

FILED

AUG 30 2005

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

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Attorneys for Respondent Teck Cominco
American Incorporated

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2000-0222

ROBERT FLYNN and CARL MILLER, Individually and on Behalf of
Others Similarly Situated,

Petitioners,

v.

MONTANA STATE FUND,

Respondent/Insurer,

and

LIBERTY NORTHWEST INSURANCE CORPORATION,

Intervenor.

**RESPONDENT TECK COMINCO AMERICAN INCORPORATED'S
RESPONSE TO THE COURT'S SUMMONS**

Teck Cominco American, Incorporated (hereinafter "Teck Cominco"), received the Court's Summons on or about June 10, 2005, and subsequently retained Montana legal counsel

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to represent its interests in the subject matter. Teck Cominco subsequently requested and was granted an extension until August 30, 2005, to review its records and respond to the Summons. Accordingly, Teck Cominco submits the following Response to the Court's May 4, 2005, Summons.

As noted in its request for extension, Teck Cominco has operated various mining ventures in Montana during the period stated in Petitioners' Notice of Attorney's Lien. Teck Cominco believes its only relevant operation in Montana for purpose of this Response was the Warm Springs Phosphate Mine at Garrison, Montana, where active mining occurred up to 1996-97. During operations at Garrison, Teck Cominco was self-insured and paid compensation claims directly from its annual operating account at the mine.

Teck Cominco has changed corporate status and location several times since 1974 and many of the relevant records have been destroyed or are yet to be discovered. Teck Cominco continues to research its files for relevant information and will amend and/or revise its position as pertinent materials are located.

Accordingly, Teck Cominco asserts:

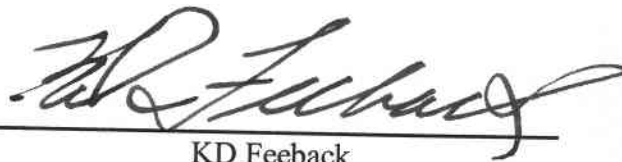
1. Teck Cominco objects to its inclusion in the common fund litigation because its relevant compensation expenditures, if any, were paid out as an internal operating expense singular to its individual operations and were an internal cost of doing business, not a common fund as contemplated by common fund doctrine in Montana.
2. Common fund certification is improper in the subject matter because the assertion that a common fund even exists was not made in a timely manner, thus, the equitable doctrines of *laches*, *waiver*, and *estoppel* bar Petitioners' claim for attorney fees.
3. Petitioners' claims are barred by applicable statutes of limitation.
4. Application of Petitioners' claim against Teck Cominco violates traditional notions of due process as set forth in the U.S. Constitution and the Montana Constitution.
5. Petitioners' claims to attorney fees may not permissibly be held retroactive pursuant to *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), as set forth by the Montana Supreme Court in *Dempsey v. Allstate Insurance Company*, 2004 MT 391, ¶ 21.
6. Petitioners' claims are barred because Teck Cominco does not possess comprehensive

records enabling it to ascertain potentially relevant beneficiaries of compensation.

7. Petitioners' claims are barred because neither Roger Flynn nor Carl Miller created or preserved an identifiable common fund from which the unidentified alleged beneficiaries are ascertainable.
8. Petitioners' claims are barred because Montana law has never required records be kept detailing the amount of attorney fees expended to obtain SSD payments; as such, it is not possible, even were it deemed necessary, to determine an appropriate contribution to common fund attorney fees under unjust enrichment theories.
9. Petitioners' claims are impermissibly broad in that under common fund doctrine, should same be found to exist here, non-participants in the subject litigation are only required to offset the litigation expense to the extent same benefitted an individual non-participating recipient/claimant.
10. Teck Cominco reserves the right to assert defenses that have been or could be raised by other Respondents herein or in any of the other common fund cases currently pending.
11. Teck Cominco reiterates that it is not an insurance company; on information and belief asserts it did not maintain a common fund wherein company employees benefitted by the litigation of others, and reserves the right to seek dismissal once it has been able to locate and examine relevant records.

Dated and submitted this 30th day of August 2005.

GOUGH, SHANAHAN, JOHNSON & WATERMAN



KD Feedback

Attorneys to Teck Cominco American, Inc.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 30th day of August, 2005, a true and correct copy of the foregoing *Response to the Court's Summons* was mailed by first-class mail, postage prepaid, and addressed to the attention of the following:

Mr. Rex Palmer
Attorneys, Inc.
301 West Spruce
Missoula, Montana 59802

Sharon J. Janelly