5 (Ky. 1976).

In the wake of the Fletcher decision, the threshold question presented in this case is whether an unconstitutional suspension of statues by the Governor -- an action that is

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[13] The Fletcher opinion stated as follows:

> In fact, KRS 48.150 anticipates that the budget will appropriate funds to each department of government to meet unexpected contingencies or emergencies. However, in the absence of a proper delegation of authority by one department to another, or a specific acceptation articulated by the Constitution, itself, Section 28 has erected a "high wall," which precludes the exercise by one department of a power vested solely in either of the others.

163 S.W.3d at 863. (citation omitted)

void *ab initio* -- can be ratified by the General Assembly. Appellants freely concede that "[w]hen the General Assembly eventually passed the 2002-2004 biennium budget bill in 2003, it ratified and codified the Governor's plan." (Appellants' Brief at 5-6) Nowhere, however, do Appellants even attempt to explain how the legislature may ratify and codify gubernatorial actions that are void *ab initio*. There is no case to be made. The separation of powers doctrine would be rendered meaningless if the General Assembly could *ex post facto* sanction unconstitutional acts by the Governor. If the legislature could ratify Governor Patton's unconstitutional acts, this Court's decision in Fletcher v. Commonwealth is a nullity.

II. MONIES IN THE BRF ARE HELD IN TRUST SEPARATE AND APART FROM "PUBLIC FUNDS" AND THUS MAY NOT BE TRANSFERRED TO THE GENERAL FUND BASED ON THE CLEAR HOLDING IN *ARMSTRONG*.

Appellants claim that the transfers in question out of the BRF can be justified as temporary suspensions of the statutes at issue. Yet they also acknowledge that the BRF trust at issue consists primarily of private funds. Appellants' argument therefore runs directly counter to the following admonition in Armstrong v. Collins:

> However, the transfers of funds ***which relate to appropriations of private contributions*** cannot be termed suspensions or modifications of the operation of the statutes.

709 S.W.2d at 446. (emphasis added) The opinion made clear that such transfers are unconstitutional:

> Because the General Assembly has no authority to transfer private funds to the general fund, the transfer of money from agencies in which public funds and private employee contributions are commingled, and cannot be differentiated, is unconstitutional.

709 S.W.2d at 446. The Court specifically enumerated that retirement monies and monies held in the Workers' Claims Special Fund as being off limits to transfer:

> The employee contributions and the insurance company assessments constitute private, mandatory donations. To the extent that private funds were transferred, we reverse.

Id. at 447.

Coal severance tax transfers, employer assessments and investment income together constitute the BRF Trust after the 1996 reforms. KRS 342.122. Appellants flat out admit that "[s]ince 1998, BRF has been a 'commingled' fund . . . . " (Appellants' Brief at 36) Appellants' principal line of attack, however, is to argue that, while BRF trust funds are commingled, they can be "differentiated" between private and public funds. Appellants' theory is that the General Assembly only transferred "public funds" from the BRF, a move they claim is expressly sanctioned by Armstrong.[14] Appellants' "proof" on this point is in the form of two affidavits from a budget office staffer:

> And, the unrebutted evidence in the form of Mary Lassiter's affidavits [attached to Appellants' Brief as Appendices 2 and 4] confirms that the "public" funds in the BRF can be differentiated from the "private" funds therein, and that ample "public" funds were available to cover this transfer.

(Appellants' Brief at 36) This argument (and the purported "proof" supporting it) is completely off base for several reasons.

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[14] Appellants' references to the purported transfer of "public funds" sound like a broken record. For example, Appellants state that "there were plenty of public funds in the BRF to cover the 2003 transfers out of it." (Appellants' Brief at 7) They state further that "to the extent that a special fund commingles public and private monies, and the funds can be differentiated, the public funds can be transferred to the General Fund." (*Id.* at 18) And Appellants argue that "the General Assembly made clear that it was following Armstrong and only reclaiming "public" funds in the BRF . . . ." (*Id.* at 36).

First, KRS Chapter 342 unmistakably articulates that ***there are no public funds in the BRF***:

> [The KWCFC shall] [h]old, administer, invest, and reinvest the funds collected pursuant to KRS 342.122 and its other funds [together comprising the BRF] separate and apart from all "state funds" or "public funds," as defined in KRS Chapter 446.

KRS 342.1223(2)(a).[15] Further, all BRF funds are held by the KWCFC as a fiduciary. KRS 342.1223(2)(b). Thus, while the source of the $19 million credits to the BRF is public funds, once those coal severance tax revenues are credited they become a commingled part of the BRF Trust and, by statute, can no longer be differentiated as either public or private funds.

Second, it is worth emphasizing that Armstrong itself expressly declared that monies held by the various retirement systems fall within the category of commingled funds that cannot be differentiated. 709 S.W.2d at 446-47. Immediately after stating that it is unconstitutional to transfer money from agencies in which public funds and private employee contributions are commingled, and cannot be differentiated, the Armstrong Court stated as follows:

> Diversion from the Kentucky Employees' Retirement System, County Employees' Retirement System, State Police Retirement System, and Teachers' Retirement System fall within this category . . . .

Id. ***Each and every one of those retirement systems holds monies that come from both public and private sources***. Once a retirement system accepts

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[15] KRS 446.010(32) defines "state funds" or "public funds" as "sums actually received in cash or negotiable instruments from all sources *unless otherwise described* . . . ." (emphasis added) KRS 342.1223(2)(a) expressly "otherwise describes" BRF funds as funds held separate and apart from public funds.

monies from public or private sources, Armstrong teaches that those sources can no longer be differentiated. Would Appellants seriously contend that, after Armstrong, the legislature has the power to divert retirement monies to the General Fund so long as a budget office staffer can provide an accounting of past employer contributions to those systems?

The third problem with Appellants' analysis is that there is no mechanism to track BRF trust funds by source. *See* KRS 342.1229. By way of example, appropriations to the BRF Trust authorized for expenditure by KWCFC in the 2000-02 biennial budget were stated as follows:

	2000-01	**2001-02**
General Fund	$ 19,000,000	$ 19,000,000
Restricted Funds	135,957,600	136,075,500
Total	154,957,600	155,075,500

(2000 Ky. Acts, c 549, p. 1757) Notably, the appropriation itemized $19 million each year from the General Fund.[16] Plainly, the $19 million budget item was authorized for current annual expenditures to pay Special Fund claims and administer workers' compensation programs pursuant to KRS 342.1229. ***No directive in the budget detailed whether the $19 million allotments would be spent currently for authorized programs during the biennium, or would be invested to pay future liabilities, or apportioned between current and future needs, or in any other way differentiated from employer assessments and investment income.*** In short, year-end balances simply cannot be segregated into categories called

[16] Although the budget does not identify the source of the General Fund transfers, surely the General Assembly intended to comply with the directive in KRS 342.122 (1)(c) that the Kentucky Department of Revenue "shall credit $19 million in coal severance tax revenues" levied under KRS 143.020 to the BRF.

"public money" and "private premium assessments" as Appellants suggest. (Appellants' Brief at 6)

Fourth, BRF balances do not "lapse" and cannot be "reclaimed" by whim of the chief executive or the legislature. Appellants contend the $19 million annual appropriations can be "reclaimed" from BRF by adding up all severance tax revenues received from FY 1997 to FY 2003 and apportioning BRF expenditures among funding sources (severance taxes, employer assessments and income). (Supplemental Record, p. 12) However, reclaiming the prior coal severance tax credits to the BRF in a biennial budget contradicts KRS 342.1227, prohibiting BRF funds from being transferred to the Commonwealth, and contradicts KRS 342.1223 (2)(a), declaring that all BRF funds are to be held separate and apart from "state funds" or "public funds." Reclaiming the prior credits smacks of "a sharp trick by professing to appropriate and ostensibly appropriating to its use an amount conceived to be necessary for its purposes, when in fact such was not its purpose." Greene v. Kentucky Illiteracy Commission, 214 S.W. 436, 438 (Ky. 1919).

Finally, the opinions of Deputy Budget Director, Mary E. Lassiter, contained in the two affidavits attached to Appellants' Brief as Appendices 2 and 4, are entitled to absolutely no weight and certainly do not amount to "proof" that BRF funds can be differentiated. Thus, while Ms. Lassiter may opine in a sworn statement that "public funds are monies originating in the General Fund, and are primarily raised through taxation," the legal definition of "public funds" relevant to this case is found in KRS 342.1223(2)(a) and KRS Chapter 446. As this Court has recently made clear, legal conclusions contained in affidavits will not fly:

> Statements that amount to legal conclusions are not properly included in an affidavit and, in any event are not substantial evidence.

General Electric Co. v. Cain, 236 S.W.3d 579, 585 (Ky. 2007). Appellants' entire case for "proving" how BRF funds can be differentiated rests on the following statement by Ms. Lassiter:

> The funds in the BRF originating in the General Fund can be differentiated from the allegedly private revenues deposited in the BRF pursuant to KRS 342.122(1)(b).

(Lassiter Affidavit ¶ 12, Appellants' Brief Appendix 2) That statement, however, is nothing more than a legal conclusion that is contrary to very definite statutory pronouncements and, in any event, is not substantial evidence. Appellants' "proof" on differentiation is mere window dressing.

In conclusion, just like the retirement funds addressed head-on in Armstrong, the BRF trust funds are commingled funds that cannot be differentiated.[17] Accordingly, this Court's decision in Armstrong prohibits the General Assembly from transferring BRF Trust funds into the General Fund.

III. TERMINATING COAL SEVERANCE TAX CREDITS TO THE BRF HAD THE EFFECT OF PERMANENTLY AMENDING LAWS NOT GERMANE TO THE SUBJECT OF APPROPRIATIONS, IN VIOLATION OF SECTIONS 15 and 51 OF THE KENTUCKY CONSTITUTION.

A budget bill may not repeal, amend, modify or suspend provisions not germane to the subject of appropriations. *See* Armstrong, 709 S.W.2d at 446-47. The Armstrong

[17] Appellants repeatedly state that the transfers of BRF Trust funds are "identical in purpose and nature" to the suspensions of state employee salary statutes in Armstrong. (Appellants' Brief at 24 and 35) Statutes setting salaries hardly relate to trust funds that are held separate and apart from public funds. It is a real stretch to argue that the transfers at issue in this case are anything like the suspensions sanctioned by Armstrong -- they are much more akin to the suspensions invalidated by Armstrong.

opinion stated as follows:

> We repeat ourselves when we say that the General Assembly has, constitutionally speaking, the power in a budget bill to *repeal or amend* the manner in which public funds are used. Ky. Const. Sec. 51, the "title" Section, has not been violated by the matters clearly relating to appropriations. What we decide is simply that the transfers of funds which are merely temporary, determinable suspensions of the operations of the statutes ***relating to appropriations of public funds*** are within the legislative authority as set out in SB 294 and Ky. Const. Sec. 51, the amendment Section.

(*Id.* at 446) (emphasis added)[18] Armstrong, of course, dealt in part with budget provisions directing the Transportation Cabinet to use road fund resources to meet lease rental payments to the Kentucky Turnpike Authority. (*Id.* at 447) The budget bill further provided that in the event such resources were insufficient to meet payments, the shortage was to be met by transferring coal severance tax receipts to "cover the obligation." (*Id.*) The Armstrong opinion upheld these transfers, but the key distinction with this case is that both provisions in Armstrong were germane to appropriations -- they essentially entailed the transfer of monies from one public fund to another public fund.

More recently, this Court employed Section 51 to strike down a provision in a biennial budget bill providing that sovereign immunity would be waived to the extent a governmental agency purchased motor vehicle liability insurance. Grayson County

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[18] Stated a bit differently, the power to suspend laws in the budget bill is confined to suspending laws that have "financial implication":

> Provisions in the budget document which effectively suspend and modify existing statutes ***which carry financial implication*** certainly are consistent with those duties and responsibilities [to balance the budget].

Armstrong, *supra*, 709 S.W.2d at 443. (Emphasis added.)

Board of Education v. Casey, 157 S.W.3d 201 (Ky. 2005). The relevant budget bill contained the following provision:

> Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, to the extent that any governmental agency purchases *motor vehicle liability insurance,* sovereign immunity shall be waived to the extent of the insurance coverage.

(Id. at 207-08) In striking down that provision, the Casey opinion had this to say about germaneness:

> [In Armstrong], we held that the General Assembly could in its biennial budget bill suspend or modify existing statutes if the suspensions or modifications were germane to the broad subject of appropriations . . . .

(*Id.* at 208-09) The Court in Casey specifically found that the relevant provision of the 1998 budget bill was not germane in any way to "appropriations providing financing for the operations, maintenance, support and functioning" of any governmental agency. (*Id.* at 209) In particular, the budget bill "did not authorize the purchase of automobile liability insurance and did not require the Commonwealth to pay any judgment, much less appropriate any state funds for either purpose." (*Id.*) The waiver of sovereign immunity in Casey, therefore, was not germane to the subject of the biennial budget bill and was not stated in its title.

In the case at bar, canceling the $19 million annual credits to the BRF Trust accomplishes much more than a temporary suspension "notwithstanding KRS 342.122(1)(c)." Each annual denial of funding: 1) increases the liability of Kentucky employers to pay the Special Fund debt, 2) amends KRS 342.122(1)(b) setting the Special Fund assessment rate, 3) overrides the legislative finding of KRS 342.1241 that black lung costs "have placed a substantial financial burden on all employers of the

Commonwealth" through the Special Fund assessments previously imposed on all employers, and 4) redirects the allocations of coal severance tax revenues under KRS 42.4582 and KRS 42.4585 (which require that the credits to the BRF are made "off the top"). ***None of these workers' compensation laws are germane to the subject of the 2002-2004 Budget Bill*** nor are they stated in its title, which reads as follows:

> An ACT relating to appropriations and revenue measures providing financing for the operations, maintenance, support and functioning of the government of the Commonwealth of Kentucky and its various officers, cabinets, departments, boards, commissions, institutions, subdivisions, agencies, and other state-supported activities.

(HB 269, 2003 Regular Session)[19] Accordingly, under Armstrong and Casey the General Assembly's actions in this case violate Sections 15 and 51.

IV. THE GENERAL ASSEMBLY VIOLATED SECTION 51 OF THE KENTUCKY CONSTITUTION WHEN IT FAILED TO PUBLISH PERMANENT AMENDMENTS TO THE WORKERS' COMPENSATION SPECIAL FUND STATUTORY FRAMEWORK.

The inescapable effect of the legislature's action in suspending the $19 million transfers was to permanently shift liability for injured workers' claims from the Commonwealth to all private employers. Specifically, eliminating the $19 million transfers permanently and demonstrably amends the formula for setting Special Fund assessment rates. The KWCFC is obligated to fix an annual assessment rate which "shall produce enough revenue to amortize on a level basis the unfunded liability of the Special Fund" ending December 31, 2018. KRS 342.122(1)(b). Thus, the statutory assessment and the level amortization obligations continue until December 31, 2018.

[19] HB 269 marked the first time in modern history -- perhaps ever -- that the legislature combined appropriations and revenue measures in the same bill.

Notwithstanding the legislature's "suspensions" in this case, KRS 342.122(1)(b) still directs that employers be assessed in an amount that, "when added to the coal severance tax appropriated," shall produce enough revenue to "amortize on a level basis the unfunded liability" ending December 31, 2018. Diverting the $19 million annual credits to the BRF changes the entire assessment formula because, when no severance tax is appropriated, employer assessments must be increased to amortize on a level basis the unfunded liability ending December 31, 2018.

Again, the Thompson opinion is instructive. In striking down the diversion of KRA funds, the Thompson opinion states as follows:

> It goes without saying that KRA will thus come up short in its financial obligation to the Special Fund by at least this amount and will, *ergo*, charge that additional sum to its subscribers to meet its obligations. This is clearly an improper use of private funds.

Thompson, *supra*, 710 S.W.2d at 857. Likewise, thanks to the diversion of funds KWCFC came up $19 million short and, *ergo*, charged that additional amount to all Kentucky employers. Fundamentally changing the assessment formula is not a statutory "suspension" nor is it "temporary." In fact, eliminating $19 million annually from the BRF Trust beginning January 1, 2002 and ending December 31, 2018, transfers an obligation to Kentucky employers totaling $323 million. That is a permanent change that will not be undone absent relief in this case.

Not only did the legislature permanently alter the employer assessment formula, it is also apparent that the legislature permanently altered the public policy underlying the workers' compensation Special Fund in this state. Annual credits of $19 million to the BRF Trust are designated "statutorily dedicated receipts." KRS 42.409(12)(a). Statutorily dedicated receipts are not "available revenues" for other purposes. KRS

42.409(5). These provisions, combined with KRS 42.4582 and 42.4585 (requiring credits to the BRF from "off the top" of receipts) and with the mission of the KWCFC to manage the BRF Trust and expend all resources only for defined workers' compensation programs, establish a public policy commitment of revenues for a distinct purpose. That public policy was delineated in detail by the General Assembly during the 1996 Special Session. Specifically, the General Assembly assumed liabilities previously paid by the Commonwealth's coal operators and dedicated $19 million annually as tax revenues not available for other purposes. The actions by the General Assembly under review in this case permanently turn this public policy on its ear.[20]

Appellants argue that the General Assembly's disregard for workers' compensation reform is "acceptable" because "[t]o the extent these sections are affected, it is by implication." (Appellants' Brief at 31). Appellants support this flawed argument by misrepresenting the holding in Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Paducah v. City of Paducah, 333 S.W.2d 515 (Ky. 1960). (*Id.*) Appellants conveniently omit the sentence prior to the one they cite. The relevant paragraph needs to be read in its entirety:

> As concerns the contention that the Act amends existing statutes without setting them forth at length, the simple answer is that the Act does not purport to amend any existing statute, but merely states that it is intended to supersede certain existing statutes to the extent that they apply to second-class cities. Section 51 of the Constitution does not require that statutes which are amended or repealed merely by implication, or by the superseding effect

[20] Future General Assemblies, of course, will have full constitutional authority to amend or alter the manner of providing for the liabilities undertaken in 1996. Arguably, the General Assembly could revert to the assessments on coal operators that existed prior to the 1996 legislation. To date, however, the public policy enunciated in 1996 remains fully in place.

> of the later enactment, be republished and set forth at length. *Id.* at 521. (citations omitted).

Taken in its entirety, the Paducah opinion is clear that Section 51 is inapplicable *only* when a statute is amended or repealed by implication in the situation in which a subsequent statute says something inconsistent with a prior statute. Under those circumstances, the contradictory language is resolved by honoring the language of the more recent law. But such is not the case here. Here, we do not have separate statutes addressing similar subject matter with contradictory language. Here, we have Budget Bills that, with two words, amend an entire statutory framework. The Paducah case is inapposite, and there is no authority for an implied amendment as Appellants posit.

V. THE GENERAL ASSEMBLY PERPETRATED A FRAUD BY SURREPTITIOUSLY PASSING A TAX INCREASE ON KENTUCKY EMPLOYERS, IN VIOLATION OF SECTION 51 OF THE KENTUCKY CONSTITUTION.

Armstrong makes clear that the purpose of Section 51 is to "prevent the enactment of 'surreptitious' legislation." 709 S.W.2d at 443. The Armstrong opinion further states that "[t]he framers of the Constitution intended to prevent surprise and fraud upon the members of the General Assembly and other interested parties, thus preventing the practice of 'log rolling.'" (*Id.*)[21] While Section 51 has always been liberally construed, it still imposes "wholesome limits to what can be loaded into one bill," and the facts of this case cry out for the application of Section 51. This Court described Section 51's continuing vitality in a 1977 decision as follows:

> Section 51 of the Kentucky Constitution has enjoyed, or suffered, an extremely liberal construction over the years, and we realize that time and technology have diminished the

[21] For a discussion of the legislative abuses known as "log rolling" and "joker practices," *see* Curry v. Laffoon, 88 S.W.2d 307, 312-13 (Ky. App. 1935).

> risks of deception that it was intended to guard against. Still, however, it is not a lifeless anachronism, and there are wholesome limits into what can be loaded into one bill. We have only to ponder the incredible morass in Washington D.C., to be admonished against what can happen to legislation when it can be made up, sidetracked, taken apart, switched around and put together again like a freight train. Happily, our Constitution does not permit it.

McGuffey v. Hall, 557 S.W.2d 401, 407 (Ky. 1977). In McGuffey, Justice Palmore authored the unanimous opinion of the Court, holding that an Act that states in its title that it relates to malpractice insurance and claims and which predominantly addresses KRS Chapter 304 (the insurance code) violates the prohibition in Section 51 against a law relating to more than one subject, insofar as the bill in question also amended KRS 311.377, which relates to the practice of medicine, osteopathy and podiatry.

The court below bluntly described the connection between the redirection of $19 million annually from the BRF to the General Fund and the corresponding increase in Special Fund assessments from 9% to 11.5%:

> It is impossible not to note that after the suspension of these funds and the "recoupment" of an additional $5 million from the BRF, the assessment range for employers was increased by the KWCF Commission from 9% to 11.5%.

(Opinion and Order at 10) The circuit court further saw that rate increase as a tax increase noting that Appellants themselves conceded that the increase in the assessment rate was a "side effect from the suspension." (*Id.*) In their Brief, however, Appellants dismiss the trial court's ruling as "speculation." (Appellants' Brief at 27) Appellants further argue that "the only evidence in the record proves that the suspension of the $19 million appropriation did **not** cause any increase in assessment rates." (*Id.* at 28) Appellants' position is not sustainable for several reasons.

First, the direct connection between the $19 million transfer and the tax increase on employers is strongly suggested by the fact that the two legislative suspensions in this case appear side by side in the 2003 Budget Bill. House Bill 269 provided as follows:

> Notwithstanding KRS 342.122(1)(c), no General Fund appropriation is provided to the Workers' Compensation Funding Commission in fiscal year 2002-2003 and fiscal year 2003-2004.
>
> Notwithstanding KRS 342.122(1)(b), the workers' compensation assessment rate shall remain at 11.5 percent for the biennium.

(*Id.* at 337, copy attached as **Appendix C**.) Clearly, the legislature recognized that it could not just take $19 million per year out of an actuarially balanced fund that has a specific amortization horizon (*i.e.* year 2018) without somehow replacing those monies! In fact, based on the Deputy Budget Director's cash flow summary (copy attached to her affidavit as Exhibit A and hereto as Appendix B), Kentucky employers paid assessments totaling $87,924,751 in fiscal year 2002, and in fiscal year 2003 Kentucky employers paid a total of $107,729,331 -- a difference of $19.8 million. That is hardly a coincidence.

Second, the fact that the tax increase was necessitated by raiding the BRF is borne out by a review of the rate since the 1996 reforms -- ***it was 9.0% every year from 1996 through 2001***. The actuary retained by KWCFC recommended the 9.0% rate, described in each actuarial evaluation as the "point estimate" or mid-point. The exact same type of analysis and recommendation was presented by the actuary to the KWCFC Board on October 16, 2001. The difference in 2001? Governor Patton had just canceled the $19 million BRF credit on September 7. In sum, there was no need for a rate increase absent the raid on the BRF.

Third, Appellants have another proof problem -- this time through their mischaracterization of the sworn statement of Jon Nielsen, the former Executive Director of KWCFC. (A copy of Mr. Nielsen's affidavit is attached to Appellants' Brief as Appendix 3). In their Brief, Appellants state as follows:

> . . . the only evidence in the record proves that the suspension of the $19 million appropriation did **not** cause any increase in assessment rates. The increase resulted from other factors. The economy was weakening at the time, the KWCFC Board met in October 2001 to decide the assessment rate for calendar year 2002. An actuarial firm hired by KWCFC to assist in setting the rates found that the rate would have to be 11.41% in a pessimistic scenario, even assuming the public fund appropriations would be made to the BRF. The Board was indeed pessimistic considering the tragedy of September 11 had occurred just weeks before and uncertainty was at a high. The Board therefore increased the premium assessment from 9% to 11.5%. The KWCFC's executive director confirmed under oath that this increase was unrelated to any suspension of the $19 million appropriation.

(Appellants' Brief at 28-29, citing Affidavit of Jon Nielsen) A completely different story, however, emerges from the affidavit.

In fact, the affidavit makes clear that the actuary provided a ***range*** of rates for the Board to consider:

> The actuarial report provided a range of rates for the Board to consider based on different economic assumptions, such as varying interest rates. The report projected that under optimistic assumptions, the assessment rate would need to be set at 7.5%. It projected that under pessimistic assumptions, the assessment rate would need to be set at 11.41%.

(Neilsen Affidavit, ¶ 6) Appellants' Brief neglected to mention the optimistic scenario presented! Next, Neilsen's affidavit does not say a word about September 11. And it certainly does not say that in the wake of September 11, the Board "therefore" increased

the premium assessment rate. Finally, Mr. Nielsen in no way "confirmed under oath" that the rate increase was unrelated to the suspension of the $19 million appropriation. He said only that "[t]o the best of my knowledge, the Board did not mention the loss of the $19 Million coal several appropriation when adopting the 11.5% rate . . . ." (Nielson Affidavit, ¶ 9) In fact, the actuary calculated that the rate should be fixed at "9.13% of Kentucky workers' compensation premiums collected from January 1, 2002 to December 31, 2018."[22]

Finally, evidence of the linkage between the employer assessment rate and the $19 million coal severance tax credits occurred in the first quarter of fiscal 2004-2005. The General Assembly failed for the second consecutive time to enact a biennial budget in the 2004 session. Governor Fletcher, recognizing that KRS 342.122(1)(c) is a self-executing statute, directed that the quarterly credits to BRF resume. (*See* video of hearing on Defendants' motion for summary judgment, October 22, 2004, at 3:17:15 to 3:17:44, R. 144) The KWCFC Board met on October 22, 2004, after Governor Fletcher ordered resumption of the coal severance tax credits and reduced the assessment rate back to 9%, reversing the increase to 11.5%. Governor Fletcher's action in resuming the funding foretold, in a measure, the eventual ruling of this court in Fletcher v. Commonwealth.

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[22] A level 9.13% assessment rate, based on the actuary's assumptions, was projected to be sufficient to pay all expenses through 2018 and all losses on both known, and incurred but not reported (IBNR), claims until all claims were closed. ***Included among the actuary's assumptions was continued receipt of the $19 million in coal severance tax revenues annually***! Thus, the actuary's 9.13% level funding recommendation conforms precisely with the requirement in KRS 342.122(1)(b) of an assessment rate that, coupled with tax revenues, produces "enough revenue to amortize ***on a level basis*** the unfunded liability of the Special Fund."

Based on the foregoing it is crystal clear that the raid of BRF trust funds ***necessitated*** the rate increase to 11.5%. Moreover, it seems just as clear that the rate increase was, in fact, a tax increase. Appellants implicitly concur that the 2.5% assessment increase was a tax on Kentucky employers. Appellants note that the legislature exercises "the inherent right to make statutory modifications with 'financial implication' in a budget bill because they are absolutely necessary to ensure the solvency and proper operation of state government." (Appellants' Brief at 38) But how on earth can a 2.5% rate increase on private employers help "to ensure the solvency and proper operation of state government"? A "tax" is "universally defined as an enforced contribution to pay for the support of government . . . . Taxes are a means for the government to raise general revenue without regard to direct benefits which may inure to the payor or to the property tax." Kentucky River Authority v. City of Danville, 932 S.W.2d 374, 376 (Ky. App. 1996). Never before had the General Assembly exercised its "inherent right to make statutory modifications" by fixing an employer assessment rate in a budget bill. We fully agree with Appellants that the 2.5% rate increase had "financial implications for the budget," precisely in the amount of $19 million. The Court of Appeals in Kentucky River Authority stated as follows:

> The validity of special assessments and user fees depends on an analysis of the charge and the benefit received. Assessments and fees charged without a relationship to a benefit received by the payor are arbitrary and capricious and violate due process and the Constitutional prohibition against the taking of private property without just compensation.

932 S.W.2d at 376. Treating the BRF Trust as a monetary vehicle for state government, overriding its statutory purpose, thus violates due process and Section 242 of the Kentucky Constitution.

Appellants' view that fixing employer assessment rates in a budget bill is "the inherent right" of the legislature suggests that the workers' compensation assessment increase is a permissible tax increase under Section 59 of the Kentucky Constitution. Appellants obviously blur the distinction between "assessment" and "tax." Assessments fixed actuarially by the KWCFC Board in conformity with statutory standards to pay Special Fund liabilities are just and proper. However, bypassing the statute by setting the assessment rate in a budget bill, immediately following a provision withholding the $19 million credit from the BRF Trust, more accurately resembles a "tax" *i.e.*, an enforced contribution to provide for the support of government, instead of a "fee," *i.e.*, a charge for a particular service.

In conclusion, the General Assembly's actions in this case had several palpable effects on statutes not even mentioned in HB 269. One such effect was to increase a tax on all employers surreptitiously, in direct contravention of Section 51.

VI. THE TRIAL COURT CORRECTLY HELD THAT KRS 48.316 PROHIBITS THE LEGISLATURE FROM AMENDING KRS CHAPTER 342 IN THE BUDGET BILL.

The circuit court specifically held that KRS 48.316 is the legislature's sole statutory authority for suspending statutes. (Opinion and Order at 10). Specifically, Judge Graham ruled that " . . . under KRS 48.316, no authority exists to amend or modify Chapter 342 in the Budget Bill." (*Id.*) Appellants, however, make the odd argument that such authority is provided by KRS 48.310 -- rather than KRS 48.316 -- because KRS 48.310 is "more general" and "not confined to any particular statute." (Appellants' Brief at 34) This is a misstatement of Kentucky law because "[i]t is well established that when two statutory provisions deal with a similar subject matter, the specific statute controls over the general statute." Kendrick v. Toyota, 145 S.W.3d 422,

425 (Ky. App. 2004) (*citing* Boyd v. C&H Transportation, 902 S.W.2d 823, 824 (Ky. 1995)). A specific statute always controls over a more general statute. *See* Heady v. Commonwealth, 597 S.W.2d 613, 614 (Ky. 1980). "As between legislation of a broad and general nature on the one hand, and legislation dealing minutely with a specific matter on the other hand, the specific shall prevail over the general." City of Bowling Green v. Board of Education of Bowling Green Independent School District, 443 S.W.2d 243, 247 (Ky. 1969). Accordingly, Appellants' argument that the more general KRS 48.310 prevails over the specific language of KRS 48.316 must fail. The General Assembly's actions in this case are therefore prohibited by KRS 48.316, and the Franklin Circuit Court should be affirmed on that point.[23]

VII. SINCE A DESIGNATED PORTION OF COAL SEVERANCE TAX RECEIPTS AND ALL BRF ASSESSMENTS FROM EMPLOYERS CONSTITUTE TAXES DEVOTED TO A DISTINCT PURPOSE, SECTION 180 OF THE KENTUCKY CONSTITUTION PROHIBITS THEIR USE FOR ANY OTHER PURPOSE.

As stated above, Section 180 of the Kentucky Constitution provides in part that:

> Every act enacted by the General Assembly. . . levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied or collected for one purpose shall ever be devoted to another purpose.

The specific issue before the Court therefore is whether the General Assembly violated this provision when it transferred $19 million in coal severance tax revenues from dedicated and distinct BRF purposes to General Fund purposes.

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[23] There is one other statutory glitch in the General Assembly's actions. KRS 446.145 essentially codified the constitutional limitation imposed by Section 51, as set forth in Board of Penitentiary Commissioners v. Spencer, 166 S.W. 1017 (Ky. App. 1914). The amendments to KRS 342.122(1)(c) fail to comply with KRS 446.145(1) and (2).

What are the purposes, according to the relevant statutes, of the coal severance tax? The within parties agree that prior to 1996 the statutory purposes were threefold: (1) to fund resource recovery road projects, (2) to fund the Kentucky Coal Council, and (3) to supplement the General Fund. (Appellants' Brief at 4) However, in the 1996 revamping of the workers' compensation statutory framework, the legislature modified these purposes in a significant respect. At that time the legislature specified in KRS 342.122(1)(c) that the distinct purpose for collecting the first $19 million in coal severance tax receipts would, beginning in 1998, be dedicated to augmenting the BRF.[24] Yet despite this distinct dedicated purpose, the Budget Bills in question, as well as the Executive Orders in question, allocated the first $19 million in coal severance tax receipts, under the guise of alleviating harsh economic conditions in the Commonwealth, to non-distinct General Fund purposes.

It is apparent that the 1996 General Assembly was very specific in designating what portion of the coal severance tax revenues would serve BRF purposes, *i.e.*, not just $19 million in receipts, but ***the first*** $19 million in receipts collected. In other words, if there were no revenues in excess of $19 million, the coal severance tax revenues would be limited to meeting one particular purpose, partially funding the BRF. No doubt, the legislature in 2003 and in subsequent years abandoned this purpose altogether, without amending KRS 342.122(1)(c), ostensibly in order to meet some other purpose. This total abandonment of one purpose, properly adopted by statutory amendment, to achieve another purpose via successive appropriation bills is a transparent and indisputable Section 180 violation.

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[24] Being prospective only, the 1996 legislation did not change the purpose for coal severance tax receipts collected prior to 1998.

A similar violation was identified and nullified in Kentucky Color & Chemical Company vs. Barnes, 162 S.W.2d 531 (Ky. 1942). Under a declaration of emergency, the 1942 General Assembly had transferred $1.04 million from the Kentucky Unemployment Trust Fund to the Railroad Unemployment Insurance Account. The Court held this transfer was an attempt to devote the unemployment tax fund to a purpose other than that for which it was levied in violation of Section 180. (*Id.* at 535) The opinion acknowledged "the inherent power of the legislature to amend or repeal the tax." (*Id.*) But, the Court held, funds levied and collected for a specific purpose must be so maintained until the General Assembly amends or repeals the Unemployment Compensation Act as it then existed. (*Id.*)

Even though the transfer at issue in Barnes was intended to avoid placing Kentucky employers in an "unfavorable competitive position as compared with employers in other states," the transfer was nevertheless invalid. (*Id.*) Despite the public benefit to be derived from the transfer, the Court observed: "We can only take the law as we find it and declare it accordingly." (*Id.*) Likewise, notwithstanding KRS 48.315, transfers of workers' compensation funds held in trust by KWCFC for a specified and distinct purpose are prohibited by Section 180. The laundry list of statutes in KRS 48.315, allowing BRF and other funds to be transferred for General Fund purposes, does not trump the constitutional requirement that an express and distinct purpose for a particular tax may not be ignored without amending or repealing the particular statute at issue, in this case KRS 342.122(1)(c).[25] Even more importantly, the Armstrong

[25] Enacted in 1996 as an integral part of a comprehensive reworking of the Kentucky workers' compensation statutory framework, there is no indication that any subsequent General Assembly has had an inclination to once again reconstruct this framework.

opinion made clear that the various statutes in KRS 48.315 which relate to private funds, including KRS 342.122(1)(c), cannot be used for General Fund purposes. 709 S.W.2d at 446-47.

In Barnes, the Court recognized the power of the legislature to "amend or repeal the tax," but found that, in order to comply with Section 180, funds collected had to be used for the purpose for which the tax was levied. In the case at hand, the legislature did not repeal the tax nor did it repeal the statutory restrictions on the use of the first $19 million generated by the coal severance tax. Instead, the Budget Bills at issue attempted to circumvent the restrictions on the use of the BRF money by "suspending" a portion of the statute and diverting the funds to the general obligations of government without amending the underlying law. This violates the mandate of Section 180.

In their Brief, Appellants have adopted the circuit court's approach to addressing the Section 180 issue. (Appellants' Brief at 9-10) The court below reasoned that since the $19 million allocation in KRS 342.122 was not enacted until sixteen years after the enactment of the original coal severance tax statute, KRS 143.090(4), the subsequent abandonment of the purpose for the $19 million allocation to the BRF did not violate Section 180. (Opinion and Order at 3) The underlying assumption for this rationale is that the original purpose for the coal severance tax statute, as first enacted in 1972, was fixed in stone. Granted, the original enactment included the license to use coal severance tax revenues in part "to supplement the general fund." (Opinion and Order at 3) However, in adopting the circuit court's rationale, Appellants fail to consider that the accepted purposes of the coal severance tax have changed, via statutory amendments, on several occasions since the original enactment.

Thus in 1976, Resource Recovery Roads bond payments were appropriated out of coal severance taxes via an amendment to KRS 143.090. (1976 Ky. Acts, c. 84, p. 167) In 1980, Energy Research Project payments were added. (1980 Ky. Acts, c. 298, p. 1020) The 1996 enactment specified that BRF payments were to be made out of KRS 143.020 collections ***before*** any of the purposes named in the KRS 143.090 specifying provisions. (1996 Ky. Act, ex s 1, c 1, Sec 4) In 1998, the General Assembly directed payments for osteopathic scholarships to be paid out of KRS 143.020 collections (***after BRF transfers***) (1998 Ky. Acts, c. 256, p. 824) Recently, the General Assembly directed payments for pharmacy scholarships at a college located in an Appalachian county to be paid out of KRS 143.020 collections (***after BRF transfers***) beginning in 2007. (2006 Ky. Acts, c. 252, Part XXIV) Each of these purposes, of course, are related in one way or another to the subject taxpayers' businesses as coal company operators, including the $19 million credit to partially absorb liability for black lung disabilities, the most sizeable monetary obligation of the BRF.

In addressing the Section 180 issue, the circuit court acknowledged that "the legislature could have created a scheme whereby the coal tax severance revenue was a direct appropriation into the BRF." (Opinion and Order at 3) In response, the 1996 General Assembly emphatically did create a scheme whereby coal severance tax receipts were made a "direct appropriation into the BRF." The legislature accomplished this direct appropriation in 1996 by means of KRS 342.122(1)(c), which mandates that the Department of Revenue "shall credit" the BRF with the first $19 million in coal severance tax receipts. As recited in the statute, this credit of tax receipts to the BRF is "in addition to the assessments in (a) and (b) above . . . ."

Appellants do not cite any case law for the proposition that this statutory mandate had to be enacted, in order to comply with Section 180, as part of the tax statute itself. Indeed, Appellants have never protested or argued that the mandatory BRF credit has not since 1996 been one of the distinct purposes of the tax, enacted in conformity with the mandate in Section 180 that all taxing statutes "shall specify distinctly the purpose" of the levy. Thus, though accomplished by amending a different but related statute, the 1996 legislation provided a distinct purpose for coal severance taxes collected in 1998 and thereafter.

Other statutes confirm the distinct and primary purpose, since 1996, of the first $19 million in coal severance tax receipts. Thus in KRS 42.409(12)(a), the annual credits of $19 million to the BRF are designated as "statutorily dedicated receipts." Likewise, according to KRS 42.409(5), the statutorily dedicated receipts are not "available revenues" for other purposes. This credit is to be made "notwithstanding and prior to the transfer of funds" for economic development projects under KRS 42.550 to 42.595. KRS 342.122 (1)(c) statutory credits do not come from the general fund, but are made by the Department of Revenues out of coal severance tax revenues paid under KRS 143.020. (*See* the Coal Severance Tax Flow Chart attached hereto as Appendix A) Thus the circuit court and Appellants are mistaken in concluding and arguing that the first $19 million in coal severance tax receipts are not a direct appropriation into the BRF (assuming that Section 180 entails such a requirement).

Combined with the mission of KWCFC to manage the BRF and expend all resources ***only*** for defined worker's compensation programs, the above statutory provisions (KRS 42.409(12)(a), KRS 42.409(5), KRS 42.550 to 42.595) establish a public policy commitment of funds for a distinct purpose. The $19 million in coal

severance tax revenues to KWCFC is specified distinctly for unfunded liabilities owed to injured workers and for administering workers' compensation programs. The public policy was clearly delineated by the General Assembly in HB 1 of 1996 Special Session. The General Assembly assumed liabilities previously paid by the Commonwealth's coal operators and dedicated $19 million annually as tax revenues not available for other purposes. The above enactments dedicated a defined portion of the severance tax to a specific purpose, not available to be devoted to another purpose, consistent with Kentucky Constitution Section 180.

VIII. CONCLUSION

Appellants would have the Court believe that this appeal can be quickly disposed of my a simple application of Armstrong. This Brief, however, makes clear that the suspension in this case is vastly different from the suspensions validated in Armstrong. If anything, the suspension in this case very closely resembles the suspension struck down in Armstrong, *viz.*, the suspension of laws related to the appropriation of private funds. The BRF Trust is a commingled fund that cannot be differentiated for all the reasons enumerated above. As such, it is off limits to the type of transfer affected by the General Assembly in this case.

Appellants repeatedly seek to paint a picture of legislative gridlock if Section 51 is reasonably applied to the facts of this case. Appellants worry about budget bills that will be "mammoth in size and replete with strikethroughs." (Appellants' Brief at 33) Of course, if the legislature truly desired to amend the workers' compensation Special Fund statutory framework, it could do so more efficiently in a separate bill appropriately titled -- not buried in a budget bill. The reality is that the size of budget bills is ballooning without regard to the outcome of this case. For example, though not strictly speaking

before the Court in this case, the 2006-2008 biennial budget is indeed mammoth in size and replete with strikethroughs. That is because the Act amends, republishes and creates new laws on everything from income tax, sales and use tax, commercial vehicle tax, administrative offsets for delinquent taxes, electronic levies for delinquent taxes, motor fuels tax, assignment of tobacco payments, tobacco amnesty compensation, legal notices, home incarceration, insurance, pharmacy scholarships, block grants, and amusement rides and attractions. Kentucky is fast approaching the "one-bill session," the legislative session where all-important legislation is "log rolled" under a single title. Indeed, in 2003, the legislature for the first time threw revenue measures into the appropriations bill. Talk about the type of log rolling that Section 51 is designed to prevent! This case presents a situation that is positively tailor-made for the application of Section 51, a case that in the words of the trial court "present[s] a compelling demonstration of the doctrine of Armstrong v. Collins run amok." (Opinion and Order at 5)

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