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FILED

JUN - 1 2004

Attorney for Petitioner

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT FOR THE STATE OF MONTANA

MARK MATHEWS,)	WCC Number 2001-0294
)	
Petitioner,)	BRIEF IN SUPPORT OF
)	RETROACTIVE APPLICATION
vs.)	
)	
LIBERTY NORTHWEST)	
INSURANCE CORPORATION,)	
)	
Respondent/Insurer)	

* * * * *

Since remand of *Mathews* Liberty Northwest has repeatedly demonstrated its unwillingness and outright refusal to disclose information to allow Mark Mathews to identify and seek benefits on behalf of those injured workers who were denied workers' compensation benefits simply because they held an IC exemption. Liberty Northwest now opposes any award of common fund attorney fees as a collateral attack against the work which will be required to identify and seek payment on behalf of those similarly situated claimants denied benefits by Liberty Northwest. Liberty Northwest only now seeks to mount a collateral attack on common fund fees as a means to end the enforcement of its duty to tender the benefits to all other similarly situated claimants but it already waived any objection to common fund fees.

After remand on May 9, 2003 Mathews filed his Motion to File Amended Petition for Hearing and Motion for Common Fund/Class Action Attorney Fee Lien. On May 15, 2003 Liberty Northwest filed its Brief in Opposition to Motion for Class Certification which provides no law, facts or argument but incorporates by reference its Brief in Opposition to Motion to File Amended Petition for Hearing which merely states:

Mathews' Motion to File Amended Petition for Hearing is premature because there is no ruling on this affirmative defense. If Liberty were to prevail on it then there would be no basis for a common fund/class action attorney fee lien.

Brief in Opposition to Motion to File Amended Petition for Hearing, p. 1. Liberty Northwest raised no other objections in opposition to the class action/common fund claims of Mathews.

Liberty Northwest "placed all of its eggs in one basket" when it chose to assert this single objection to the motion for class action/common fund application and attorney fees.

On June 25, 2003 the Court held a status conference at which Liberty Northwest was represented by counsel Larry Jones. The issues of common fund fees and administering the decision in *Mathews* was discussed and Liberty Northwest did not raise any objection to the claim to common fund attorney fees. Liberty Northwest sought time to inquire into the facts upon which the Court may rely in a *Chevron* type analysis regarding retroactivity.

On August 28, 2003 the Court held a second status conference at which Liberty Northwest was represented by counsel Larry Jones. The issue of common fund fees again came up and Liberty Northwest did not raise any objection.

In the Court's most recent status conference in May 2004 Larry Jones indicated that Liberty Northwest would not claim any burden would enure from Mathews inspection of the 1,111 files it denied to determine which were denied based on the existence of an IC exemption. Thus, the one year delay between conferences produced one fact: Liberty Northwest has denied 1,111 claims and it retains no information to categorize the reasons for its denial.

In light of the representation by Liberty Northwest it is Mathews position that the burden prong or third factor of the *Chevron* test (if applicable) must be found in favor of retroactivity.

Mathews maintains that the determination regarding retroactivity is a purely legal question and does not require a factual analysis beyond those facts supporting the underlying decision of the Montana Supreme Court which facts overwhelmingly favor retroactive application. If IC exemptions were unlawful an injured worker should now be able to challenge a summary denial based on the exemption. Retroactivity protects constitutional rights.

Legal Analysis

The United States Supreme Court created a bright line rule in *Harper v. Virginia Dept. of Taxation* 509 U.S. 86 (1993) that all judicial decisions must be applied retroactively. This was recently recognized by this Court in *Flynn*:

In *Harper*, the United States Supreme Court adopted a blanket rule requiring retroactive application of its decisions, thus it appeared that the Montana Supreme Court intended to do the same.

Flynn v. State Fund, 2003 MTWCC 55 ¶ 20. The Montana Supreme Court has followed the Workers' Compensation Court's analysis and agreed with *Harper* stating "we will continue to give retroactive effect to judicial decisions, which is in accordance with the U.S. Supreme Court's holding in *Harper*." *Porter v. Galarneau*, 275 Mont. 174, 185, 911 P.2d 1143, 1150 (1996). *Porter* adopts the *Harper* rule as applicable in Montana notwithstanding the *Chevron* analyses which followed and reached the same result.

The United States Supreme Court has since applied *Harper* with the clearest iteration of the scope of this rule in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994):

While it was accurate in 1974 to say that a new rule announced in a judicial decision was only *presumptively* applicable to pending cases, we have since established a firm rule of retroactivity.

Landgraf at 280, FN 32. *Harper* clearly stated to give full retroactive effect a decision must be applied as to all events, regardless of whether such events predate or postdate announcement of the rule. *Id.*; see also *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910). Thus, the timing of the underlying events also cannot defeat the retroactive effect of judicial decisions. This point was reiterated in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). The United States Supreme Court recognized in *Hyde* that *Harper* held when (1) the Court decides a case and applies a new rule to the parties before it, then (2) it and other courts must treat that same rule as "retroactive" for all cases whether or not those cases involve predecision events. *Id.*

The decision in *Mathews* must be applied retroactively to all those injured workers who were denied workers' compensation benefits because they held an IC exemption.

Liberty Northwest urges the Court, despite *Harper* and *Galarneau*, to apply the three factors of the *Chevron* test to find retroactive application would pose undue hardship on the insurer Liberty Northwest¹. The *Chevron* test examines whether (1) a new principle of law was established by overruling precedent or deciding an issue of first impression that was not clearly foreshadowed, (2) retroactive application will further or retard the new principle of law and (3) retroactive application would create an iniquity.

Liberty Northwest argues these three points by claiming that it had no notice that the IC exemption was invalid, that "retroactive application . . . will not further the rules application" and that there can be additional costs to administer *Mathews* so it would create a burden on the insurer Liberty Northwest.

Liberty Northwest claims that the new decision was not clearly foreshadowed but Liberty Northwest's past practice was to summarily deny any claim where a IC exemption existed without determining if it was true in fact that the worker was an independent contractor. The IC exemption stated on its face that it was valid if the facts were consistent with the form and the employee was actually an independent contractor. This issue is not whether the IC exemptions would be found invalid but whether a blind application of the form without a factual analysis would be upheld. IC exemptions were found by the Supreme Court to be invalid if they were not actually held by independent contractors after reviewing all of the facts. This fact specific analysis was foreshadowed by the many years that such an analysis was part of the application of the IC exemptions. The irrebuttable presumption within the statute was invalid on its face.

¹While the United States Supreme Court overruled and discarded the *Chevron* analysis in *Harper* the argument made by Liberty Northwest under *Chevron* is analyzed to demonstrate the merits of retroactive application.

Liberty Northwest next claims that "retroactive application . . . will not further the rules application." That is to say retroactive application of the rule requiring a factual review to determine if the exemption matches the facts will not further the denial of benefits only to those who are in fact independent contractors. Liberty Northwest supports this conclusion with three statements. First, it notes that the Supreme Court "created a new insurer liability" and "insurers are now on notice." Neither of these statements address whether the rule will be promoted or hindered by its retroactive application. The last statement is that prospective application of the rule will not weaken the rule or retard its operation. But the question is will retroactive application promote its purpose. It will. The fact that prospective application will also promote its purpose is of no consequence to this analysis.

Lastly, Liberty Northwest argues that retroactive application would create a substantial inequity because benefits are determined based on the statutes in effect at the time of the injury. Liberty Northwest appears to be asking the Court to hold prior application of this invalid rule valid to avoid the payment of benefits to those who were wrongfully denied benefits in the past.

Liberty Northwest has failed to demonstrate under the old *Chevron* test that retroactive application would create an inequity or would not further the purpose of the rule as stated in *Mathews*. Liberty Northwest has not carried its burden. The inequity of applying the decision retroactively are non-existent or slight in comparison to the public policy considerations and the financial gain Liberty Northwest would experience if it were allowed to continue to withhold these benefits which the Montana Supreme Court said were due under the then existing law.

The arguments made by Liberty Northwest entitled contract, settled cases, unsettled cases statute of limitations and laches deal with the limits of the retroactive application once the Court holds that the decision will be given retroactive effect. These arguments are premature.

When the *Mathews* decision is applied retroactively these arguments should be summarily denied. Cases that were settled may be reopened if the settlement is facially invalid because of a clear mutual mistake of material fact. If the settlement in light of the potential benefits is not facially invalid then no apparent mutual mistake of fact existed or affected the settlement. The statute of limitations question has previously been answered and rejected by this court as has the claim of laches. The contract argument is simply a claim that the Supreme Court erred in its holding. Liberty Northwest's motion to find the invalidity of the irrebuttable presumption to apply prospectively only must be denied.

Conclusion

This Court must hold that the decision in *Mathews* is retroactive because the case is controlled by *Harper*. The entitlement to benefits under the workers' compensation act in Montana is a constitutionally guaranteed right to full legal redress. Even if the Court applied *Chevron* the burden created by retroactive application is non-existent or slight while retroactive will promote the purpose of the Court's holding. If the irrebuttable presumption was invalid when it was written then all those summarily denied benefits are entitled to a determination of whether they were in fact independent contractors.

Liberty Northwest waived its right to oppose the payment of common fund fees and it is bound by that waiver.

DATED this 1st day of June 2004

ANGEL LAW FIRM



Geoffrey C. Angel

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 1st day of June 2004 a true and correct copy of the foregoing was hereby served, by depositing the same, in an envelope in the United States mail, first-class, postage pre-paid, addressed to:

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JEREMY RUHD;)	WCC Number: 2002-0500
)	
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)	BRIEF IN SUPPORT OF
vs.)	RETROACTIVE APPLICATION
)	
LIBERTY NORTHWEST)	
INSURANCE CORPORATION;)	
)	
Respondents.)	

This Court certified as final its order on common fund attorney fees and that matter is before the Montana Supreme Court. Liberty Northwest waived before this Court and before the Montana Supreme Court any objection to the Court's order on common fund fees.

Since remand of *Ruhd* Liberty Northwest has repeatedly demonstrated its unwillingness and outright refusal to tender the payment of impairment awards to permanently totally disabled claimants further justifying the payment of common fund fees. This attack against the award of common fund fees must be summarily denied because the Court certified the issue to the Montana Supreme Court and thus, lacks jurisdiction; Liberty Northwest has twice waived any objection to the award of common fund fees and it is bound by the prior representation/waiver. Liberty Northwest only now seeks to mount a collateral attack on common fund fees as a means to end the enforcement of its duty to tender the benefits to all other similarly situated claimants.

After remand Liberty Northwest filed its Brief of Respondent on Remand asserting that "Liberty takes no position as to the merits of the claims and counterclaims of the attorneys for fees involved in this case." *Brief on Remand, January 27, 2003*. Once the Court ruled on common fund fees the issue was certified to the Montana Supreme Court and Liberty Northwest waived its right to file a brief asserting any objection it may have to the award¹.

¹Notably, the Court recognized in the March 29, 2004 hearing that Liberty Northwest's current attack on common fund fees raises the issue "whether [Liberty Northwest] conceded this issue and counsel will examine the transcripts of prior hearings to determine if he did." This waiver appears in both the prior transcripts and the pleading cited herein. Although the Court said "I do not want that issue briefed at this time" it is incumbent upon Jeremy Ruhd to respond to the briefing filed by Liberty Northwest. *Minute Entry, March 29, 2004*.

Liberty Northwest filed its proposed statement of facts on April 12, 2004 in support of its current motion to have the Court hold the *Ruhd* decision to be prospective only. Ruhd does not dispute that Liberty Northwest has recognized fourteen (14) injured workers to be totally permanently disabled out of the greater than 14,000 injuries since it began writing workers' compensation insurance in Montana in 1985. Ruhd has no reason to dispute the information regarding the claim numbers, date of injury, status or representation of the claims identified. The remaining contents of Liberty Northwest's proposed statement of facts are contentions of law which remain in dispute. The statement of facts proposed by Liberty Northwest are irrelevant to the Court's determination of the retroactive application of *Ruhd*.

Ruhd maintains that the determination regarding retroactivity is a purely legal question and does not require a factual analysis beyond those facts supporting the underlying decision of the Montana Supreme Court which facts overwhelmingly favor retroactive application.

Legal Analysis

The United States Supreme Court created a bright line rule in *Harper v. Virginia Dept. of Taxation* 509 U.S. 86 (1993) that all judicial decisions must be applied retroactively. This was recently recognized by this Court in *Flynn*:

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The United States Supreme Court has since applied *Harper* with the clearest iteration of the scope of this rule in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994):

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The decision in *Ruhd* must be applied retroactively to all those permanently totally impaired workers who seek payment of an impairment award as the injured workers' of Liberty Northwest do in this case.

Liberty Northwest urges the Court, despite *Harper* and *Galarneau*, to apply the three factors of the *Chevron* test to find retroactive application would pose undue hardship on the insurer Liberty Northwest². The *Chevron* test examines whether (1) a new principle of law was established by overruling precedent or deciding an issue of first impression that was not clearly foreshadowed, (2) retroactive application will further or retard the new principle of law and (3) retroactive application would create an inequity.

Liberty Northwest argues these three points by claiming that it had no notice that impairment awards were due permanently totally disabled claimants, that "retroactive application . . . will not further the rules application" and that there can be additional costs to administer *Ruhd* so it would create a substantial inequity for Liberty Northwest. Each of these arguments is virtually unsupported by any logical factual analysis.

Liberty Northwest claims that the new decision was not clearly foreshadowed because the Supreme Court said that no specific section explicitly authorizes the impairment awards per se. The crux of the issue is not whether a specific statutory provision authorizes the payment of impairment awards but whether the fact that impairment awards were due was foreshadowed. The issue has its genesis in the original dispute with the State Fund over whether impairment awards were payable immediately or at age 65. Neither the State Fund nor Liberty Northwest raised the claim that impairment awards were never due totally disabled claimants until this Court so ruled. This Court's holding that impairment awards were not due total disabled claimants was unexpected by the prior payment of impairment awards at age 65 was the norm. Liberty Northwest has failed to carry its burden to show that the rule requiring the payment of impairment awards to permanently disabled claimants was not clearly foreshadowed.

Liberty Northwest next claims that "retroactive application . . . will not further the rules application." That is to say retroactive application of the rule requiring payment of impairment awards will not further the payment of impairment awards to permanently totally disabled claimants. Liberty Northwest supports this conclusion with three statements. First, it notes that the Supreme Court "created a new insurer liability" and "insurers are now on notice." Neither of these statements address whether the rule will be promoted or hindered by its retroactive application. The last statement is that prospective application of the rule will not weaken the rule or retard its operation. But the questions is will retroactive application promote its purpose. It will. The fact that prospective application will also promote its purpose is of no consequence to this analysis.

Lastly, Liberty Northwest argues that retroactive application would create a substantial inequity because "there would be additional costs" to the insurer as occurred in *Murer*. The additional costs to the insurer in *Murer* where of the insurer's own making and based on its inability to effectively and efficiently use its own records.

²While the United States Supreme Court overruled and discarded the *Chevron* analysis in *Harper* the argument made by Liberty Northwest under *Chevron* is analyzed to demonstrate the merits of retroactive application.

Liberty Northwest has failed to demonstrate under the old *Chevron* test that retroactive application would create an inequity or would not further the purpose of the rule as stated in *Ruhd*. Liberty Northwest has not carried its burden. The inequity of applying the decision retroactively are non-existent or slight in comparison to the public policy considerations and the financial gain Liberty Northwest would experience if it were allowed to continue to withhold these benefits which the Montana Supreme Court said were due under the then existing law.

The arguments made by Liberty Northwest entitled contract, settled cases, unsettled cases statute of limitations and laches deal with the limits of the retroactive application once the Court holds that the decision will be given retroactive effect. These arguments are premature.

When the *Ruhd* decision is applied retroactively these arguments should be summarily denied. Cases that were settled may be reopened if the settlement is facially invalid because of a clear mutual mistake of material fact. If the settlement in light of the potential benefits is not facially invalid then no apparent mutual mistake of fact existed or affected the settlement. The statute of limitations question has previously been answered and rejected by this court as has the claim of laches. The contract argument is simply a claim that the Supreme Court erred in its holding that the statutes entitle permanently impaired workers to a impairment award.

Conclusion

This Court must hold that the decision in *Ruhd* is retroactive because the case is controlled by *Harper*. The entitlement to benefits under the workers' compensation act in Montana is a constitutionally guaranteed right to full legal redress. Even if the Court applied *Chevron* the burden created by retroactive application is non-existent or slight while retroactive will promote the purpose of the Court's holding.

Liberty Northwest waived its right to oppose the payment of common fund fees and it is bound by that judicial admission.

DATED this 1st day of June 2004

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