

there is no legal beneficiary, a claim for death benefits is not timely made, or all legal beneficiaries cease to be eligible before 364 weeks of benefits have been paid. The Code provisions require all workers' compensation insurance carriers, including the Municipal Risk Pool, to pay these death benefits to the Workers' Compensation Commission for deposit into the Subsequent Injury Fund.³ The Fund then distributes these funds 1) to workers across the state who receive a second injury that, combined with the effects of a prior injury, entitles the employee to lifetime benefits,⁴ and 2) to compensate insurance carriers that were required by the Commission to pay benefits when it is later determined that those benefits were not owed.⁵ In the absence of these Code provisions, insurance carriers, including the Municipal Risk Pool, would retain the funds when there is no legal beneficiary to receive death benefits.

The Municipal Risk Pool contends, and the trial court held, that these Code provisions violate article III, section 52(a) of the Texas Constitution as applied to political subdivisions. This section of the constitution provides in relevant part:

[T]he Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. However, this section does not prohibit the use of public funds or credit for the payment of premiums on nonassessable property and casualty, life, health, or accident insurance policies and annuity contracts issued by a mutual insurance company authorized to do business in this State.⁶

³ TEX. LAB. CODE §§ 403.007(a), 408.184(c).

⁴ *Id.* § 408.162.

⁵ *Id.* § 410.032(b).

⁶ TEX. CONST. art. III, § 52(a).

The court of appeals reversed the trial court, and the Court today affirms that judgment, although on different grounds. Because I agree with the trial court that the challenged Code provisions and administrative regulations violate article III, section 52(a), I respectfully dissent. The payment of the death benefits to the Commission is not actuarially based. The fact that payments could be made from the Subsequent Injury Fund to employees of a political subdivision does not save the current scheme. This Court has held repeatedly that article III, section 52(a) prohibits the Legislature from directing a political subdivision to make *any* payment to an individual or private corporation unless that governmental entity has an independent legal obligation to make that payment. The Code sections at issue in this case require political subdivisions of the State to grant public money to individuals (workers) for injuries for which the political subdivision has no responsibility or liability, and the Code requires political subdivisions to compensate private corporations (insurance carriers) for losses that have no relation whatsoever to the political subdivisions. Even though the Subsequent Injury Fund serves legitimate needs and indirectly benefits the public, article III, section 52 prohibits the Legislature from directing political subdivisions to contribute to that fund.

This case is governed by the decision in *City of Tyler v. Texas Employers' Insurance Association*.⁷ The question in that case was whether a city could become a subscriber under the former Workmen's Compensation Act. The answer was that it could not because under that Act, an employee would be compensated for an on-the-job injury even though there was no negligence or other culpability

⁷ 288 S.W. 409 (Tex. Comm'n App. 1926, judgment adopted).

on the part of the government employer. The court in *City of Tyler* explained that the purpose of article III, section 52 of the Texas Constitution is to “prevent the gratuitous appropriation of public money or property.”⁸ It continued, “a grant in aid of or to any individual, association, or corporation whatsoever⁹ is not one of these purposes, but is expressly forbidden.” It did not matter that the premiums a city paid would also cover on-the-job injuries caused by its own negligence for which it would be legally liable under the common law or statutes. The fact that under the Act, employees would also be compensated for injuries for which a city had no legal liability was enough to render participation by a city in the workmen’s compensation scheme unconstitutional:

When the Workmen's Compensation Law is analyzed and fully understood, it is clear that to permit a municipal corporation to become a subscriber to the insurance association therein provided authorizes it to grant public money by way of premiums for insurance in aid of its employes to whom it is under no legal liability to pay. As already pointed out, the act contemplates compensation in the absence of any legal liability other than the acceptance of the plan. Cities and towns have no power to appropriate the tax money of its citizens to such a purpose. It is at best a gratuity, a bonus to the employe. The city might as well pay his doctor's fee, his grocer's bill, or grant him a pension.¹⁰

Accordingly, even though a city would receive some consideration for the premiums it paid, which was the coverage of claims by its employees for which it was liable under the common law or statutes, that consideration did not render participation in the Workmen’s Compensation Act scheme constitutional.

⁸*Id.* at 412.

⁹ *Id.*

¹⁰ *Id.*

The Texas Constitution has since been amended, in article III, section 60, to permit cities and other political subdivisions of the state to provide workers' compensation insurance or to provide their own insurance risk to "employees of the political subdivision."¹¹ Accordingly, a political subdivision is no longer prohibited from obtaining or providing workers' compensation benefits to its own employees for injuries for which it would not be legally liable. But that amendment does not permit a political subdivision to fund compensation coverage for employees of other political subdivisions, much less workers in the private sector. And section 60 does not permit a political subdivision to compensate private insurance carriers for losses they sustain.

The core holding in *City of Tyler* remains intact. Political subdivisions have no common-law or contractual obligation to provide benefits to workers other than their own employees or to remunerate private carriers who were required by the Commission to pay benefits for a period of time even though the worker's injury was not compensable. The Legislature is prohibited by section 52(a) from authorizing or requiring a political subdivision to divert public funds for these purposes.

¹¹ Article III, section 60, adopted in 1948, allowed counties to provide workmen's compensation insurance; as amended in 1962, it permitted political subdivisions to cover employees. In 1952, with the adoption of article III, section 61, coverage could be provided to employees of cities, towns, and villages. *See* TEX. CONST. art. III §§ 60, 61 interp. commentary. Constitutional amendments adopted in 2001 consolidated sections 60 and 61 into former section 60 and repealed section 61. Section 60 now provides:

§ 60. Workers' Compensation Insurance for employees of counties and other political subdivisions

Sec. 60. The Legislature shall have the power to pass such laws as may be necessary to enable all counties, cities, towns, villages, and other political subdivisions of this State to provide Workers' Compensation Insurance, including the right of a political subdivision to provide its own insurance risk, for all employees of the political subdivision as in its judgment is necessary or required; and the Legislature shall provide suitable laws for the administration of such insurance in the counties, cities, towns, villages, or other political subdivisions of this State and for the payment of the costs, charges and premiums on such policies of insurance and the benefits to be paid thereunder.

The Court says today that as long as a political subdivision receives “sufficient” consideration, even though it is not “equal” to what that political subdivision pays, then the paying out of public funds is constitutional.¹² For this proposition, the Court cites *Key v. Commissioners Court of Marion County*,¹³ a per curiam opinion of a court of appeals that was never reviewed by this Court. But even that meager authority does not support the Court’s conclusion. The court of appeals in *Keys* held that a state-created agency could not transfer complete control of the “Christmas Candlelight Tour” or the publication of an historical periodical to a tax-exempt charitable organization. The court reasoned that these projects were “things of value.”¹⁴ During the course of its discussion, the court of appeals distinguished cases in which a state entity had contractually retained the services of a private business:

Each case cited is readily distinguishable from the present situation. These cases involve contractual agreements for services or property entered into by a governmental arm with private business. In this case we have no such contractual obligation and no retention of formal control. Had the Historic Jefferson Foundation obligated itself contractually to perform a function beneficial to the public, this obligation might be deemed consideration, and where sufficient consideration exists, Article III, § 52(a) of the Texas Constitution would not be applicable to the transaction.¹⁵

In the case before us today, political subdivisions are required to transfer funds that will be used to pay for injuries for which the political subdivisions have no liability. The funds will also be used to compensate private corporations for losses for which the political subdivisions have no liability. The fact

¹² ___ S.W.3d at ___.

¹³ 727 S.W.2d 667 (Tex. App.–Texarkana 1987, no writ).

¹⁴ *Id.* at 669.

¹⁵ *Id.*

that in some cases, employees of a political subdivision may also be compensated does not render this scheme constitutional. Any compensation that may flow to a particular employee of a political subdivision is unlikely to be proportionate to the political subdivision's contribution to the Subsequent Injury Fund. And, in some instances, a political subdivision may make payments to the fund even though none of its employees receive benefits. Moreover, a political subdivision receives no benefit whatsoever from compensating private insurance carriers from the Subsequent Injury Fund.

The difference between the Subsequent Injury Fund scheme and the self-insurance functions of the Risk Pool is that assessments on each political subdivision for its share of the self-insurance fund are based on each political subdivision's actual claims experience. They pay no more than their share of the actual claims for which they are legally liable. The opinion of the attorney general cited by the Court explains why a political subdivision cannot constitutionally participate in a workers' compensation scheme that is based on assessments that are not tied to each political subdivision's actual claims history.¹⁶ The reasoning in that opinion applies with equal force to the facts in this case.

Finally, the Court's opinion could be read as holding that as long as public money is expended for a public purpose, public money can be given, gratuitously, to an individual or a private corporation. The opinion should not be construed so broadly. I believe that what the Court meant to say, but has not done so as clearly as it could, is that a political subdivision may make expenditures for goods or services or for

¹⁶ Op. Tex. Atty. Gen. No. DM-326 at 1728 (1995) (reasoning that an assessment policy scheme would violate article III, section 52(a) of the Texas Constitution because it would "constitute an unconstitutional lending of credit," and membership would be "tantamount to holding stock in a corporation, association or company").

compensating those that are injured by its actionable negligence as long as those expenditures serve a legitimate public purpose. The Court cites *Edgewood Independent School District v. Meno*,¹⁷ in concluding that the payments of unclaimed death benefits at issue in this case “provide[] a clear public benefit.”¹⁸ But in *Edgewood*, the Legislature required payments to be made by one political subdivision (a school district) to another for public education. That case does not stand for the proposition that public funds can be funneled to an individual or a private corporation so long as the public interest is somehow furthered.

When individuals or private entities receive public funds, it must be pursuant to a contract or in satisfaction of an obligation the political subdivision owes to the individual or private entity. None of the 1600 political subdivisions that form the Risk Pool have any contractual or other obligation to workers other than their own respective employees, nor do they have any obligation or even any remote connection with the private insurance carriers who are reimbursed from the Subsequent Injury Fund.

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The Subsequent Injury Fund serves laudable purposes. However, as currently structured, the means of funding it is unconstitutional as applied to political subdivisions. Accordingly, I must dissent.

Priscilla R. Owen
Justice

¹⁷ 917 S.W.2d 717 (Tex. 1995).

¹⁸ __ S.W.3d at __.

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