IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 62

WCC No. 9602-7492

RICHARD C. KLIMEK

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

SONNY ADDINGTON

Employer.

ORDER AND PARTIAL SUMMARY JUDGMENT

Summary: Claimant alleged injury during employment on December 19, 1987. State Compensation Insurance Fund, the alleged insurer, conceded it did not accept or deny the claim within 30 days of receipt. Later, it denied the claim on the ground claimant was an independent contractor, not an employee. On November 21, 1995, the Montana Supreme Court decided *Haag v. Montana Schools Group Ins. Authority*, 274 Mont. 109, 906 P.2d 693 (1995), holding that an insurer that fails to accept or deny a claim within 30 days, as required by section 39-71-606(1), MCA, is liable for the claim as a matter of law. *Haag* reversed *Solheim v. Tom Davis Ranch*, 208 Mont. 265, 677 P.2d 1034 (1984), which held that failure to accept or deny within the time specified by the statute "does not automatically entitle a claimant to benefits." Here, the question presented on motions for summary judgment was whether Haag applied "retroactively" to a situation in which the claim was filed, and the insurer's failure to accept or deny within 30 days, occurred before Haag was decided.

Held: After extensive review of state and federal decisions relevant to the issue whether a court decision overturning a prior decision interpreting a statute should be given "retroactive" application, the WCC finds that *Chaney v. U.S. Fidelity & Guaranty*, 276 Mont. 513, 917 P.2d 912 (Mont. 1996) and *Kleinhesselink v. Chevron U.S.A.*, 277 Mont. 158, 920 P.1d 108 (Mont. 1996) require retroactive application of court decisions.

Topics

Cases: Workers' Compensation Court Cases: *Haag v. MSGIA*. WCC holds that *Chaney v. U.S. Fidelity & Guaranty*, 276 Mont. 513, 917 P.2d 912 (Mont. 1996) and *Kleinhesselink v. Chevron U.S.A.*, 277 Mont. 158, 920 P.1d 108 (Mont. 1996) require that *Haag v. Montana Schools Group Ins. Authority*, 274 Mont. 109, 906 P.2d 693 (1995) be applied retroactively to a case in which the injury and failure to accept/deny within 30 days occurred prior to *Haag*.

Claims: Acceptance. WCC holds that *Chaney v. U.S. Fidelity & Guaranty*, 276 Mont. 513, 917 P.2d 912 (Mont. 1996) and *Kleinhesselink v. Chevron U.S.A.*, 277 Mont. 158, 920 P.1d 108 (Mont. 1996) require that *Haag v. Montana Schools Group Ins. Authority*, 274 Mont. 109, 906 P.2d 693 (1995) be applied retroactively to a case in which the injury and failure to accept/deny within 30 days occurred prior to Haag.

Statutes and Statutory Interpretation: Retroactivity. WCC holds that *Chaney v. U.S. Fidelity & Guaranty*, 276 Mont. 513, 917 P.2d 912 (Mont. 1996) and *Kleinhesselink v. Chevron U.S.A.*, 277 Mont. 158, 920 P.1d 108 (Mont. 1996) *require that Haag v. Montana Schools Group Ins. Authority*, 274 Mont. 109, 906 P.2d 693 (1995) be applied retroactively to a case in which the injury and failure to accept/deny within 30 days occurred prior to *Haag*.

In *Haag v. Montana Schools Group Ins. Authority*, 274 Mont. 109, 906 P.2d 693 (1995), the Montana Supreme Court held that an insurer which fails to accept a claim for compensation within 30 days, as required by section 39-71-606(1), MCA, is liable as a matter of law for the claim.[(1)] *Haag* overruled the Court's prior decision in *Solheim v. Tom Davis Ranch,* 208 Mont. 265, 280, 677 P.2d 1034, 1041 (1984), which held that failure to accept a claim within the time specified by section 39-71-606(1) "does not automatically entitle a claimant to benefits . . . ." Under *Solheim* the claimant still bore the burden of proving liability even though the insurer failed to deny the claim within the statutory period, at least where the issue was whether the claimant was an employee or an independent contractor.[(2)]

The *Haag* decision changed the consequence of an insurer's failure to accept or deny a claim within the 30-day period. As a result, a number of claimants who may have been unable to prove the elements necessary to establish liability, but whose claims were not denied within the statutory deadline, have petitioned the Court for a determination that their claims are automatically compensable under *Haag*. This is one of those cases.

The claimant herein, Richard C. Klimek (Klimek), alleges that he was injured on December 19, 1987, while employed by Sonny Addington (Addington). At the time of Klimek's alleged injury, Addington was insured by the State Compensation Insurance Fund (State Fund). On August 11, 1988, Klimek's attorney, Tom L. Lewis (Lewis), forwarded a claim for compensation to the Department of Labor (Department), which in turn forwarded the claim to the State Fund. On September 18, 1988, the State Fund wrote Lewis a letter telling him

that it had been unable to determine if Klimek was employed by Addington. The State Fund advised Lewis that it would continue its investigation.

The facts presented to the Court do not show when the State Fund received the claim or whether the State Fund sent the September 18th letter within 30 days after receipt of the claim. In any event the September 18th letter constituted neither an acceptance nor a denial of the claim. However, on November 21, 1988, clearly more than 30 days after receipt of the claim, the State Fund denied the claim.

The parties apparently mediated the claim in late 1989 and the mediator issued a recommendation in early January 1990. Thereafter, the State Fund persisted in its denial. Nonetheless, Klimek did not pursue the matter until after the *Haag* decision.

Haag was decided on November 21, 1995. On February 5, 1996, Klimek filed his present petition, alleging that the State Fund's failure to accept or deny his claim within 30 days amounted to an automatic acceptance of his claim. As in *Solheim,* the State Fund has responded that Klimek was not an employee of its insured. It argues that *Haag* should not be applied retroactively and further alleges that the present petition is barred by the doctrine of laches.

Klimek counters that *Haag* must be applied retroactively. He also argues that the State Fund is collaterally estopped from urging non-retroactivity because it argued for retroactivity in *Chaney v. U.S. Fidelity & Guaranty,* 917 P.2d 912 (Mont. 1996), a case in which the Supreme Court applied the *Haag* decision retroactively to an injury which occurred in November 1983.

The Pending Motions

The motions under consideration are Petitioner's Motion for Summary Judgment and the State Fund's Cross Motion for Summary Judgment and Request for Oral Argument.

Oral Argument and Subsequent Briefing

Pursuant to the request of the State Fund, this matter was set for oral argument on June 12, 1996. In their initial briefs presented to the Court at that time, both parties relied on *Porter v. Galarneau,* 275 Mont. 174, 911 P.2d 1143 (1996), as supporting their respective positions. *Porter* concerned the retroactive application of a statute but in passing also mentioned the retroactivity of judicial decisions. *Porter* did not specifically address the issue presented in this case, which is whether a judicial decision which overrules a prior decision interpreting a particular statute may be applied retrospectively.

I consider the specific issue raised by the facts of this case an important one. Had the legislature reacted to the *Solheim* decision by changing the statute to expressly require automatic liability for failure to accept a claim within 30 days, the Montana Supreme Court would surely have held that the statute may be applied prospectively only. *Buckman v.*

Montana Deaconess Hosp., 224 Mont. 318, 325-29, 730 P.2d 380, 384-86 (1986). Our government is founded on the fundamental principal that we shall be governed by laws. Laws fix the rules by which we must abide. They advise us in advance of the consequences of our acts. Those of us who are law abiding, and who are informed of the laws, do in fact conform our conduct to those laws.

When it denied Klimek's claim, the State Fund was not automatically liable for his claim: Klimek was still required to prove that he was an employee and not an independent contractor. Had the State Fund been forewarned that the Supreme Court of Montana would overrule *Solheim*, it might have heeded the 30-day rule and simply denied Klimek's claim upon receipt rather than postponing its decision.[(3)]

The retroactivity issue is not one merely affecting insurers or others with deep pockets. The next case could involve retroactive application of a case overruling a prior precedent which benefited claimants. Thus, because of the importance of the issue and the fact that *Porter* did not directly support either parties' position, I requested the parties to find and supply me with cases which concern the retroactive application of a decision overruling a prior precedent. I also directed them to provide further briefing regarding the laches issue.

The parties have completed the additional briefing as directed by the Court. Counsel requested oral argument upon completion of that briefing but thereafter agreed that such argument is unnecessary unless the Court has specific questions to ask counsel. I am satisfied that the issue has been adequately aired and have no questions of counsel.

Facts

The pertinent undisputed facts, gleaned from the pleadings, an affidavit of Klimek (Affidavit),[(4)] and the briefs of counsel,[(5)] are as follows:

1. On August 11, 1988, Klimek forwarded a claim for compensation to the Insurance Compliance Bureau of the Department of Labor and Industry (DLI). (Affidavit of Richard C. Klimek ¶3.)

2. According to his claim, Klimek broke his leg on December 19, 1987, while employed by Sonny Addington. (Ex. A to Memorandum in Support of Petitioner's Motion for Summary Judgment.)

3. At the time of the accident, Addington was insured by the State Fund. (Petition for Hearing, ¶ 2; Response to Petition for Hearing, ¶ 2.)

4. The State Fund received the claim at least by September 18 or 19, 1988. (Affidavit ¶ 4; Ex. D to Memorandum in Support of Petitioner's Motion for Summary Judgment.)

5. By letter dated September 18, 1988, to claimant's counsel, Tom L. Lewis, the State Fund acknowledged the claim. The letter stated:

Dear Mr. Lewis:

We received your client's Claim for Compensation in relation to a December 19, 1987 industrial injury.

To date, we have been unable to establish whether your client is an employee of Sonny Addington. We are continuing to investigate this claim and will contact you as soon as we obtain this information.

Should you have any questions, please feel free to give me a call.

Sincerely,

/s/ Jeri Mainer
JERI MAINER

Claims Examiner

(Ex. D to Memorandum in Support of Petitioner's Motion for Summary Judgment; Affidavit ¶ 4.)

6. Thereafter, on November 21, 1988, the State Fund denied the claim in another letter to Lewis. In relevant part, the letter stated:

This letter is in reference to your client, Richard Klimek, and an accident he suffered on December 19, 1987. Upon careful review and investigation of the facts, it appears your client is not an employee of Sonny Addington but rather an independent contractor. Therefore, we will be unable to accept liability for your client's injury.

(Ex. E to Memorandum in Support of Petitioner's Motion for Summary Judgment; Affidavit ¶ 5.)

7. The claim was mediated sometime in 1989. Klimek thereafter did not contact the State Fund for several years. He renewed contact in early 1996 following the Supreme Court's decision in *Haag*. (Ex. H to Memorandum in Support of Petitioner's Motion for Summary Judgment; State Fund's Brief Regarding Summary Judgment Motions at 3.)

Claimant also argues that his disability is an undisputed fact, reciting that he has been unable to work since his accident. (Memorandum in Support of Petitioner's Motion for Summary Judgment at 2.) The State Fund disagrees, pointing out that between 1989 and January 1996, it heard nothing from claimant and received little medical or employment information. It states that it is not presently "entirely familiar with the circumstances surrounding Richard Klimek's work history and medical situation over the last eight years." (State Fund's Brief Regarding Summary Judgment Motions at 3.) The State Fund is entitled

to complete information regarding Klimek's medical condition and disability prior to responding to his specific claim for benefits. It will be permitted discovery concerning these matters. ARM 24.5.329(8). Moreover, Klimek does not specifically argue that the Court should determine his disability or benefits on summary judgment. Therefore, the Court will not address either matter at this time.

On its part, the State Fund asserts that it is undisputed that Lewis has been Klimek's counsel since 1988 and was also Haag's counsel at "all pertinent times." (State Fund's Brief Regarding Summary Judgment Motions at 2.) Lewis responds by advising the Court that he has not always been Haag's counsel. We need not address this matter further, however, since it is immaterial to the decision in this case.

Applicable Summary Judgment Standards

Rule 24.5.329(2) of the rules of this Court provides that

summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for production, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

It is the same standard as provided under Rule 56(c), Mont. R. Civ. P.

There must be a genuine absence of factual controversy as to those facts which are essential to summary judgment. *Kober v. Stewart,* 148 Mont. 117, 121-22, 417 P.2d 476, 477-78 (1966). The essential facts in this case are undisputed. Specifically, the State Fund does not dispute its failure to accept or deny Klimek's claim within the 30 days provided by section 39-71-606, MCA (1987). Thus, the necessary factual predicate exists for the Court to determine if the *Haag* decision is retroactive. Similarly, Klimek does not dispute that he did not actively pursue his claim for several years. That delay is the predicate for the laches argument.

Discussion

1. Retroactivity

As mentioned earlier, both parties in this action initially based their retroactivity[(6)] arguments on the *Porter* case. *Porter* addressed the retroactivity of a 1995 amendment to the Montana Scaffolding Act. The plaintiff in that case fell from a ladder in 1992. Prior to plaintiff's 1992 fall, the Supreme Court had construed the Scaffolding Act and determined that "a ladder is considered a scaffold." *Porter* at 1147 (citing *Mydlarz v. Palmer/Duncan Const. Co.,* 209 Mont. 325, 682 P.2d 695, 702-03 (1984)). Thus, at the time of his fall the plaintiff had a cognizable cause of action under the Act. However, the 1995 Montana Legislature amended the Act to specifically exclude ordinary ladders from its provisions.

On appeal the defendant in *Porter* invoked the canon that "courts should apply the law in effect at the time it renders its decision." *Porter* at 1148 (citing *Haines Pipeline Const., Inc. v. Montana Power Company,* 251 Mont. 422, 433, 830 P.2d 1230, 1238 (1991)). He argued that the action should be dismissed because the 1995 Act applied to the claim. On her part, the plaintiff invoked the rule that a statute should not be retroactively applied "unless expressly so declared." *Porter* at 1148 (citing § 1-2-109, MCA). She argued that her claim should proceed under the pre-1995 law.

In addressing the parties' arguments, the Supreme Court acknowledged that prior decisions invoking the canons were seemingly contradictory, however, it concluded that the rule disfavoring retroactivity should be applied whenever a statute is involved. It noted that the confusion concerning which rule should apply arose as the result of the United States Supreme Court's decision in *Thorpe v. Housing Auth. of Durham,* 393 U.S. 268, 281 (1969), which applied the canon that "an appellate court must apply the law in effect at the time it renders its decision" to a statute. *Porter*, 275 Mont. 183, 911 P.2d at 1148-49. This canon, hereafter *"Thorpe's* canon", and the *Thorpe* decision were cited by the Montana Supreme Court in several later cases. *Id.*[7]

In rejecting *Thorpe's* canon in the statutory context, the *Porter* decision focuses on a concurring opinion of Justice Scalia in *Kaiser Aluminum & Chemical Corp. V. Bonjorno,* 494 U.S. 827 (1990). Justice Scalia argued that the *Thorpe* canon originated from cases involving retroactive application of judicial decisions rather than statutes. In a decision subsequent to *Bonjorno,* a majority of the United States Supreme Court held that *Thorpe's* canon does not supersede the usual rule against retroactive application of a statute. *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1499 (1994). In *Porter* the Montana Supreme Court found Justice Scalia's reasoning persuasive and declared that *Thorpe's* canon is limited "to those cases involving the retroactive application of judicial decisions." *Porter,* 275 Mont. at 185, 911 P.2d at 1150.

In further discussion of retroactivity, the Court in *Porter* said:

In *West-Mont, Lee,* and *Haines Pipeline* this Court specifically relied on *Thorpe* to retroactively apply changes in state administrative rules or statutes and to the extent these cases are inconsistent with this opinion, they are overruled. (FN2) In *Day* we correctly applied *Thorpe* in its federal context to a federal statute. In *McNeil,* this Court relied on *Thorpe* to retroactively apply a judicial decision which is consistent with our ruling in this case.

The *Thorpe* holding is therefore inapplicable to situations involving the retroactive application of a state statute, ordinance or regulation. 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. [Emphasis added.]

Id.

The State Fund argues that the Supreme Court's holding in *Haag* was equivalent to a new statute and that *Porter* therefore precludes retroactive application of *Haag*. Klimek insists that the language cited in the two previous paragraphs conclusively shows that *Haag* must be applied retroactively. The analyses of both parties are incorrect.

Initially, the State Fund's reliance on *Porter* has some logical appeal. A court decision overruling prior interpretation of a statute has the same effect as legislation which amends a statute and overrules a court's prior interpretation of the statute. Had the Montana Legislature amended section 39-71-606, MCA, following the *Solheim* decision, *Porter* would limit the application of the amendment to cases arising after the amendment. *See also Buckman v. Montana Deaconess Hosp.,* 224 Mont. 318, 325-29, 730 P.2d 380, 384-86 (1986). Logically, it should not make a difference that the change in the law is affected by a subsequent judicial decision. However, as the *Porter* decision clearly shows, the rules governing retroactive application of statutes are not the same as those for the retroactive application of judicial decisions.

Klimek relies on the general statements in *Porter* which have been previously quoted. Those statements concern the retrospective application of judicial decisions. These statements, however, cannot be stripped of the limited context in which they were made. *United States v. Niefert-White Co.,* 390 U.S. 228, 231 (1968) (language in a prior case "cannot be taken as a decision upon a point which the facts of the case did not present."). The quoted statements were made in the context of whether *Thorpe's* canon superseded the usual rule that a statute is not retroactive. While it may be the general rule that judicial decisions are retroactive, the Montana Supreme Court in *Porter* did not discuss possible exceptions to that general rule. It did not indicate that the rule should be applied without exception and did not discuss or expressly overrule its prior decisions concerning the retroactivity of judicial decisions. Also, the Court spoke in terms of "continuing" to give retroactive effect to judicial decisions. "We will <u>continue</u> to give retroactive effect to judicial decisions . . . ." *Porter,* 275 Mont. at 185, 911 P.2d at 1150 (emphasis added). The word "continue" suggests that the Court intends to adhere to existing precedents regarding the retroactivity of judicial decisions.

The last point is most important. Prior decisions of the Montana Supreme Court support the State Fund's argument that the *Haag* decision should apply prospectively only.

The seminal case is *Montana Horse Products Co. V. Great Northern Railway Co.,* 91 Mont. 194, 7 P.2d 919 (1932). The case is more than 60 years old but has never been overruled. It has been cited as dispositive as recently as 1980 in *Kussler v. Burlington Northern, Inc.,* 186 Mont. 82, 89, 606 P.2d 520, 524 (1980). *Porter* does not mention the case or its progeny.

Montana Horse involved a tariff set by the Montana Railroad Commission for rail transport of range horses. The tariff was effective April 21, 1926. Thereafter Montana Horse Products Co. (Montana Horse) shipped 166 carloads of range horses via the defendant, Great Northern Railway Co. After the shipments had been made the Railroad Commission determined that the tariff was unreasonable and excessive by fifty percent, and that Montana Horse had been overcharged by $7,512.25. Relying on a prior Montana Supreme Court case permitting a shipper, such as Montana Horse, to pursue an action in district court to recover damages based on the Railroad Commission's retrospective determination that the railroad's tariff was unreasonable, *Doney v. Northern Pac. Ry. Co.,* 60 Mont. 209, 236, 199 P.2d 432, 440 (1921), Montana Horse sued in district court and was awarded damages in the amount of the overcharge. Great Northern appealed.

On appeal the Montana Supreme Court found that it had erred in *Doney*. Noting that the Railroad Commission lacked authority to retroactively promulgate rates, and that the rates in effect at the time of shipment were mandatory and binding on both shipper and railroad, the Court in *Montana Horse* found that a shipper does not have a cause of action to recover amounts which the Commission subsequently determines were unreasonable. The Court overruled that part of the *Doney* decision which had held otherwise. *Montana Horse,* 91 Mont. at 205-06.

The decision in *Montana Horse* involved two different retroactivity issues. The first concerned the Railroad Commission's statutory power to retroactively find a previously approved tariff to be unreasonable. The Court found that while the Commission was empowered to make such a finding, its determination could only operate prospectively to fix future rates and that did not affect the tariffs in effect at the time of shipping.

The second retroactivity issue concerned the retroactive application of the Court's decision to overrule *Doney.* The Court posed the issue as follows: "But what of the effect of our misinterpretation of the law in the *Doney Case* above noted?" 91 Mont. at 210, 7 P.2d at 925. Having thus posed the question, the Court concluded that it would be manifestly unjust to apply its new interpretation retroactively, and it refused to do so:

After our statutes had received such erroneous construction by this court [in *Doney*], the shipments were made and the rates approved by the board of railroad commissioners paid under protest. It must be concluded that the holding in that case gave just basis for the claim of the shipper although the decision in that case now appears to us to be manifestly erroneous, and the shipper's demand should not now be lightly considered or impaired by reason of a change in construction of the statutes by this court. . . .

It would be manifestly unjust and improper to deprive the shipper of its legal right to recover the excessive amount of tariff exacted by the railway company as pronounced by this court simply because of the later opinion expressed by this court repudiating its former decision. . . .

In our opinion, in all justness and fairness it cannot be said that the carrier has, as a result, been injured, for it must have appreciated its liability under the holding of this court in the *Doney Case*.

91 Mont. at 210-11, 7 P.2d at 925. The Court then affirmed the judgment for *Montana Horse*.

Upon a motion for rehearing, the Court reaffirmed its determination that its new interpretation of the statute should not be applied retroactively. In addressing the motion, the Court added a constitutional basis for its refusal to do so:

The construction given to a statute, although erroneous, before its reversal or modification, becomes a part of it [a contract] as much as though written into it; and the change made in construction will affect only contracts made thereafter.

In Lewis' Sutherland On Statutory Construction, the rule is thus stated: "A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of these rights. To divest them by a change of construction is to legislate retroactively. The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded, so as to affect the obligations of existing contracts made on the faith of the earlier adjudications."

91 Mont. at 215-16, 167 P.2d at 927(citations omitted).

Montana Horse had a companion case, *Sunburst Oil & Refining Co. v. Great Northern Ry. Co.,* 91 Mont. 216, 7 P.2d 927 (1932). *See Stare Decisis -- The Montana Doctrine,* 13 Mont. L. Rev. 74, at 79. The Montana Supreme Court's holdings in *Sunburst* duplicated its holdings in *Montana Horse*. *Sunburst* was appealed to the United States Supreme Court. In that appeal, the carrier argued that *Montana Horse* and *Sunburst* must be applied retroactively to defeat the shipper's claim for damages. *Great Northern Ry. v. Sunburst Co.,* 287 U.S. 358, 362 (1932). In an opinion authored by Justice Cardozo, the United States Supreme Court rejected the challenge, 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." *Great Northern Ry.,* 287 U.S. at 364.

One year after *Montana Horse,* the Montana Supreme Court again considered whether it should retroactively apply a decision overruling its prior interpretation of a statute. In *Continental Supply Co. V. Abell,* 95 Mont. 148, 24 P.2d 133 (1934), the Court considered the personal liability of a corporation's directors for corporate debts incurred between May and September 1927. *Continental,* 95 Mont. at 156. The case involved an amendment to an existing statute requiring corporations to file annual reports. In the event of the corporation's failure to file a required report, the statute imposed personal liability upon directors for debts incurred subsequent to the filing deadline. Prior to 1927 the statute imposed personal liability with respect to "all debts or judgments of the corporation then

existing, or which may thereafter be in anywise incurred until such report shall be made and filed." 95 Mont. at 157. The 1927 legislature amended the statute to delete the words "then existing, or", thus leaving intact the liability for subsequently incurred debts. The amendment was effective on July 1, 1927 and was not expressly made retroactive.

The corporate debts at issue were incurred in 1927. Those debts were reduced to judgment in 1928 and the plaintiff sued the directors in 1929. Concluding that the judgment merely reflected the underlying debt, the Supreme Court held that "plaintiff was required to show liability, not at the time the judgment was secured, but rather at the time the debt was incurred . . . " 95 Mont. at 160. In other words, the directors' liability arose, if at all, in 1927 when the corporation incurred the indebtedness.

The Supreme Court considered the effect of the 1927 amendment on the directors' liability. In amending the existing statute, the 1927 Legislature provided: "[A]ll Acts and Parts of Acts in conflict herewith are hereby repealed." *Continental,* 95 Mont. at 161. In a prior case, the Supreme Court determined that a similar repealer "deprived a creditor of any right he might have had to enforce a director's liability under the prior statute." *First National Bank v. Barto,* 72 Mont. 437, 440, 233 P. 963, 964 (1925) (quoted and cited in *Continental* at 161, 24 P.2d at 136). Applying *First National* in the context of *Continental* required the Court to find that the 1927 amendment had extinguished all liability with respect to previous years, including 1927. However, in *Continental* the Court went on to conclude that it had improperly applied common law rules of statutory construction when deciding *First National*. It acknowledged that it should have followed the rules of construction enacted by the Montana legislature. Under those rules, the amendment of 1927 did not extinguish liability with respect to prior years. Concluding that it had erred in *First National,* the Supreme Court overruled that prior decision. Thus, it concluded that the defendant directors sued were personally liable for corporate debts incurred in 1927.

The directors sought and secured a rehearing. After rehearing the Court held that its decision should not be retroactively applied and reinstated the district court's decision sustaining the directors' demurrer. Following the rationale of *Montana Horse,* the Court said:

The rule that a judicial interpretation of a statute becomes a part of the statute itself, so far as contract and property rights are concerned, and that changes in judicial interpretation should not be given retroactive effect, has received judicial sanction by many courts.

Continental, 95 Mont. at 171, 24 P.2d at 140. It further pointed out that the creditors who had sued the directors could not claim any surprise in the Court's refusal to apply the new rule retrospectively:

Plaintiff is not injured by holding that the principles of law announced in the main opinion in this case shall be applicable only from and after its promulgation. It cannot complain that it

is not given an advantage not existing under the law at the time the debt was incurred. At that time it extended credit to the Abell Oil Company, it knew, or will be held to have had knowledge, that under the prior decisions of this court, July 1, 1927, marked the end of its unenforced remedies against the directors.

Id. at 170-71.

The applicability of *Montana Horse* and *Continental* to the facts of the present case cannot be easily dismissed. The Montana Supreme Court has held that "[t]he basis for Workers' Compensation is a contract of hire either express or implied." Based on that characterization, it has applied the contract clauses of the United States and Montana Constitutions in workers' compensation cases. *Buckman v. Mont. Deaconess Hospital,* 224 Mont. 318, 325, 730 P.2d 380, 384. In *Buckman* the Court specifically held that "the liability of Montana Deaconess Hospital, employer, to Buckman, employee, arises out of the contract between them, and that the Workers' Compensation statutes in effect on the date of the Buckman injury are a part of that contract." *Id*. at 326, 730 P.2d at 385.

In *Kussler v. Burlington Northern, Inc.,* 186 Mont. 82, 606 P.2d 250 (1980), the Montana Supreme Court applied the rule of *Montana Horse* to a change in the common law. Prior to its decision in *Kussler*, the Court had held that a written release of one tort-feasor operates to release all joint tort-feasors unless there is a specific and clear provision to the contrary. The Kussler Court determined that the long standing rule should be abandoned in favor of one stating that where the agreement is silent concerning joint tort-feasors the Court shall determine whether the parties intended to release joint tort-feasors. The Court, however, declined to apply the new rule retroactively. Relying on logic adopted in *Montana Horse*, the Court said:

This logic applies with even more force to the instant case where we are changing the common law. It would be manifestly unfair to change a law which has been relied upon in this jurisdiction. Consequently, the new rule adopted will only apply to releases executed after the date of this decision. To all others, the old rule will apply.

Kussler, 186 Mont. at 89, 606 P.2d at 524. Relying on *Great Northern Ry. V. Sunburst Co.,* 287 US. 358 (1932), the Court pointed out that the retroactivity of judicial decisions (at least on non-federal questions) is a matter of state, not federal, law. *Id*. at 89, 606 P.2d at 524-25.

Other cases citing *Montana Horse* and *Continental* as supporting the Montana Supreme Court's refusal to retrospectively apply a decision overruling a prior case are *State ex rel. Mueller v. Todd,* 117 Mont. 80, 86, 158 P.2d 299, 301 (1945); *Hayward v. Richardson Construction Co.*, 136 Mont. 241, 250-51, 347 P.2d 475, 480 (1959); *Graham v. Rolandson,* 150 Mont. 270, 290-91, 435 P.2d 263, 273 (1967); and *Wilson v. Swanson,* 169 Mont. 328, 334-35, 546 P.2d 990, 994 (1976). *Montana Horse* is also cited in *Dunham v.*

Southside National Bank of Missoula, 169 Mont. 466, 475, 548 P.2d 1381, 1388 (1976). *Mueller* involved a change of procedure which the Supreme Court declined to apply retroactively. *Hayward* overruled a prior precedent concerning the right to a mistrial. *Graham* considered an historical jury instruction concerning unavoidable accident, determining that it should not be given, but refused to apply its determination retroactively. *Wilson* declined to apply the repeal of a statute retroactively in absence of a specific legislative directive to do so, pithily saying, "We decline to legislate retroactively as condemned in *Montana Horse Products* . . . ." 169 Mont. at 335, 546 P.2d at 994. *Dunham,* citing *Montana Horse*, refused to retroactively apply a newly enacted comparative negligence statute. 169 Mont. at 475, 548 P.2d at 1388. Strictly speaking, the cited decisions which rely upon *Montana Horse* and *Continental* do not involve the overruling of prior precedents which construe statutes. Nonetheless, the Supreme Court's continued reliance on *Montana Horse* indicates its continued agreement with the decision's basic logic.

In several cases the Montana Supreme Court has applied criteria announced by the United States Supreme Court in *Chevron Oil v. Huson,* 404 U.S. 97 (1971), when determining whether a decision interpreting a statute should be applied retroactively. The *Chevron* criteria were first invoked in *LaRoque v. State,* 178 Mont. 315, 318-19, 583 P.2d 1059, 1061 (1978). In *LaRoque* the Court summarized the criteria as follows:

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 non-retroactivity is proper.

Id.

The specific issue in *LaRoque* was whether the United States Supreme Court decision in *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973), should be applied retroactively with respect to taxes imposed by the State of Montana on income earned by enrolled tribal members living on an Indian reservation. *McClanahan* held that such taxation "interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves." *LaRoque,* 178 Mont. at 321, 583 P.1062 (quoting from *McClanahan* at 165). Based on *McClanahan*, LaRoque, an enrolled tribal member, sued the State of Montana for a refund of Montana

income taxes he had paid with respect to income earned on the Fort Peck Reservation. The State argued that *McClanahan* should not be applied retroactively.

On appeal the Montana Supreme Court applied the *Chevron* criteria but held that *McClanahan* should apply retroactively. It found that prior to *McClanahan* there was **no** "clearly declared judicial doctrine" regarding taxation of reservation income and that, although *McClanahan* was a case of first impression, the holding in that case was foreshadowed by previous preemption cases involving Indian reservations. *LaRoque, 178 Mont.* at 319, 583 P.2d at 1061-62. It further concluded that retroactive application of the *McClanahan* decision would further the operation of the rule announced in *McClanahan* and that there was no substantial inequity in applying the rule retroactively. *Id.* at 320, 583

P.2d at 1062. On the latter subject, the Court specifically noted that Montana procedural provisions governing tax refunds "will prohibit substantial refunds."[(8)] *Id*.

In *Riley v. Warm Springs State Hospital,* 229 Mont. 518, 748 P.2d 455 (1987), the Supreme Court again applied the *Chevron* criteria. That case involved an employee discharge claim which arose prior to the Court's decision in *Gates v. Life of Montana Ins. Co,* 196 Mont. 178, 638 P.2d 1063 (1983), *rev'd on other grounds after remand*, 205 Mont. 304, 668 P.2d 213 (1983). *Gates* held that there is an implied covenant of good faith and fair dealing in any employment relationship and that there is a common law action for violation of the covenant. The Court determined that the rule of law announced in *Gates* was *arguably* clearly foreshadowed and that it would be inequitable not to apply its ruling retroactively.

But more recently, the Montana Supreme Court, still adhering to the *Chevron* criteria, has refused to retroactively apply decisions. In *Montana Bank of Roundup v. Musselshell County Bd. of Com'rs,* 248 Mont. 199, 205-06, 810 P.2d 1192, 1196 (1991), the Court refused to retroactively apply a prior decision exempting United States obligations and interest from direct or indirect state taxation. In *Sheehy v. State of Montana,* 250 Mont. 437, 820 P.2d 1257 (1991), the Court refused to apply a United States Supreme Court decision striking down state taxation of federal retirement benefits. Thus, at least as late as 1991, the Chevron test was alive and well in Montana.

At the federal level, *Chevron* has been abandoned and a rule of blanket retroactivity adopted with respect to judicial decisions. *James Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991); *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 94-98 (1993). "[A] rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." *Harper,* 509 U.S. at 96. *Harper* indicates that reliance on an old rule of law, as well as considerations of equity, may no longer be considered when deciding whether to apply a new judicial rule retrospectively. *Id.* at 97.

None of the recent United States Supreme Court cases, however, specifically address the retroactivity of a decision overruling a prior decision interpreting a statute. Most of the recent cases involve state taxation. None address the rights of private parties acting in reliance on an overruled principal of law.

Moreover, the blanket rule announced in *Jim Beam* and *Harper* applies only to federal court decisions interpreting and applying federal law. It is not binding on state courts on matters of state law. *Great Northern Ry. Co.,* 287 U.S. at 365. The highest courts of several states have adhered to *Chevron* as the better rule and have declined to follow *Jim Beam* and *Harper*. *E.g., Beavers v. Johnson Controls World Serv., Inc.,* 881 P.2d 1376 (N.M. 1994); *Wiley v. Industrial Comm. of Arizona,* 847 P.2d 595 (Ariz. 1993) (Arizona Supreme Court refused to retroactively apply a workers' compensation decision which overruled cases decided thirteen years earlier)[(9)]; *Martin Marietta Corp. v. Lorenz,* 823 P.2d 100 (Colo 1992) (Colorado Supreme Court acknowledges *Jim Beam* but declines to follow it).

In *Beavers* the New Mexico Supreme Court characterized the debate concerning the retroactivity of judicial decisions announcing new rules of law, or changing old ones, as "one of the great jurisprudential debates of the twentieth century." *Beavers,* 881 P.2d at 1377. In discussing its reasons for refusing to follow the United States Supreme Court's lead, the New Mexico Court rejected the argument embraced in *Harper* that the interest in treating all similarly situated parties uniformly requires blanket retroactivity. *Id.* at 1382. While it found it appropriate to adopt a rule of "presumptive retroactivity," it found that other considerations, particularly the parties' reliance on an established rule of law, may outweigh the presumption:

The extent to which the parties in a law suit, or others, may have relied on the state of the law before a law-changing decision has been issued can hardly be overemphasized. It is a factor that receives repeated recognition in cases discussing retroactivity vs. [sic] prospectivity.

Id. at 1384. Regarding the third inequity factor from *Chevron,* the Court went on to say:

[W]e think that at least one of the powerful considerations informing the inequity factor is, as already mentioned, the degree of reliance that persons affected, or potentially affected, by the rule may have placed on the state of the law antedating the rule. The greater the extent a potential defendant can be said to have relied on the law as it stood at the time he or she acted, the more inequitable it would be to apply the new rule retroactively. Defendants make this point forcefully, arguing that "[o]ne of the cherished, fundamental principles of this nation's jurisprudence is that persons are at least entitled to know in advance what consequences adhere to their actions."

Id. at 1386-87 (second brackets in the original text). The New Mexico Court, however, found that the reliance factor was insufficient to overcome the presumption of retroactivity in the

context of a newly announced tort where the tort involved intentional harm inflicted on a plaintiff by the defendants. *Id*. at 1387.

As I have stated much earlier in this discussion, the Montana Supreme Court has not expressly overruled its prior decisions in *Montana Horse, Continental,* and *LaRoque*. Nonetheless, it appears to have done so *sub silento*. In *Chaney v. U.S. Fidelity & Guaranty,* 917 P.2d 912, 914-15 (Mont. 1996), the Court applied *Haag* retroactively. In *Kleinhesselink v. Chevron U.S.A.,* 920 P.2d 108, 111 (Mont. July 24, 1996), the Court retroactively applied its recent decision in *Stratemeyer v. Lincoln County,* 915 P.2d 175 (Mont. 1996).[(10)] In deciding to retroactively apply *Stratemeyer*, the Court, citing *Porter*, said, "We give retroactive effect to judicial decisions." 920 P.2d at 111. Unlike *Porter*, the principle was directly applicable to the facts and the failure of the Supreme Court to expressly address those precedents. I am bound by *Chaney* and *Kleinhesselink*. Thus, notwithstanding earlier precedents, I find that the rule of law announced in *Haag* must therefore be applied retroactively to claims arising prior to the *Haag* decision.

2. Laches

Despite claimant's assertion to the contrary, a defense of laches may be raised in a workers' compensation case. The doctrine was considered in *Miller v. Frasure,* 248 Mont. 132, 139, 809 P.2d 1257, 1262 (1991). While the elements necessary to invoke the defense were lacking in *Miller,* in *Sampson v. Broadway Yellow Cab,* WCC No. 8512-3369 (June 9, 1988), the elements were satisfied and the doctrine was applied to bar a claimant from seeking increased benefits. Laches has also been applied in workers' compensation cases in other jurisdictions. *Carney v. Newburgh Park Motors,* 84 A.D. 2d 599, 444 N.Y.S.2d 220 (1981)(laches imputed to state insurance fund in workers' compensation case even though it is a state agency); *Modjeski v. Federal Bakery of Winona,* 240 N.W.2d 542, 307 Minn. 432 (1976)(doctrine of laches is a viable defense in workers' compensation case); *Badon v. General Motors Corp.,* 470 N.W.2d 436 (Mich. App. 1991)(laches defense was available in this workers' compensation case but defendant was found to have waived it). While the doctrine is an equitable defense, other equitable defenses, such as equitable estoppel, have been applied in Montana workers' compensation cases.[(11)] *E.g., Sampson v. Broadway Yellow Cab,* 226 Mont. 273, 277, 735 P.2d 298, 300 (1987).

The doctrine "precludes recovery to those who sleep on their rights." *Miller,* 248 Mont. at 139, 809 P.2d at 1257. Laches applies "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." *In re Marriage of Hahn and Cladouhos,* 263 Mont. 315, 318, 868 P.2d 599, 601 (1994). The delay in this case was neither negligent nor unexplained. Between the time of claimant's injury and the *Haag* decision, the State Fund was entitled to litigate the claimant's employment status. Presumably claimant concluded that he could not prevail on that issue. But

with *Haag* the employment issue became irrelevant. Applied retroactively, *Haag* meant that the State Fund's failure to accept claimant's claim within 30 days amounted to an automatic acceptance of the claim even if Klimek was in fact an independent contractor. Klimek immediately pressed his claim following the *Haag* decision.

3. Estoppel

In light of the determination made with respect to the preceding issues, it is unnecessary to consider Klimek's estoppel argument.

ORDER AND PARTIAL SUMMARY JUDGMENT

For the reasons set forth in the preceding discussion, IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. Since the State Fund failed to accept or deny the petitioner's claim within the 30-day period set forth in section 39-71-606, MCA (1987), the petitioner's claim is deemed accepted as a matter of law. The State Fund is thereby precluded from asserting that petitioner was not an employee for purposes of compensation.

2. The petitioner's claim is not barred by the doctrine of laches.

3. Factual issues remain as to the extent of petitioner's disability and the amount of compensation, if any, to which he is entitled. Those issues shall be resolved at trial.

4. A new scheduling order setting a date for trial and pretrial deadlines shall accompany this Order and Partial Summary Judgment.

DATED in Helena, Montana, this 11th day of October, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Tom L. Lewis
Mr. Charles G. Adams
Submitted: August 21, 1996

1. The *Haag* decision does not preclude the insurer from raising an affirmative defense, such as fraud, but does relieve the claimant of the burden of proving the elements necessary to establish the compensability of the claim.

2. In *Solheim* the insurer contended that the claimant was an independent con-tractor, not an employee, and was therefore ineligible for compensation. The Workers' Compensation Court found for the insurer and the Supreme Court affirmed despite the insurer's failure to deny the claim within the period prescribed by statute.

In *Haag* the Court found that *Solheim* was factually distinguishable because the defense raised by the insurer was not based on the lack of an employment relationship but rather on whether an industrial accident had occurred. Nonetheless, the Court refused to rest its decision on that distinction, deciding instead to reverse *Solheim*. While I can only speculate as to why the Court chose not to pin its decision on the factual distinction, the decision in *Solheim* was premised on the Court's view that a rule of automatic acceptance would have amounted to a penalty. The majority in *Solheim* noted that section 39-71-2907, MCA, provided for a penalty based on unreasonable delay in the payment of benefits and declined to construe section 39-71-606, MCA, as imposing any additional penalty. The Court said:

We hold that the claimant has failed to show a need for such a drastic penalty as the granting of claim approval for failure to accept or deny the claim within 30 days, and conclude that the 20% penalty provision affords reasonable protection for claimants in the same position as the claimant in this case. We hold that Section 39-71-606, MCA does not automatically entitle a claimant to benefits because of the failure of an insurer to accept or deny a claim within 30 days.

Solheim at 280, 677 P.2d at 1041-42. The language appears to render irrelevant the factual distinction mentioned in *Haag*.

3. The State Fund might have also invoked section 39-71-608, MCA (1987), which provides:

Payments within thirty days by insurer without admission of liability or waiver of defense authorized -- notice. An insurer may, after written notice to the claimant and the division, make payment of compensation benefits within 30 days of receipt of a claim for compensa-tion without such payments being construed as an admission of liability or a waiver of any right of defense.

4. Affidavit of Richard C. Klimek (April 30, 1996). Some of the exhibits referred to in the affidavit are attached to Klimek's opening brief rather than to his affidavit. Also, some of the exhibits referred to in the opening brief are not specifically identified in his affidavit. The State Fund does not resist the exhibits and they are accepted by the Court as authentic. However, it is better practice to expressly authenticate exhibits by way of affidavits.

5. The Court accepts as true those facts which **both** parties set out in their briefs. While this may exceed the usual rule requiring facts to be set forth in affidavits, depositions and other formal discovery, where the parties agree in their briefs to certain facts, such agreement shall be deemed a stipulation of facts.

6. A "retroactive law" is "one which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, attaches a new disability in respect to transactions already passed". . . . or [gave a] "transaction a different legal effect from that which it had under the law when it occurred." *Porter,* 911 P.2d at 1148-49 (Mont.

1996) (citations omitted). The application of *Haag* to the facts of this case would be a retroactive application since it would impose a new liability with respect to a past transaction.

7. The cases citing the canon and *Thorpe* were *West-Mont Community Care v. Board of Health*, 217 Mont. 178, 703 P.2d 850 (1985); *Lee v. Flathead County*, 217 Mont. 370, 704 P.2d 1060 (1985); *Haines Pipeline Const., Inc. v. Mont. Power Co., 251 Mont. 442, 830 P.2d 1230 (1991); McNeil v. Currie*, 253 Mont. 9, 830 P.2d 1241 (1992); and *Day v. Child Support Enforcement Div.*, 272 Mont. 170, 900 P.2d 296 (1995).

8. In workers' compensation cases there is no statute of limitation or procedural bar which would preclude prosecution of old claims.

9. The decision mentions but does not specifically discuss *Jim Beam*. However, the Court was presumably aware of the new rule outlined by five of the justices in *Jim Beam*.

10. *Kleinhesselink* did not involve the application of a case overruling a prior decision and the retroactive application of *Stratemeyer* may well have satisfied the *Chevron* criteria as *Stratemeyer* was arguably foreshadowed by earlier decisions.

11. Klimek's counsel asserted at the June 12, 1996 hearing that equitable defenses cannot be raised in workers' compensation cases because workers' compensation proceedings are governed by statutes and are not equitable proceedings.