

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 6

WCC No. 2000-0174

LEE A. MILLER

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer.

ORDER ON MOTIONS

Summary: Claimant petitioned Court for additional benefits due him under *Broeker v. State Compensation Mutual Ins. Fund*, 275 Mont. 502, 914 P.2d 967 (1996), which held that it is improper to include social security cost of living allowances (COLA's) in computing the social security offset to total disability benefits. He sued on his own behalf and claimants of Liberty Mutual Fire Insurance Company who are similarly situated. Liberty has filed various motions resisting the claim of the present claimant, as well as any payment of any other *Broeker* claims. In addition there are outstanding motions regarding discovery and other matters.

Held: (1) *Broeker* is retroactive. (2) The *Broeker* claims are not time barred. (3) Although some *Broeker* claims might be barred by the doctrine of *laches*, it is too soon to determine which ones. (4) While the Workers' Compensation Court declines to adopt and rigidly adhere to Rule 23, *Mont.R.Civ.P.*, which governs class actions in district court, where other similarly situated claimants are due benefits the Court will order the insurer to identify and pay those claimants, utilizing informal, cooperative methods to do so if possible.

Topics:

Statutes and Statutory Interpretation: Retroactivity. Where a statute is interpreted as plain on its face, the statute, as interpreted, must be applied retroactively.

Cases Discussed: *Broeker v. State Compensation Mutual Ins. Fund*, 275 Mont. 502, 914 P.2d 967 (1996). *Broeker v. State Compensation Mutual Ins. Fund*, 275 Mont. 502, 914 P.2d 967 (1996), must be applied retroactively.

Class Actions. The Workers' Compensation Court declines to adopt Rule 23, *Mont.R.Civ.P.*, governing class actions. That technical nature and requirements of the rules are unnecessary given the nature of Workers' Compensation Court proceedings. However, since insurers have a direct duty to pay claimants the benefits they are owed, the Court will enforce that duty in quasi-class proceedings. It will proceed in a more informal and cooperative manner than contemplated by Rule 23, however, where appropriate it will look to Rule 23 for guidance. *Murer v. Montana State Compensation Mutual Ins. Fund*, 257 Mont. 434, 849 P.2d 1036 (1993) (*Murer I*)

Courts: Retroactivity of Decisions. Where a statute is interpreted as plain on its face, the statute, as interpreted, must be applied retroactively.

Defenses: Laches. Where a petition for benefits is not barred by the statute of limitations, the claim is barred by the doctrine of *laches* **only if** there are extraordinary circumstances for barring the claim.

Insurers: Duties. Insurers have a direct duty to claimants to pay them the benefits to which they are entitled.

Limitations Periods: Workers' Compensation Benefits. Once a claim has been filed in writing within the limitation period prescribed by section 39-71-601, MCA, the Workers' Compensation Act does not prescribe any other limitation period with respect to a claim for benefits except for the two-year limitation which was added by the Legislature in 1997 for bringing an action after benefits are *denied*. Unless benefits are part of a settlement, the two-year limitations period for fraud or mistake, § 27-2-203, MCA; the two-year limitations for "liability created by statute," § 27-2-211, MCA; and the three- and eight-year limitations applicable to contracts, § 27-2-202, MCA, do not apply.

¶1 This is a *Broeker*⁽¹⁾ case involving Liberty's inclusion of cost-of-living adjustments in the social security rate it used in computing the social security offset to claimant's total disability benefits. Claimant - Lee A. Miller - brings his action on his own behalf and on behalf of other similarly situated workers receiving benefits from Liberty. Miller has requested class certification. Liberty has filed a number of motions, some of which challenge the class Miller wishes to represent. Others concern discovery and other matters. The motions have been fully briefed and are ready for decision.

I. Class Action - General Discussion

¶2 The Workers' Compensation Court does not have a rule for class actions, however, it is clear from *Murer v. Montana State Compensation Mutual Ins. Fund*, 257 Mont. 434, 849 P.2d 1036 (1993) (*Murer I*),⁽²⁾ that the Court has the authority to follow class action rules laid out in the Montana Rules of Civil Procedure. In *Murer I* the Supreme Court said:

Although the Workers' Compensation Court rules do not provide for class action certification, the Workers' Compensation Court applied Rule 23, M.R.Civ.P., to this question. We have previously approved the Workers' Compensation Court seeking guidance from the Montana Rules of Civil Procedure. See Moen v. Peter Kiewit & Sons, Co. (1982), 201 Mont. 425, 434, 655 P.2d 482, 486.

257 Mont. at 436, 849 P.2d at 1037.

¶13 The purpose of any class action is to identify and pay benefits owed to similarly situated claimants. In Murer the potential class consisted of claimants who were due additional benefits on account of the expiration of a temporary cap on their benefits. In Broeker the potential class consists of claimants whose social security offsets were improperly calculated because of the inclusion of social security COLA's. In both cases, following the establishment of the legal precedents giving rise to the additional entitlements, this Court has overseen proceedings to assure that the claimants entitled to the additional benefits are identified and paid. See Murer v. State Compensation Mutual Ins. Fund, 283 Mont. 210, 942 P.2d 69 (1997) for discussion of the process followed in Murer. It has done so without resort to the technical and cumbersome rules governing class actions, and without resort to extended discovery. In both cases, with the oversight and approval of the Court, the parties have worked together to gather the necessary information to identify affected claimants and to get them paid. The process relies on cooperation and communication. A similar process is in place in another case - Gonzales v. Montana Power Co., WCC No. 9803-7941.

¶14 My experience in these cases tells me that more is accomplished faster through a cooperative process than through adherence to formal class action rules. Montana workers' compensation insurers are not ordinary defendants: they have a direct duty to pay claimants. §§ 39-71-407(1), -2203, MCA (2001). Disputes between insurers and claimants regarding benefits is within the exclusive jurisdiction of the Workers' Compensation Court, thus insurers appear regularly before the Court. The workers' compensation bar is small and well versed in workers' compensation law and with the practices and procedures of the Workers' Compensation Court. I expect that in future class-action type cases the same spirit of cooperation will prevail that has prevailed in Broeker, Murer and Gonzales. I therefore decline to adopt the class action provisions of the Montana Rules of Civil Procedure. However, where the rules provide helpful guidance, the Court will certainly look to them for assistance in determining a proper course of action.

¶15 In this case, Liberty is already cooperating in obtaining information which will assist in the identification of Broeker claimants, and I anticipate that process will continue. Meanwhile, Liberty has raised a number of legal issues as to which claimants may be entitled to Broeker benefits.

II. Pending Motions

¶16 At the Court's request, Liberty has consolidated its arguments concerning the application of Broeker into an omnibus motion. (Docket 56.) As set forth in that motion, the motions are as follows:

¶16a Statutes of Limitation Motions

1. Liberty moves the Court to apply a two-year statute of limitation in Mr. Millers case and in the cases of any common-fund claimants. In these cases, the claimants causes of action accrued on the date of the initial offset calculation. The two-year statute of limitations bars the litigation of claims that were not brought within two years of the date of the initial offset calculation.

2. In the alternative, Liberty moves the Court to apply a three-year statute of limitation in the cases of claimants whose employment was governed by an oral contract and to apply an eight-year statute of limitation to claimants whose employment was governed by a written contract.

¶16b Liberty moves the Court to sunburst, or prospectively apply, the Broeker decision.

¶16c Liberty moves the Court to bar this matter under the doctrine of laches.

¶16d Liberty moves the Court to bar any Broeker claims that have been litigated under the doctrine of res judicata.

Liberty also requests the Court to rule on the previously filed motions. Those motions are as follows:

¶16e Liberty's Motion to Dismiss Petitioner's Request for Class Action Certification and Supporting Brief and Request for Hearing.

¶16f Liberty's Second Motion to Dismiss and Request for Hearing.

¶16g Petitioner's Motion to Compel Discovery.

¶16h Liberty's Motion for Protective Order and Supporting Brief.

¶16i Motion to Suspend Decision on Insurer's Motion to Dismiss Class Allegations.

¶16j Liberty's Motion to Compel and Supporting Brief.

I consider the motions in the above order.

III. Resolution of Motions

Two-year Statute of Limitations

¶17 Liberty's two-year statute of limitations argument is premised, initially, on section 27-2-203, MCA, which governs actions based upon fraud and mistake, and section 27-2-211,

MCA, which prescribes a two-year limitations for liability created by statute. Secondly, it cites the two-year statute of limitations applicable to liabilities created by statute.

¶18 Section 27-2-203, MCA, governs actions based on fraud or mistake, providing:

27-2-203. Actions for relief on ground of fraud or mistake. *The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within 2 years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.*

*The section has been applied in workers' compensation cases but **only** with respect to settlements. *Whitcher v. Winter Hardware Co.*, 236 Mont. 289, 296, 769 P.2d 1215, 1219 (1989); *Preston v. Transportation Inc.*, 2002 MTWCC 23; *Miller v. State Compensation Ins. Fund*, 1999 MTWCC 21 and 34.1; *Hayes, Thompson Owen, Sleath and Truesdell v. State Compensation Ins. Fund*, 1999 MTWCC. The section has never been applied to failure of the insurer to pay proper benefits.*

¶19 *As I read its argument, Liberty is arguing that since workers' compensation is deemed a part of the contract between workers and their employers, at least for purposes of the Contract Clauses of the Montana and United States Constitutions, then statutes of limitation governing contracts should apply to actions for benefits. (See Liberty's Omnibus Motion at 4-5, citing *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 325-26, 730 P.2d 380, 384-85 (1986).) That contention is addressed in the next section.*

¶10 *Even assuming Liberty's contractual analysis is sound, the two-year limitations period does not apply unless there was fraud or there was a mutual mistake of fact or law. *Rath v. St. Labre Indian School*, 249 Mont. 433, 439-440, 816 P.2d 1061, 1065 (1991) (while actual knowledge of the mistake by both parties is not required to commence the statute of limitations period, at minimum the running of the statute requires a showing that the party "would have discovered the mistake had he or she exercised ordinary diligence."); *Miller v. State Compensation Ins. Fund*, 2000 MTWCC 72 (mutual mistake of fact may be basis for reopening settlement, citing *Brown v. Richard A. Murphy, Inc.*, 261 Mont. 275, 280-82, 862 P.2d 406, 409-411 (1993)). The unilateral decision of an insurer to pay particular benefits does not constitute fraud or mistake. Absent a settlement agreement, benefit calculations are not negotiated and do not rest upon the consent or agreement of the claimant. Moreover, Liberty does not suggest that it knowingly miscalculated the social security offset. The *Broeker* case shows that the controversy was a legitimate dispute of law and not a matter of fraud or mistake.*

¶11 *I therefore conclude that the statute of limitations governing fraud and mistake is inapplicable, at least in the absence of a settlement agreement which a claimant is attempting to set aside.*

¶12 I similarly conclude that the two-year statute of limitations applicable to "a liability created by statute," § 27-2-211, MCA, is also inapplicable. That provision is a catchall provision. The only workers' compensation context in which it has been applied is with respect to rights of subrogation arising under section 39-71-414, MCA. *Royal Ins. Co. v. Roadarmel*, 301 Mont. 508, 11 P.3d 105 (2000). It does not apply with respect to **benefits** because the Workers' Compensation Act (WCA) has its own statutes of limitation with respect to benefits. Section 39-71-601 (1), MCA, provides that claims not presented in writing within twelve months are barred. The twelve-month limitation has been on the books for decades. Recently the legislature enacted an additional limitations period, requiring since 1997 that "[a] petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." § 39-71-2905, MCA (1997-2001). These statutes are specific to workers' compensation claims for benefits, and are clearly intended to be the only limitations periods with respect to workers' compensation claims. Since they are more specific, they, not the more general two-year limitations period of section 27-2-211, MCA, apply. *Smith v. State, Driver's Imp. Bureau*, 1998 MT 94, ¶ 15, 288 Mont. 383, 736 P.2d 94 (1998) ("A particular statutory intent controls over a general one which is inconsistent with it. Section 1-2-102, MCA. Further, when two statutes deal with a subject, one in general and comprehensive terms and the other in minute and more definite terms, the more definite statute will prevail to the extent of any opposition between them."). I therefore conclude that the two-year limitation prescribed by section 27-2-211, MCA, is inapplicable.

¶13 My determination above is reinforced by *Acme v. Koepsel*, 234 N.W. 756, 758 (Wis. 1931), wherein the Wisconsin Supreme Court found a general limitations provision inapplicable where the legislature had enacted a more specific provision in their workers' compensation laws. The Court noted that enactment of the specific provision "would seem to indicate a legislative belief that the provisions relating generally to the limitations of actions did not apply to proceedings under the Workmen's Compensation Act" *Id.*

Contract Statutes of Limitations

¶14 Liberty next argues that the three-year statute of limitations governing oral contracts, § 27-2-202(3), MCA, should apply in cases of employments not in writing, and the eight-year limitations governing written contracts, § 27-2-202(1), MCA, should apply to employments in writing. Its argument is premised language in *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 325, 730 P.2d 380, 384 (1986), stating that workers' compensation is based on contract law and that "the Workers' Compensation statutes in effect on the date of injury **set the contractual rights between the parties.**" The flaw in Liberty's contract argument is that, just as the provisions regarding benefits fix the contractual rights of the party, the statutes of limitation in the WCA also become part of the contract, thus the limitations period specified in the WCA govern. Moreover, as set forth in the preceding

paragraph, since the Workers' Compensation Act has set out specific provisions governing limitations of actions, those provisions are exclusive and controlling.

Prospective Application

¶15 Liberty urges that the decision in Broeker v. State Compensation Mutual Ins. Fund, 252 Mont. 502, 914 P.2d 957 (1996), should be applied prospectively to cases where payments were made after Broeker. It cites Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) ("Sunburst"); Montana Horse Products Co. v. Great Northern Ry. Co., 91 Mont. 194, 7 P.2d 919 (1932) ("Montana Horse"); Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) ("Chevron"); and LaRoque v. State, 178 Mont. 315, 583 P.2d 1059 (1978) ("LaRoque"), as supporting its argument.

¶16 In Montana Horse the Montana Supreme Court held that its earlier interpretation of a statute was erroneous. However, it also declared that it would be manifestly unjust to apply the new, correct interpretation retrospectively since the parties had relied upon the old interpretation in their dealings and actions. (See Klimek v. State Compensation Ins. Fund, WCC No. 9602-7492, Order and Partial Summary Judgment (October 11, 1996) at 10-12, for a more extended discussion of Montana Horse.) Sunburst was an appeal to the United States Supreme Court of a companion case to Montana Horse in which the Montana Supreme Court repeated its Montana Horse holdings. On appeal to the United States Supreme Court, that Court sustained the prospective application of Montana Horse, holding, "A state in defining the limits of adherence to precedent may make a choice of itself between the principle of forward operation and that of relation backward." Sunburst at 364.

¶17 The retroactivity holding of Montana Horse is cited in several subsequent Montana Supreme Court decisions, including Dunham v. Southside National Bank of Missoula, 169 Mont. 466, 475, 548 P.2d 1381, 1388 (1976). (See discussion in Klimek at p. 15.)

¶18 LaRoque, which was decided in 1978, adopted the three-prong Chevron test for determining whether a judicial decision should be applied retroactively. In that case the Montana Supreme Court said:

The United States Supreme Court in Chevron Oil v. Huson (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, enumerated the factors to be considered before adopting a rule of nonretroactive application. First, the decision to be applied nonretroactively must establish a new principle of law either by overruling established precedent on which litigants have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, the merits of each case must be weighed by looking to the history, purpose and effect of the rule in question and whether retroactive application will further or retard its operation. Finally, the inequity of retroactive application must be considered, for

where substantial inequity will result by such application, a ruling of nonretroactivity is proper.

LaRoque at 318-19, 583 P.2d at 1061.

¶19 In *Klimek v. State Compensation Ins. Fund*, WCC No. 9602-7492, Order and Partial Summary Judgment (October 11, 1996), I considered and discussed *Sunburst, Montana Horse, Chevron, and LaRoque*. The issue in *Klimek* was whether the Supreme Court decision in *Haag v. Montana Schools Group Ins. Authority*, 274 Mont. 109, 906 P.2d 693 (1995), was retroactive, i.e., whether it applied to claims and cases arising prior to the *Haag* decision.

¶20 In *Haag* the Supreme Court interpreted a statute requiring an insurer to accept or deny a claim within thirty days. § 39-71-606(1), MCA. The Court held that an insurer failing to do either within the thirty-day period automatically accepts the claim. The decision reversed a prior ruling in *Solheim v. Tom Davis Ranch*, 208 Mont. 265, 280, 677 P.2d 1034, 1041 (1984), which had held that an insurer's failure to accept or deny a claim within thirty days does **not** constitute an automatic acceptance of a claim.

¶21 In *Klimek* I determined that *Haag* applied retroactively. In reaching my determination, I considered the most recent Supreme Court decisions available to me at that time. The cases I found that were determinative were *Porter v. Galarneau*, 275 Mont. 174, 911 P.2d 1143 (1996); *Chaney v. U.S. Fidelity and Guaranty*, 917 P.2d 912 (Mont. 1996); and *Kleinhesselink v. Chevron U.S.A.*, 920 P.2d 108 (Mont. 1996).

¶22 In *Porter*, the Supreme Court said in dicta: "We will continue to give retroactive effect to judicial decisions, which is in accord with the U.S. Supreme Court's holding in *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74." 275 Mont. at 185, 911 P.2d at 1150. In *Harper* the Supreme Court abandoned the *Chevron* test which has been adopted by the Montana Supreme Court in *LaRoque*. In its place, the United States Supreme Court adopted a blanket rule requiring retroactive application of its decisions. 509 U.S. at 96-97. Whether there may be exceptions to the blanket rule remains unclear to me; I have not examined the matter in more detail. What is clear is that the United States Supreme Court has abandoned the *Chevron* analysis. *Liberty* does not disagree, rather it argues that despite the citation of *Harper* in the Montana Supreme Court's *Porter* decision, other state courts continue to recognize and apply the *Chevron* analysis, and so should Montana courts. (*Liberty's Omnibus Brief* at 11.)

¶23 As I noted in my *Klimek* decision, in *Chaney* and *Kleinhesselink* the Montana Supreme Court **in fact** applied two of its decisions retroactively. In *Chaney* the decision it applied retroactively was *Haag*, although the Court did not discuss the retroactivity issue. In *Kleinhesselink* the Court considered whether *Stratemeyer v. Lincoln County*, 915 P.2d 175

(Mont. 1996), should be applied retroactive. Without further discussion, and citing Porter, the Court said, "We give retroactive effect to judicial decisions." *Id.* at 111.

¶24 In considering Liberty's arguments in the present case, I have looked for pertinent Montana cases decided subsequent to my decision in *Klimek*. I have found one case. That case is *Benson v. Heritage Inn, Inc.*, 1998 MT 330, 292 Mont. 268, 971 P.2d 1227. In *Benson* the Court considered whether a prior decision (*Richardson v. Corvallis Public School District No. 1*, 286 Mont. 309, 950 P.2d 748 (1997)), which "clarified" the law concerning liability for accumulations of snow and ice, *id.* at ¶ 25, should be applied retroactively. In considering that question, and without discussion of Porter, Harper, Kleinhesselink, or Chaney, the Court applied the Chevron test. Thus, it appears that the Chevron test may be alive and well in Montana despite my analysis in *Klimek*.

¶25 In applying the three-prong Chevron test in *Benson*, the Court quoted from *Riley v. Warm Springs State Hosp.*, 229 Mont. 518, 521, 748 P.2d 455, 457 (1987):

Three factors are considered before adopting a rule of nonretroactive application of a judicial decision. *Jensen v. State, Dept. of Labor and Industry* (Mont. 1984), 689 P.2d 1231, 1233, 41 St.Rep. 1971, 1973, *aff'd after remand*, 718 P.2d 1335, 43 St.Rep. 621. First, the ruling to be applied nonretroactively must establish a new principle of law either by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed. Next, the new rule must be examined to determine whether retroactive application will further or retard its operation. Third, the equity of retroactive application must be considered.

Benson at 275, 971 P.2d at 1232, quoting from *Riley* at 521, 748 P.2d at 457.

¶26 Applying the three factors in the present case does not avail Liberty since they clearly require retroactive application of the decision in *Broeker*. Unlike *Haag* and *Montana Horse*, *Broeker* did **not** overrule a prior precedent. *Broeker* may have been a case of first impression, but it involved garden variety statutory interpretation. The Supreme Court, as did this Court, held that the statute was clear on its face, thus Liberty can hardly argue that the result was "not clearly foreshadowed." Factor one has not been met.

¶27 With respect to factor two, retroactive application of the *Broeker* decision will further its operation. As noted in the previous paragraph, *Broeker* involved a garden variety statutory interpretation. The insurer in *Broeker* and, apparently, in this case, interpreted the statute incorrectly. To deny retroactive application would reward those insurers for their misinterpretation. Indeed, denying retrospective application would allow insurers to postpone the effect of a valid, clear statute simply by misinterpreting it.

¶28 Finally, there is no equitable reason to deny retroactivity to the *Broeker* decision. Please see my previous paragraph.

¶29 I therefore hold that the decision in *Broeker* is retroactive and applies to benefits due or paid prior to the decision.

Laches

¶30 In support of its laches argument Liberty cites from my opinion in *Cheetham v. Northwest Ins. Corp.*, 2001 MTWCC 65. While Liberty has correctly set out my citation and quotation of language from *Marriage of Hahn and Cladouhos*, 263 Mont. 315, 318, 868 P.2d 599, 601 (1994), it ignores other critical discussion in the opinion. The full discussion is as follows:

I still must consider Liberty's laches argument. The doctrine of laches is summarized in *Marriage of Hahn and Cladouhos*, 263 Mont. 315, 318, 868 P.2d 599, 601 (1994), as follows:

Section 1-3-218, MCA, provides that "[t]he law protects the vigilant before those who sleep on their rights." Laches is a concept of equity that can apply when a person is negligent in asserting a right, and can apply where there has been an unexplained delay of such duration or character as to render the enforcement of the asserted rights inequitable. *Fillner v. Richland* (1991), 247 Mont. 285, 290, 806 P.2d 537, 540. Each case must be determined on its own unique facts. *Fillner*, 806 P.2d at 540.

When a claim is filed within the time set by the statute of limitations, "the defendant bears the burden to show that extraordinary circumstances exist which require the application of laches." *Id.*, 263 Mont. at 319, 868 P.2d at 601. Liberty has not provided uncontroverted evidence of any extraordinary facts. It argues that had claimant given notice of his need for domiciliary care when that need arose, then it could have investigated the need. However, its denial of his claim effectively waived any right to contemporaneous notice. The doctrine of laches does not bar the present claim. [Emphasis added.]

¶31 Liberty has set out a number of facts which may make it difficult or impossible to identify some *Broeker* claimants, especially claimants paid benefits fifteen to twenty years ago. (Liberty's Omnibus Motion at 16-17.) The doctrine of laches may well apply to some claimants who cannot be readily identified. However, which claims are barred by the doctrine involves facts which require greater exploration. Liberty has not shown "extraordinary circumstances" that persuade me at this time to establish a cut-off date. I fully understand that it may be impossible or impractical to identify all claimants insured by Liberty to whom *Broeker* benefits may be payable, but we faced a similar hurdle in *Broeker*. In *Broeker* we adopted the best means available to identify some of the older claimants, including newspaper notices. It may turn out that some cut-off date is necessary, or that some sort of published notice with respect to older claims, is the best method for identifying older claims.

¶132 While Liberty has requested an evidentiary hearing to present evidence regarding its factual allegations, a hearing at this time is premature since there has not been a full opportunity for discovery. The Court has been proceeding on a cooperative basis without resort to formal discovery procedures, and progress has been made in determining how Broeker claimants can be identified. I expect that process will continue and that ultimately we will be able to make a determination concerning methods to identify Broeker claimants.

¶133 With respect to the individual claim of Miller in the present case, which dates back to as early as 1987, Liberty has failed to show extraordinary circumstances which would bar his claim. His present request for benefits is not barred by the statute of limitations and Liberty has failed to show how it has been prejudiced by his delay in seeking the additional benefits.

Res Judicata

¶134 The Court does not understand Liberty's res judicata argument. Liberty cites *Cole v. Greyhound Lines, Inc.*, 220 Mont. 503, 716 P.2d 611 (1986) and *Calcaterra v. Montana Resources*, 2001 MT 193, 32 P.3d. 674, as authority for the proposition that a claimant cannot "re-litigate a case after a Supreme Court decision has changed the law in a way the litigant believes would have allowed him to proceed on a claim that was barred under the old legal standard." (Liberty's Omnibus Motion at 15.) In the first place, Broeker did not "change the law." Second, *Cole* involved a prior judgment of this Court as to the benefits sought in the second action. The Supreme Court merely applied the well recognized rule that a prior judgement is final and may not be reopened even if the rule of law on which it was based has changed. 220 Mont. at 506, 716 P.2d at 613. *Calcaterra* reached the identical conclusion in a third-party action against an employer.

¶135 Certainly, the doctrine of res judicata applies to Broeker claims that have been previously litigated or which are encompassed in prior judgments of this Court. However, Liberty has not identified any prior judgment with respect to Miller which would bar his present claim. If it is arguing that Broeker claims by **other** Liberty claimants may be barred by prior court judgments, such claims have not been identified, so it is impossible at present to say which, if any, claims are in fact barred.

Motions to Dismiss Class Action

¶136 Liberty asks that the Court now rule on its two prior motions to deny claimant's request for class certification. As previously indicated, this Court does not intend to strictly adhere to class actions rules, however, it will look to the rules for guidance.

¶137 In considering whether a proceeding in the nature of a class action is appropriate, I again note that Liberty, as well as other insurers, owes claimants a direct duty to pay additional benefits. § 39-71-2203(2), MCA, and see also §§ 39-71-701 through 703, MCA.

The claimant in this case is seeking to enforce that duty on behalf of himself and other similarly situated claimants.

¶138 In looking at the rules governing class actions, I find nothing in them that persuades me to dismiss the class action request. Rule 23 of the Montana Rules of Civil Procedure provides in applicable part:

RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. *One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.*

(b) Class Actions Maintainable. *An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:*

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

**(c) Determination by Order Whether Class Action to Be Maintained--Notice--
Judgment--Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

....

¶39 Subsection (a) contains three requirements for class certification. The first - numerosity - may or may not be met. Without discovery or investigation, it is impossible to determine how many Liberty claimants are affected by the Broeker decision. The methods used to determine numbers of those claimants is likely to also identify the claimants. If numerous, then the numerosity test is met; if few, then they could be joined as additional parties. Either way, Liberty must pay them.

¶40 The second requirement - common questions of law or fact - is met. Broeker held as a matter of law that social security COLA's cannot be included in computing the social security offsets against total disability benefits. That holding extends to all claimants whose social security offset included COLA's. While some claimants otherwise entitled to Broeker benefits might not be entitled to them on account of prior adjudications or settlements, those claimants can be identified and omitted from any class.

¶41 The third requirement - typicality - is also met. Claimant in this action claims that his social security offset improperly included COLA's.

¶42 Finally, the fourth requirement - fair representation - is met. Liberty has advanced no good reasons why claimant's interest is any different than other claimant's entitled to Broeker benefits, or why he cannot fairly and adequately protect their interest.

¶43 Subsection (b) contains additional requirements for class certification. The requirements are three in number but are in the alternative, thus only one need be met. In this case subsection (b)(3) is met. The questions of law and fact common to claimants whose social security offset improperly included COLA's are identical. The re-computation of the offset, and computation of any additional benefits due claimants, are arithmetical

computations using standard formulas. All claims for additional benefits on account of Broeker are within the original and exclusive jurisdiction of this Court. Even though some claims may be complicated by other factors, such as prior settlements, those claims can be sorted out. See, e.g., *Murer v. State Compensation Ins. Fund*, 1998 MTWCC 13, Order Concerning Identification and Payment of Murer Benefits; *Murer v. State Compensation Mutual Ins. Fund*, 283 Mont. 210, 942 P.2d 69 (1997). Indeed, the agreement reached in Broeker following remand is a paradigm for identifying and paying Broeker benefits. A copy of the Broeker agreement is attached to this decision.

¶44 At this point, I do not certify a class or embrace the procedures that must be followed under Rule 23, Mont.R.Civ.P., once a class is certified, however, I find good cause to proceed with the identification of Liberty claimants entitled to Broeker benefits. The motions to dismiss are **denied**.

Motions to Compel and for a Protective Order

¶45 The Petitioner's Motion to Compel (Docket 22) and Liberty's Motion for Protective Order (Docket 19) relate to claimant's requests for production issued early on in this case. The requests relate to the identification of claimants whose benefits were effected by improper inclusion of COLA's when computing their social security offsets. Since the filing of the motions, the Court has met with the parties and worked out informal discovery aimed at gathering the information sought by claimant but without the burden of formal discovery. That process is ongoing. In light of the process, both motions are **denied** but without prejudice should matters reach an impasse at a later time.

Motion to Suspend

¶46 Liberty asks for a ruling on claimant's Motion to Suspend Decision on Insurer's Motion to Dismiss Class Allegations. (Docket 15.) The motion is moot in light of the rulings made herein.

Liberty's Motion to Compel

¶47 The next item is Liberty Mutual's Motion to Compel. (Docket 24.) This is an old motion and was followed by numerous Court conferences with counsel. It is not clear to me that the materials sought through the motion are needed or not already available to both parties. For that reason, I request both parties to inform me whether any of the materials are still at issue and why. Pending further information, I take no action on this motion.

Solicitation of Claims

¶48 Finally, I address a section of Liberty's Omnibus Motion which is entitled "Solicitation of Claims." In that section, Liberty cites the general rule that insurers and employers are "not required to solicit claims" or "advise a claimant of his/her rights under the Act." It quotes from *Devilin v. Galusha, Higgins & Galusha*, 202 Mont. 134, 138-39, 655 P.2d 979 (1982).

Devilin holds that the insurer and employer do not have a duty to solicit a written claim from a claimant. This case has nothing to do with filing of any claim. The claims at issue were filed. The question before the Court is simply whether Liberty paid the proper benefits.

ORDER

¶49 Pursuant to the foregoing discussion, the various motions are disposed of as follows:

¶49a The statutes of limitation motions and arguments are **denied**.

¶49b Liberty's request that Broeker be applied prospectively only is **denied**.

¶49c Liberty's laches defense is **denied without prejudice** to renewing the argument with respect to particular claims or particular types of claims.

¶49d Liberty's res judicata argument is incomprehensible. If it is arguing that prior adjudications bar particular claims, then those claims must be identified and addressed on an individual basis. Otherwise, the motion is **denied**.

¶49e Liberty's motion to dismiss claimant's request for class certification is **denied**, however, the Court is not bound by the technical class action rules set out in the Mont.R.Civ.P. A specific class is not certified at this time, rather the Court shall proceed on a more informal basis in an attempt to identify claimants due Broeker benefits.

¶49f The various motions to compel and for a protective order are **denied**.

DATED in Helena, Montana, this 7th day of February, 2003.

(SEAL)

Is\ Mike McCarter
JUDGE

c: Mr. Lawrence A. Anderson

Mr. Larry W. Jones

Submitted: May 3, 2002

Attached: Broeker Agreement

1. [Broeker v. State Compensation Mutual Ins. Fund, 275 Mont. 502, 914 P.2d 967 \(1996\)](#).

2. The Murer case has been the subject of three separate appeals. The appeals are reported in Murer I cited above, [Murer v. State Compensation Mutual Ins. Fund, 267 Mont. 516, 885 P.2d 428 \(1994\)](#) (Murer II), and [Murer v. State Compensation Mutual Ins. Fund, 283 Mont. 210, 942 P.2d 69 \(1997\)](#) (Murer III).