IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 47

WCC No. 2001-0300

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

MONTANA STATE FUND

Intervenor.

DECISION AND JUDGMENT REGARDING COMMON FUND ISSUES

AFFIRMED IN PART/REVERSED IN PART 06/07/05

Summary: In *Schmill v. Liberty Northwest Ins. Corp.,* 2003 MT 80, 315 Mont. 51, 67 P.3d 290, the Montana Supreme Court held that the reduction of benefits in indemnity benefits in proportion to non-occupational factors violated the equal protection clauses of the United States and Montana Constitutions. After the Remittitur, the petitioner's attorney claimed a lien for common fund attorney fees against all benefits payable as a result of that decision irrespective of the insurer liable for the benefits. Respondent, as well as Montana State Fund, which has intervened, contest the lien.

Held: The decision in *Schmill v. Liberty Northwest Ins. Corp.,* 2003 MT 80, 315 Mont. 51, 67 P.3d 290, is retroactive and created a common fund consisting of the additional benefits due claimants as a result of the decision. The common fund, however, is limited to claimants who are entitled to benefits from the respondent/insurer in this case (Liberty Northwest) and does not encompass claimants who may be entitled to additional benefits from other insurers. Petitioner's attorney is therefore entitled to attorney fees only with respect to those Liberty Northwest claimants who are entitled to *Schmill* benefits.

Topics:

> **Courts: Retroactivity of Decisions.** Montana decisions concerning retroactivity of judicial decisions are in conflict, however, the latest decision available to the Workers' Compensation Court as of June 1, 2004, indicates that Montana follows

the three part *Chevron* test regarding retroactivity rather than the *per se* rule of *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993).

Courts: Retroactivity of Decisions. *Schmill v. Liberty Northwest Ins. Corp.,* 2003 MT 80, 315 Mont. 51, 67 P.3d 290, is retroactive.

Attorney Fees: Common Fund. Where a party through active litigation creates, reserves, or increases a fund, others sharing in the fund must bear a portion of the litigation costs, including reasonable attorney fees.

Attorney Fees: Common Fund. In determining whether the common fund doctrine applies, a court must determine whether in fact a common fund has been created or preserved as a result of the petitioner's efforts.

Attorney Fees: Common Fund. Where the litigation pursued by the petitioner results in a decision establishing not only her entitlement to benefits but the entitlement of other claimants to similar benefits, the other claimants can be identified, and the additional benefits due those claimants are mathematically certain, a common fund exists and the petitioner is entitled to common fund fees from the benefitted claimants.

Attorney Fees: Common Fund. The common fund doctrine extends only to claimants who are insured by the insurer which is the respondent in the case which establishes the precedent giving rise to the common fund.

Attorney Fees: Common Fund. It is not enough that the petitioner in a workers' compensation case establishes a general principal of law applicable to other claimants, she must show that the litigation entitles similarly situated, identifiable claimants to specific monetary benefits.

Jurisdiction: Common Fund. The Workers' Compensation Court has jurisdiction to enforce common fund attorney fee liens.

Pleading: Attorney Fees. Since entitlement to common fund attorney fees arises only after the precedent giving rise to the common fund has been established, the attorney claiming the fees may seek them after the precedential decision and need not plead the request for fees in the original petition.

¶1 On June 22, 2001, this Court held that section 39-72-706, MCA (1989-1999), which provides for a reduction in indemnity benefits in proportion to non-occupational factors violated the equal protection clauses of the United States and Montana Constitutions. On April 10, 2003, the Montana Supreme Court affirmed that decision. *Schmill v. Liberty Northwest Ins. Corp.,* 2003 MT 80, 315 Mont. 51, 67 P.3d 290.

¶2 Following the decision of the Montana Supreme Court, the petitioner's attorney filed a notice of her intent to claim a twenty-five percent common fund attorney fee on all benefits due claimants as a result of the holding in *Schmill*. The claimed lien extends to all claimants irrespective of the insurer, a lien which I have previously characterized as a "global lien."

¶3 After several conferences with the Court, it was agreed that the parties and the Intervenor, Montana State Fund (State Fund), would prepare stipulated facts which would allow the briefing of the defenses raised by respondent to the claimed lien. The parties have filed their stipulated facts and present the following issues to the Court for resolution at this time:

> ¶3a Does the failure to request common fund fees or class certification in the pre-remand proceedings in *Schmill* bar the Petitioner from now requesting common fund fees or class certification?
>
> ¶3b Does the appellate decision in *Schmill,* 2003 MT 80, apply retroactively?
>
> ¶3c Does the appellate decision in *Schmill,* 2003 MT 80, create a common fund? If so, as a general matter, what claimants are encompassed by the common funds?
>
> ¶3d If a common fund is created as a result of the appellate decision in *Schmill,* 2003 MT 80, is the common fund limited solely to claimants insured by the named respondent, or does the fund encompass all claimants irrespective of their insurers?

(*See* Minute Entry No. 3426 *and* Judge McCarter's Memo of February 24, 2004.)

Stipulated Facts Regarding Liberty

¶4 For the limited purposes of resolving the issues presented above, the parties have stipulated to the following facts:

¶4a Liberty NW ("LNW"), wrote its first Montana workers' compensation policy in July of 1988.

¶4b As of August 25, 2003, LNW had a total of 31,794 claims in Montana.

¶4c As of October 16, 2003, LNW identified 909 occupational disease claims from the 31,794 total claims filed in Montana.

¶4d LNW's computer system is not able to identify whether apportionment was taken in any of the 909 occupational disease claims.

(Joint Statement Of Stipulated Facts, filed February 25, 2004 at 2.)

Stipulated Facts Regarding Montana State Fund

¶5 The State Fund and the petitioner in *Stavenjord v. State Compensation Insurance Fund,* WCC No. 2000-0207, have similarly entered into a Joint Statement of Stipulation of Facts, albeit with respect to common fund and retroactivity issues arising in that case. The facts, however, provide some insight into the identification of the State Fund claimants who may be entitled to *Schmill* benefits. I summarize the salient facts from that stipulation as follows:

> ¶5a Between July 1, 1987 and June 22, 2001, the State Fund utilized two different computer database systems to record basic claim information. It utilized the DB02, mainframe system until February 1997. Since February of 1997 it has used the CMS system.
>
> ¶5b Montana State Fund has run queries on both systems and identified 2,939 claims coded as occupational diseases arising on or after July 1987. It has also identified eighteen claims coded as injuries but which had payments coded as occupational disease benefits.
>
> ¶5c Some occupational disease claims may be coded erroneously. For the period of July 1, 1990 through June 30, 2002, an internal actuary for the State Fund identified 586 claims which were coded as injuries but where the nature of the reported injury may be consistent with an occupational disease.
>
> ¶5d Since July 1, 1995, all claim files have been maintained by optical imaging and are accessible by computer. Files closed prior to July 1, 1995, are stored on microfiche. Review of those files requires use of a microfiche reader and attached printer, and is time consuming. State Fund says:
>
> > Microfiche may be either copied to other microfiche or may be copied to paper by the State Auditor's Office. With its present staff, the maximum document production by the State Auditor's Office is about 600 pages per day and the average claim file is about 90 to 100 pages. MSF also has two machines that allow it to print paper copies from microfiche. With experienced operators and minimal equipment malfunction, it is reasonable to estimate each machine could produce an average of 100 pages per hour from microfiche to paper.

(Joint Statement Of Stipulated Facts filed February 27, 2004 at 3-4).

DISCUSSION

I. Failure to Request Common Fund Fees Prior to Pre-Remand

¶6 The original petition in this case did not request common fund fees or class certification. It was only after the Supreme Court affirmed my decision striking down section 39-72-706, MCA (1989-1999), that the petitioner's attorney, for the first time, gave

notice of her intent to claim a common fund lien. Respondent (hereinafter "Liberty") objects to notice of a lien, urging that it is untimely and is barred by the doctrine of *res judicata*. It further argues that the Workers' Compensation Court lacks jurisdiction to award common fund fees and that allowing such fees at this late date would violate its procedural due process rights.

A. Jurisdiction to Award Common Fund Fees

¶7 Liberty's jurisdictional argument is premised on language in section 39-71-2905, MCA, which says:

The penalties and assessments allowed against an insurer under chapter 71 are the exclusive penalties and assessments that can be assessed by the workers' compensation judge against an insurer for disputes arising under chapter 71.

Its reliance on the language is misplaced. Common fund fees are not assessed "against an insurer." The fees are paid by claimants. *Murer v. State Compensation Ins. Fund,* 283 Mont. 210, 222-23, 942 P.2d 69, 76-77 (1997).

¶8 The role of the Workers' Compensation Court in common fund cases is to *enforce* the attorney's lien for common fund fees. Such enforcement is within the well-established jurisdiction of the Court. Section 39-71-2905, MCA, gives the Workers' Compensation Court exclusive jurisdiction over all disputes relating to benefits. Application of the lien requires a determination of which claimants are due additional benefits, as well as the amount of benefits due.

¶9 Moreover, the Supreme Court long ago held that the jurisdiction of the Workers' Compensation Court extends to ancillary matters, including enforcement of attorney fee liens. In *State ex rel. Uninsured Employers' Fund v. Hunt,* 191 Mont. 514, 519, 625 P.2d 539, 542 (1981), the Court pointed out that "the history of the court and the statute providing exclusive jurisdiction in the court indicate that the jurisdiction of the court goes beyond that minimum whenever the dispute is related to benefits payable to a claimant." The Court went on to say:

> Although the Workers' Compensation Court is not vested with the full powers of a District Court, it nevertheless has been given broad powers concerning benefits due and payable to claimants under the Act. It has the power to determine which of several parties is liable to pay the Workers' Compensation benefits, or if subrogation is allowable, what apportionment of liability may be made between insurers, and other matters that go beyond the minimum determination of the benefits payable to an employee.

Id. It then held that the Court had jurisdiction to entertain and adjudicate a petition filed by the purported employer of an injured employee seeking a determination that the claimant was an independent contractor, not an employee.

¶10 In *Kelleher Law Office v. State Compensation Ins. Fund,* 213 Mont. 412, 691 P.2d 823 (1984), the Supreme Court held that the Workers' Compensation Court's ancillary jurisdiction extended to the enforcement of an attorney fee lien against benefits paid by an insurer. Thus, the Workers' Compensation Court clearly has jurisdiction to enforce the lien claimed by the petitioner in this case.

B. Timeliness, *Res Judicata* , Due Process and Estoppel Arguments

¶11 Liberty challenges the right of the petitioner to seek common fund fees based on arguments concerning timeliness, *res judicata*, due process, and estoppel. I considered and rejected the identical arguments in *Flynn v. State Compensation Ins. Fund,* 2003 MTWCC 55. In *Flynn* I held that the petitioner's failure to request common fund attorney fees in her petition does not preclude her from demanding such fees after an adjudication on the merits of her claim. After reviewing Liberty's arguments, I am still persuaded that my discussion and holding in *Flynn* were sound: I reaffirm and incorporate that holding and discussion. Accordingly, I find that the petitioner's assertion of a common fund lien is not barred.

II. Retroactivity

¶12 Liberty argues that *Schmill* should be applied prospectively only. Prospective application would defeat the request for common fund attorney fees since no common fund exists unless the decision is applied retroactively.

¶13 Prior to *Porter v. Galarneau,* 275 Mont. 174, 911 P.2d 1143, 1150 (1996), the Montana Supreme Court applied the three-part test articulated by the United States Supreme Court in *Chevron Oil C. v. Huson,* 404 U.S. 97 (1971), to determine whether one of its decisions should be applied retroactively. The *Chevron* test was adopted in *LaRoque v. State,* 178 Mont. 315, 583 P.2d 1059 (1978).[(1)]

¶14 However, in 1994 the United States Supreme Court repudiated the *Chevron* test and adopted a *per se* rule of retroactivity for its decisions. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993). The Montana Supreme Court appeared to have followed suit in 1996 when it decided *Porter v. Galarneau,* 275 Mont. 174, 911 P.2d 1143 (1996). In *Porter* the retroactivity issue involved the statute. The Court noted that several of its prior decisions appeared to require retroactive application of statutes. However, the Court distinguished between retroactively applying statutes, which is generally condemned, and retroactively applying judicial decisions. With regard to judicial decisions, it said, "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.

¶15 Subsequent Montana Supreme Court decisions concerning the retroactivity of judicial decisions are inconsistent, making it nearly impossible for an inferior Court to determine whether the *Chevron* test or the *per se* rule of *Harper* applies. Some of the cases resolve retroactivity issues by citing *Porter* and *Harper,* others invoke the *Chevron* analysis without mentioning *Harper* or *Porter*.

¶16 The first two cases of interest are *Chaney v. U.S. Fidelity and Guaranty,* 276 Mont. 513, 917 P.2d 912 (1996) and *Kleinhesselink v. Chevron U.S.A.,* 277 Mont. 158, 920 P.2d 108 (1996). In *Chaney* the Supreme Court retroactively applied its decision in *Haag v. Montana Schools Group Ins. Authority,* 274 Mont. 109, 906 P.2d 693 (1995). *Haag* had overruled a prior decision - *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 did not constitute an automatic acceptance of the claim. The situation presented in *Chaney* was thus similar to the one presented in the early case of *Montana Horse Products Co. v. Great Northern Ry. Co.,* 91 Mont. 194, 7 P.2d 919 (1932), a case in which the Montana Supreme Court declined to retroactively apply a decision overruling a prior precedent. However, the Court in *Chaney* did not discuss retroactivity and simply applied *Haag*. I do note that the *Chaney* case was in litigation at the time *Haag* was decided, which may explain why retroactivity was not addressed.

¶17 In *Kleinhesselink*, however, the Court expressly addressed retroactivity of its decision in *Stratemeyer v. Lincoln County,* 276 Mont. 67, 915 P.2d 175 (1996). Citing *Porter,* it said, "We give retroactive effect to judicial decisions." *Id*. at 111. There was no further discussion.

¶18 On May 5, 1998, the Supreme Court issued yet another decision in which it stated flatly that it applied judicial decisions retroactively. That case was *State v. Steinmetz,* 1998 MT 114, ¶ 10, 288 Mont. 527, 961 P. 2d 95. It cited *Kleinhesselink* and *Porter* as authority for its statement.[(2)]

¶19 As in *Chaney,* both the *Kleinhesselink* and *Steinmetz* cases were in litigation at the time the retroactively applied precedents were decided. However, there was no indication in either *Kleinhesselink* or *Steinmetz* that the statements concerning retroactive application were limited to cases already in litigation. Both cases cited to *Porter.* The statement in *Porter* cites to *Harper,* which establishes a *per se* rule of retroactivity of judicial decisions.

¶20 But four months after deciding *Steinmetz,* the Supreme Court, without any discussion or even citation to the above line of cases, invoked the *Chevron* test to determine whether one of its precedents should be applied retroactively. In *Benson v. Heritage Inn, Inc.,* 1998

MT 330, 292 Mont. 268, 971 P.2d 1227, decided September 17, 1998, the Supreme Court was asked to determine whether a prior decision[3] concerning liability for accumulations of snow and ice applied retroactively. Although it concluded that the prior decision should be applied retroactively, it did so only after weighing the *Chevron* factors. The decision in *Benson* does not cite *Porter*, *Harper, Kleinhesselink*, or *Steinmetz*. But, as I noted in my recent decision in *Flynn v. State Compensation Ins. Fund,* 2003 MTWCC 55, that may have been because neither the district court nor the parties to the appeal cited those cases:

> ¶22 That said, I also note that *Benson* did not consider or reject *Harper*. I have reviewed the appellate briefs in *Benson*. It appears from the briefs that the district court applied the three-prong *Chevron* test in its decision (which was affirmed). In addition, on appeal only one party - the plaintiff - cited any law or cases concerning retroactive application of judicial decisions, and the law cited was the *Chevron* test as articulated in *Riley v. Warm Springs State Hospital,* 229 Mont. 518, 748 P.2nd 455 (1987). *Riley* and the *Chevron* test were then cited by the Court in the *Benson* decision. I further note that in another case decided the same year as *Benson* the Supreme Court reiterated its statement, without discussion, that "[w]e give retroactive effect to judicial decisions." *State v. Steinmetz,* 1998 MT 114, ¶ 10, 288 Mont. 527, 961 P.2d 95. Given these facts, it is not at all clear to this Court that the *Benson* court intended to reject the blanket rule of *Harper* in favor of the *Chevron* test or even considered the issue. Indeed, my sense of the matter is that when squarely confronted with the issue the Supreme Court will adopt a blanket rule of retroactivity with respect to judicial decisions.

Flynn at ¶ 22.

¶21 The last, and most recent decision concerning retroactivity is *Ereth v. Cascade County,* 2003 MT 328, 318 Mont. 355, 81 P.3d 463, decided December 2, 2003. The question in that case was whether to retroactively apply a decision concerning the date on which the statute of limitations commences running in a legal malpractice case involving a public defender. The statute of limitations question was one of first impression and the Court's decision barred the claim at issue, however, the Court decided not to apply its decision retroactively. In doing so, it applied a three-factor analysis from *Riley v. Warm Springs State Hospital,* 229 Mont. 518, 748 P.2d 455 (1987). The three factors in *Riley* are the *Chevron* factors which were embraced in *LaRoque*.[4]

¶22 *Ereth* does not cite or discuss *Porter*, *Harper, Kleinhesselink*, or *Steinmetz*. As with *Benson*, I reviewed the appellate briefs filed in *Ereth* and, as with *Benson,* the briefs do not cite any of those cases. Indeed, the retroactivity issue was not even argued in the briefs.

¶23 In *Flynn*, 2003 MTWCC 55*, ¶ 22,* I said that "my sense of the matter is that when squarely confronted with the issue the Supreme Court will adopt a blanket rule of retroactivity with respect to judicial decisions." *Flynn*, however, was decided prior to *Ereth*.

¶24 If there is a way to explain and reconcile the Supreme Court's renewed embrace of the *Chevron* factors with *Harper, Porter*, *Kleinhesselink*, or *Steinmetz*, I am unable to find it. It appears that in *Ereth* the Supreme Court *sua sponte* considered the retroactivity issue and affirmatively embraced the *Chevron* test of retroactivity, thus it is unlikely that the Court simply overlooked *Harper, Porter*, *Kleinhesselink*, or *Steinmetz* even though they are not mentioned. Since *Ereth* is the Supreme Court's latest pronouncement on the issue, I can only conclude that there is no *per se* rule of retroactivity of judicial decisions in Montana and that retroactivity must be determined on a case-by-case basis by employing the *Chevron* factors.

¶25 The *Chevron* factors, and the weight which must be given to them, are summarized in *Ereth* as follows:

> If nonretroactive application is sought, "[f]irst, 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." Riley, 229 Mont. at 521, 748 P.2d at 457. . . .

2003 MT 328, ¶ 29.

¶26 At its core, the first factor involves surprise regarding the precedent at issue. If the precedent is a surprise, then the factor favors prospective application.

¶27 In *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 777 P.2d 862 (1989), the Supreme Court considered a broad equal protection challenge to "the State's classification of diseased workers under the Occupational Disease Act [ODA]." 237 Mont. at 337, 777 P.2d at 865. The Court rejected the challenge.

¶28 However*, Eastman* involved the pre-1987 version of the ODA; in 1987 the legislature substantially amended the definitions of injury and occupational disease. Those changes caused the Supreme Court in *Henry v. State Compensation Ins. Fund,* 1999 MT 126, 294 Mont. 449, 982 P.2d 456, to conclude that it was unconstitutional to deny workers suffering from occupational diseases the rehabilitation benefits afforded to injured workers under the Workers' Compensation Act (WCA). Certainly as of June 3, 1999, the date *Henry* was decided, it should have come as no surprise that other sections of the ODA which provided benefits inferior to those available under the WCA would be declared unconstitutional. Indeed, in my decisions in both *Schmill* and in *Stavenjord v. State Compensation Ins.*

Fund, 2001 MTWCC 25, I found that *Henry* clearly required a determination that other sections of the ODA are unconstitutional. In *Stavenjord*, I said:

> ¶7 The Supreme Court initially distinguished Eastman on the ground that the statute challenged in Henry involved "the wholesale denial of the same benefits to another similarly situated group," whereas Eastman had involved a mere difference in the degree of benefits available under the two acts. The Henry Court's subsequent analysis, however, makes it impossible to limit its decision to denials of benefits. The Court goes on to say:
>
> > ¶ 43 . . . Eastman filed his claim for compensation benefits in 1985, prior to the 1987 amendments to the WCA and the ODA. As pointed out earlier, after the 1987 amendments to the WCA and the ODA, the definitions of "injury" and "occupational disease" no longer focus on the nature of the medical condition, but rather focus on the number of work shifts over which the worker incurs an injury. Thus the historical justification for treating workers differently under the WCA and the ODA no longer exists. Indeed, the entire underpinnings of Eastman have evaporated, rendering its continued validity questionable.
> >
> > ¶44 **In sum, we can see no rational basis for treating workers who are injured over one work shift differently from workers who are injured over two work shifts.** Simply put, a herniated disc is a herniated disc. Rehabilitation benefits promote the policy of early return to work for both classes of workers. [Emphasis added.]

295 Mont. at 459-60. The bolded language is comprehensive and unequivocal. I am bound by it. I cannot qualify or limit it.

Stavenjord, 2001 MTWCC 25, ¶ 7. In my *Schmill* decision, 2001 MTWCC 36, I put it this way:

> ¶5 In applying the equal protection principal set out in *Henry*, I see no possible way of distinguishing the statute at issue in this case from the statutes struck down in *Henry* and *Stavenjord*. *Henry* held that there is no rational basis for paying workers entitled to compensation under the ODA less than they would receive if their condition arises under the WCA. Applying that principle to this case, the apportionment provision does not pass constitutional muster since it results in less benefits to workers whose conditions fall under the ODA than to those whose conditions fall under the WCA. I conclude the provision is unconstitutional and unenforceable. Therefore, Liberty is liable for the full amount of the impairment award without reduction based on non-occupational factors.

Schmill, 2001 MTWCC 36, ¶ 5. Thus, at least as of the date of the *Henry* decision the result in this case was clearly foreshadowed.

¶29 The more difficult questions are whether the result in *Schmill* is surprising prior to the *Henry* decision and, even if it is, whether retroactivity can be restricted to the period after June 3, 1999, when *Henry* was decided.

¶30 The most significant fact favoring a finding of surprise is the decision in *Eastman,* which expressly rejected a constitutional challenge to the ODA. However, two factors undermine any reliance on *Eastman*. First, the law changed after *Eastman* was decided and the change undermined the traditional rationale cited by the Supreme Court in *Eastman* for maintaining the distinctions between the two acts. *See Henry* at ¶ 43. The Supreme Court found *Eastman* to be "readily distinguishable" in considering the constitutional challenges to the ODA as amended in 1987. *Henry* at ¶ 42.
Second, *Eastman* was a four to three decision, a fact that indicates the equal protection challenge even under pre-1987 law raised serious constitutional issues and created a close question. Given that fact, it is even less surprising that a different result was reached after the ODA was amended in 1987.

¶31 Certainly, after adoption of the 1987 amendments to the ODA, the continued constitutionality of the ODA's benefits scheme was reasonably debatable. In that light, there may have been some surprise to those relying on *Eastman,* but the surprise should not have been great. Using a "surprise scale" analogous to the pain scale often used in workers' compensation cases involving pain, I estimate the level of surprise at a three out of ten, where zero is no surprise and ten is being blind-sided. The decision in *Henry* was only mildly surprising. I think this level of surprise cuts in favor of retroactivity, or at least renders the first factor neutral, which in turn favors retroactivity.

¶32 The second factor I must consider is whether retroactive application "will further or retard" the application of the decision in *Schmill*. I note initially that the factor does not simply ask whether the retroactive application will promote the decision but in the alternative whether it will retard it.

¶33 It is difficult for me to conjure up a case for a determination that retroactive application will retard application of the *Schmill* decision and I note that neither Liberty nor the State Fund have argued that it will. Perhaps it could be argued that retroactive application will cause the legislature to amend the WCA and ODA statutes to diminish benefits in the future, but it could do so even if the decision is applied prospectively. Perhaps it could also be argued that retroactive application would so undermine the financial positions of Montana insurers that the benefits of all claimants might be affected - a bankruptcy scenario, but no such dramatic scenario has been painted. There is simply no basis for determining that retroactive application of the decision will undermine application of the rule, therefore, at best this factor is neutral and such neutrality favors retroactivity.

¶34 State Fund's reliance on the determination in *Ereth* as supporting a prospective application in this case is misplaced. In *Ereth* the Supreme Court's finding of prospectivity

was based on the fact that a retroactive application would not assist others in the future in calculating the statute of limitations at issue in that case. In the present case, giving retroactivity to the *Schmill* decision will vindicate the rights of numerous other claimants who have been unconstitutionally denied benefits that should have been paid to them. Thus, factor two favors retroactivity.

¶35 Finally, I consider the equity of retroactive application. In *Ereth* the Supreme Court's preference for prospective application was based on the "longstanding preference for allowing 'resolution of claims on their merits rather than the arbitrary bar of the statute of limitations.'" ¶ 30. In this case, that same sort of consideration favors retroactive application since retroactive application enforces the substantive constitutional rights of the affected claimants.

¶36 Liberty and State Fund argue that the equities favor them because of administrative hardships and costs in identifying and paying the claimants entitled to *Schmill* benefits. Certainly, there will be hardships and costs, however, insurers are paid premiums to assume risks associated with the coverages they provide. The risks they assume include the risk that their actuarial assumptions may not prove accurate, whether because of unusual catastrophic disasters such as Hurricane Andrew or miscalculations concerning the law.

¶37 Liberty has not offered any evidence of the financial impact of applying *Schmill* retroactively, however, the State Fund, which is the largest insurer in the State and an intervenor in this case, has. It estimates its liability for retroactive *Schmill* benefits at $1.4 to $1.9 million. (State Fund's Opening Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees and Global Lien Of Schmill's Counsel at 14.) The State Fund has also stipulated in *Stavenjord* that it has declared dividends to its policy holders of nearly $13 million for fiscal years 2001 through 2003, a point that the petitioner has hammered home in arguing the equitability of applying *Schmill* retroactively. ([Stavenjord] Joint Statement of Stipulated Facts at ¶ 77.) State Fund justifies its dividends as follows:

> Dividends may be declared when surplus is at an adequate level. Dividends are paid to policyholders who produced favorable results and they provide policyholders with incentives to provide a safe workplace for employees and to return injured workers to employment as soon as possible. Dividends are based on past performance and have no relationship to the forces driving future pricing.

(*Id*. at ¶ 76.) *Henry* put insurers on notice that assumptions concerning the constitutionality of the ODA were suspect; the uncertainty concerning the constitutionality of the ODA certainly could have been taken into consideration in setting and determining the adequacy of reserves prior to declaring dividends. State Fund's arguments justifying its declaration of dividends is therefore unavailing

¶38 As to administrative costs and time in identifying and paying *Schmill* claimants, I have no doubt that there will be significant cost and time involved. However, no facts have been presented that the efforts and costs involved in this case will be any greater than in *Murer*, *Broeker* or *Rausch*. Moreover, most claimants potentially entitled to benefits have already been identified by computer searches, even if those searches may not have identified every single claimant. The fact that some claimants may have been omitted is no justification for denying all claimants benefits. As to identifying the actual claimants whose benefits have been apportioned, claimants receiving benefits equivalent to statutory maximums can be immediately tossed out of the claimant pool, further reducing it. As to file review, copying and review of entire files is unnecessary. Initial letters accepting liability and fixing the benefits rate should indicate whether benefits were apportioned. Those letters should be readily accessible at the beginning of the claims files. Computation of underpayments is then a simple matter of paying the claimant benefits equal to the percentage apportioned to non-occupational factors. Thus, if a claimant has been paid $60,000 over the period of the claim based on a 40% apportionment to non-occupational factors, the amount due the claimant would simply be $40,000 since the $60,000 represents 60% of the benefits due.

¶39 Thus, I conclude that the *Chevron* factors clearly favor retroactivity and determine that *Schmill* is retroactive not just to the date of the *Henry* decision but to July 1, 1987.

¶40 My conclusion in this regard is fortified by the Supreme Court's decision in *Rausch v. State Compensation Ins. Fund,* 2002 MT 203, 311 Mont. 210, 54 P.3d 25. That case involved the entitlement of permanently totally disabled workers to impairment awards under the 1991 and 1997 versions of the WCA. I held that impairment awards are not available to permanently totally disabled claimants who at no time had been only partially disabled. The Supreme Court reversed, interpreting the applicable statutes as providing for such awards. In addition, the Court held that the petitioners' attorneys are entitled to common fund attorney fees, a holding that implicitly applied the decision retroactively to all permanently totally disabled claimants injured from July 1, 1991 onward, at least to the date of the decision. Its decision in this case must be contrasted with the Court's decision in *Ereth*, a case in which the Court appears to have *sua sponte* considered the retroactivity question. I must conclude from these two decisions that if the Court had any doubts about the retroactivity of its *Rausch* decision it would have addressed the issue. Thus, at least implicitly, *Rausch* favors retroactive application of decisions which benefit claimants in workers' compensation cases.

¶41 Finally, State Fund argues that retroactive application of *Schmill* would impair the contracts between the State Fund and its policy holders because State Fund justifiably relied on the apportionment statutes when issuing policies. (State Fund's Opening Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees and Global Lien of Schmill's Counsel at 16.) The argument is without merit. "Laws existing at the date a

contract is executed are as much a part of the contract as if set forth therein." *Neel v. First Federal Sav. and Loan Assoc. of Great Falls,* 207 Mont. 376, 386, 675 P.2d 96, 102 (1984). Moreover, "[p]arties cannot privately waive statutes enacted to protect the public in general." *Phoenix Physical Therapy v. Unemployment Ins. Div., Contributions Bureau,* 284 Mont. 95, 104, 943 P.2d 523, 528 (1997), and the same is true regarding constitutional protections. The constitutions of the State of Montana and the United States are part of the law to which all contracts are subject. Thus, insurance contracts are subject to constitutional rights of claimants.

III. Common Fund

¶42 The common fund doctrine is an equitable, judicially created doctrine with a long history, both in federal and Montana law. The seminal federal case is *Trustees v. Greenough*, 105 U.S. 527, 528-29 (1881), a case which I summarized as follows in my decision in *Murer v. State Compensation Ins. Fund,* 1995 MTWCC 39A-1:

> Francis Vose was the plaintiff in *Greenough*. He owned a large number of bonds issued by the Florida Railroad Company. He brought an action on behalf of himself and other bondholders seeking to preserve trust assets, consisting of large real estate holdings, which had been pledged for the payment of the bonds. Payments on the bonds were in arrears and Vose charged that the trustees "were wasting and destroying the [trust] fund by selling at nominal prices the lands by the hundred thousand and even million acres, and failed and refused to provide for the payment of interest or sinking fund on the bonds." *Trustees v. Greenough*, 105 U.S. 527 (1881). The litigation was hugely successful, but expensive for Vose. "[A] large amount of the trust fund was secured and saved" and dividends were paid to the bondholders. *Id*. at 529. Vose, as could be expected, was resentful of his fellow, freeloading bondholders, who had reaped the rewards of his tenacity and his financial investment in the lawsuit. He petitioned the Court for litigation expenses, including attorney fees, requesting that his expenses be paid from the recovered funds. (*Id*. at 529-31.) The lower court granted his petition. His fellow, but ungrateful, bondholders appealed to the United States Supreme Court.
>
> In its landmark decision the United States Supreme Court held that Vose was entitled to his "reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit." (*Id*. at 537.) The Court indicated that although Vose was not a trustee of the property "he at least acted the part of a trustee in relation to the common interest." The Court recited the "general principle that a trust estate must bear the expenses of its administration." After noting that Vose had brought the suit not only on his own behalf "but in behalf of all other bondholders having an equal interest in the fund", and that the other bondholders would be unjustly enriched if the Court were to deny him his litigation expenses, the Court held that

> the other bondholders "ought to contribute their due proportion of the expenses which he has fairly incurred." *Id*. at 532. It then said, "To make them [the expenses] **a charge upon the fund** is the most equitable way of securing such contribution." *Id* (emphasis added). The concept of "charging the fund" rather than the individuals benefitting from the lawsuit became known as the "common fund doctrine."

(Id. at 3.)

¶43 Montana recognized the common fund doctrine in *Hardware Mutual Casualty Co. v. Butler,* 116 Mont. 73, 148 P.2d 563 (1944), in a negligence action brought by the widow and personal representative of a worker killed in an automobile accident. The workers' compensation insurer for the employer paid workers' compensation benefits and was by statute subrogated to a portion of the recovery in the negligence action. The attorney for the widow claimed a lien for attorney fees against the proceeds paid to the insurer. The Supreme Court upheld the lien even though there was no contract between the attorney and the insurer. In doing so, it cited the common fund doctrine:

> [W]here as here, one litigant has borne the burden and expense of successful litigation which has created and brought into court a fund in which others share with him, it is only just and equitable that those who share in the benefits should contribute to the payment for the services of the attorney whose labors resulted in the creating or preserving of such common fund.

148 P.2d at 568.

¶44 In *Means v. Montana Power Co.,* 191 Mont. 395, 625 P.2d 32 (1981), the Supreme Court reaffirmed the doctrine:

> The "common fund" concept provides that when a party through active litigation creates, reserves or increases a fund, others sharing in the fund must bear a portion of the litigation costs including reasonable attorney fees. The doctrine is employed to spread the cost of litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone and the "stranger" (i.e., passive) beneficiaries do not receive their benefits at no cost to themselves.

191 Mont. at 403, 625 P.2d at 37 (quoted in *Murer v. State Compensation Ins. Fund,* 283 Mont. 210, 222, 942 P.2d 69, 76 (1997)).

¶45 For the common fund doctrine to apply, three elements must be satisfied:

> First, a party (or multiple parties in the case of a consolidated case) must create, reserve, increase, or preserve a common fund. This party is typically referred to as the active beneficiary. Second, the active beneficiary must incur legal fees in

> establishing the common fund. Third, the common fund must benefit ascertainable, non-participating beneficiaries.

Rausch, 311 Mont. at 224, 54 P.3d at 35.

¶46 Under criteria one and three, there must in fact be a common fund which benefits ascertainable, non-participating beneficiaries. "The fund must be an existing, identifiable monetary fund or benefits to which all of the beneficiaries maintain an interest." *Mountain West Farm Bureau Mutual Ins. Co. v. Hall,* 2001 MT 314, ¶ 15, 308 Mont. 29, 38 P.3d 825. In *Helena Elementary School Dist. No. 1 v. State,* 236 Mont. 44, 769 P.2d 684 (1989), the Supreme Court sustained a district court determination that no common fund was created. That case involved a challenge to state statutes for the funding of schools, statutes which the district court and Supreme Court held unconstitutional. The case, however, did not determine any specific entitlements as among school districts or mandate any specific funding scheme. The Court held that the lack of any specific entitlement precluded a finding that a common fund existed, thus attorney fees were denied. Thus, it is not enough that the petitioner in this workers' compensation case establishes a general principal of law applicable to other claimants, she must show that the litigation entitles similarly situated, identifiable claimants to specific monetary benefits.

¶47 In determining whether a common fund exists in the present case, I have initially considered prior workers' compensation cases in which doctrine has been applied.

¶48 In *Murer v. State Compensation Ins. Fund,* 283 Mont. 210, 222, 942 P.2d 69, 76 (1997) (*Murer III)*, the Supreme Court held that the doctrine applied where the petitioner had successfully argued in a prior case, *Murer v. State Compensation Ins. Fund,* 267 Mont. 516, 885 P.2d 428 (1994) (*Murer II*), that 1987 and 1989 caps on benefits were temporary, not permanent. As a result of the litigation, other claimants injured between July 1, 1987 and June 30, 1991, became entitled to additional benefits. 283 Mont. at 221, 942 P.2d at 75. In finding a common fund, the Court found that

> claimants [petitioners] established a vested right on behalf of the absent claimants to directly receive immediate monetary payments of past due benefits underpayments; and based on the establishment of those vested rights, the State Fund became legally obligated to make the increased benefits payments.

Id. In *Murer* the identity of the benefitted claimants was defined, consisting of those claimants injured during the time frames of the temporary caps and receiving benefits after the expiration of the caps. Moreover, the additional benefits due each beneficiary were mathematically certain.

¶49 The situation in *Rausch* was similar. The benefitted claimants consisted of the permanently totally disabled claimants who had not been paid impairment awards. The benefits due each claimant was readily calculated by multiplying the percentage

impairment rating by 350 weeks and then multiplying the number of weeks by the claimant's permanent partial disability rate. While disputes might arise concerning the impairment rating, the statutory formula for determining the benefits due was straightforward and certain, and impairment ratings are rarely litigated.[(5)]

¶50 Two other cases involving common fund liens have been resolved by agreement of the parties with the oversight of this Court. Those cases involved the decisions in *Broeker v. State Compensation Ins. Fund,* 275 Mont. 502, 914 P.2d 967 (1996) and *Flynn v. State Compensation Ins. Fund,* 2002 MT279, 312 Mont. 410, 60 P.3d 397. *Broeker* held that the State Fund improperly included cost-of-living increases in computing the social security offset of some claimants. *Flynn* held that a workers' compensation insurer which takes a social security offset must share equally in attorney fees paid to secure the social security disability benefits which give rise to the offset. While the agreements in those cases do not establish precedents, they are consistent with the determinations in *Murer III* and *Rausch*. In both cases, the claimants who benefitted from the decision were narrowly defined. In both cases, the additional benefits were mathematically certain.

¶51 This case is similar to the four discussed above. The benefitted claimants are defined, consisting of claimants injured after June 30, 1987, whose benefits have been reduced pursuant to section 39-72-706, MCA (1987-2003). The additional benefits due those claimants are mathematically certain, amounting the difference between the benefits to which they were entitled without the reduction for apportionment and the benefits actually paid. I therefore find that criteria one and three of the common fund doctrine are met.

¶52 Criteria two is also met: The petitioner in this case incurred legal fees in establishing her entitlement and the entitlement of the other beneficiaries.

¶53 I therefore hold that the petitioner's attorney is entitled to common fund fees from claimants who benefit from the decision in *Schmill v. Liberty Northwest Ins. Corp.,* 2003 MT 80, 315 Mont. 51, 67 P.3d 290.

IV. Global Lien

¶54 In *Ruhd v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 38, I held that the common fund doctrine extends only to the claimants whose benefits are paid by the respondent insurer. I rejected the claim that the petitioner's attorney is entitled to a fee from all the claimants who may benefit from the precedent irrespective of the insurer liable for the benefits. While my decision in *Ruhd* has been appealed to the Supreme Court, I find no reason to reconsider or deviate from my decision. I therefore determine that petitioner's lien extends only to claimants whose benefits are paid by Liberty.

JUDGMENT

¶55 The decisions of this Court in *Schmill v. Liberty Northwest Ins. Corp.,* 2001 MTWCC 36, and the Supreme Court in *Schmill v. Liberty Northwest Ins. Corp.,* 2003 MT 80, 315 Mont. 51, 67 P.3d 290, are retroactive.

¶56 The decisions of this Court in *Schmill v. Liberty Northwest Ins. Corp.,* 2001 MTWCC 36, and of the Supreme Court in *Schmill v. Liberty Northwest Ins. Corp.,* 2003 MT 80, 315 Mont. 51, 67 P.3d 290, created a common fund consisting of the difference between the reduced benefits paid by Liberty pursuant to section 39-72-706, MCA, to the claimants suffering occupational diseases since June 30, 1987, and the amount of the benefits payable to those claimants without the reduction.

¶57 The petitioner's attorney is entitled to attorney fees with respect to the benefitted claimants but only as to those claimants whose benefits are the responsibility of Liberty.

¶58 The Court reserves jurisdiction to oversee the identification of the claimants entitled to additional benefits from Liberty as a result of this decision; to determine the amounts payable to those claimants; and to fix the amount of attorney fees due the petitioner's attorney.

¶59 Any party has twenty days within which to request reconsideration or amendment of this decision.

¶60 This Decision and Judgment Regarding Common Fund Issues is certified as final for purposes of appeal.

DATED in Helena, Montana, this 4th day of June, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Laurie Wallace (U.S. Mail and FAX)
Mr. Larry W. Jones (U.S. Mail and FAX)
Mr. Bradley J. Luck (U.S. Mail and FAX)
Mr. Rex Palmer (Courtesy Copy - FAX only)
Submitted: April 14, 2004

1. A more comprehensive history of Montana cases concerning retroactivity of judicial decisions is set out in *Miller v. Liberty Mutual Fire Ins. Co.,* 2003 MTWCC 6 and *Klimek v. State Compensation Ins. Fund,* WCC No. 9602-7492, Order and Partial Summary Judgment (October 11, 1996).

2. Petitioner also cites *Haugen v. Blaine Bank of Montana*, 279 Mont. 1, 926 P.2d 1364 (1996), as a case following *Porter* and *Harper*. While the discussion in that case favorably cited both *Porter* and *Kleinhesslink*, the discussion was in the context of the difference

between principles governing retroactivity of statutes and retroactivity of judicial decisions. The decision in Haugen involved application of a rule of civil procedure rather than application or interpretation of a statute or substantive rule of law.

3. *Richardson v. Corvallis Public School District No. 1*, 286 Mont. 309, 950 P.2d 748 (1997).

4. Riley cites *Jensen v. Montana Department of Labor and Industry,* 213 Mont. 84, 689 P.2d 1231 (1984), which in turn cites LaRoque and Chevron.

5. All decisions of the Workers' Compensation Court over the past ten years are reported on the Court's WEB site, http://wcc.dli.state.mt.us. I have not reviewed the decisions but doubt that more than five have involved disputes over impairment ratings. That is not to say that all disputes are litigated, certainly they are not.