

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 29

WCC No. 2001-0294

**FILED**

MARK MATHEWS

JUN - 1 2005

Petitioner

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER AND JUDGMENT AFTER REMAND

**Summary:** The Supreme Court remanded the case to the Workers' Compensation Court for reconsideration of the retroactivity issue in light of *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, 325 Mont. 207. Relying on *Poppleton v. Rollins, Inc.*, 226 Mont. 267, 735 P.2d 286 (1987), the Workers' Compensation Court had previously held that the Supreme Court's decision in *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116, 315 Mont. 441, 68 P.3d 865, could not be applied retroactively.

**Held:** *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116, 315 Mont. 441, 68 P.3d 865, must be applied retroactively in light of *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, 325 Mont. 207, which requires that judicial decisions be applied retroactively unless all three of the *Chevron* factors favor prospective application. Only one of the *Chevron* factors favored prospective application.

**Topics:**

**Courts: Retroactivity of Decisions.** *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116, 315 Mont. 441, 68 P.3d 865, must be applied retroactively in light of *Dempsey v. Allstate*, 2004 MT 391, 325 Mont. 207, which requires that judicial decisions be applied retroactively unless all three of the *Chevron* factors favor prospective application. Here, only one of the *Chevron* factors favored prospective application.

¶1 This case was remanded for reconsideration of the retroactivity issue in light of *Dempsey v. Allstate Inc. Co.*, 2004 MT 391, 325 Mont. 207. Both parties stipulated to the remand.

¶2 In my original Order and Judgment Concerning Class Action, Retroactivity, and Common Fund (2004 MTWCC 55, dated July 8, 2004), I held that the decision in the case-in-main, *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116, 315 Mont. 441, 68 P.3d 865, was retroactive. In doing so, I applied the three factors laid out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), finding that two of the three factors favored retroactivity while the third did not. I concluded that the weight of the factors therefore required retroactive application.

¶3 Subsequent to my July 8, 2004 order, Liberty requested reconsideration of my retroactivity holding. It argued that *Poppleton v. Rollins, Inc.*, 226 Mont. 267, 735 P.2d 286 (1987), precludes retroactive application unless all three *Chevron* factors are met. After reading *Poppleton*, I agreed and issued an Order Amending Decision Concerning Retroactivity (2004 MTWCC 55A, dated August 12, 2004).

¶4 My decision was then appealed to the Montana Supreme Court. While that appeal was pending, the Supreme Court decided *Dempsey, supra*. In *Dempsey* the Court noted that its discussion in *Poppleton, supra*, in which it indicated that all three *Chevron* factors must be met for retroactive application was *dicta*. 2004 MT 391, ¶ 30. *Dictum* is not binding precedent, *State v. Montoya*, 1999 MT 180, ¶ 24, 295 Mont. 288, 294, 983 P.2d 937, 942 (1999), thus the *Dempsey* court's characterization of the discussion in *Poppleton* as *dicta* is a strong indication that the statement indicating that all three factors must favor retroactive application in order to apply a judicial decision retroactively should be disregarded. In that light, it was plainly error for me to rely on *Poppleton* in setting aside my first ruling on the retroactivity issue.

¶5 Moreover, the ultimate holding in *Dempsey* requires reinstatement of my original ruling since it holds that all three factors must favor prospective application of a judicial decision, otherwise the decision must be retroactively applied. Since my July 8, 2004 order found that only one factor favored prospective application in this case, my decision in that order was the correct one and is hereby reinstated.

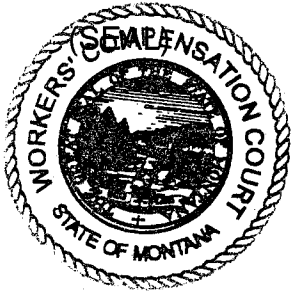
¶6 Finally, I note that the determination here does not resolve all issues in this case. My July 8, 2004 order also found that no common fund was created as a result of the original Supreme Court decision in this case, 2003 MT 116. In a conference with counsel to discuss post-remand proceedings, both counsel agreed that in stipulating to the Supreme Court's remand for reconsideration in light of *Dempsey*, their intent was only to

allow this Court to correct its error concerning the retroactivity issue and not to abandon other appealable issues.

ORDER AND JUDGMENT

¶7 This Court's August 12, 2004 Order Amending Decision Concerning Retroactivity is **withdrawn**. The Court's July 8, 2004 Order and Judgment Concerning Class Action, Retroactivity, and Common Fund is **reinstated** and certified as final for all purposes including appeal.

DATED in Helena, Montana, this 1<sup>st</sup> day of June, 2005.



*Mike McLean*

JUDGE

c: Mr. Geoffrey C. Angel  
Mr. Larry W. Jones