IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 55

WCC No. 2001-0294

MARK MATHEWS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

BJS CONSTRUCTION, INCORPORATED
a Montana Corporation

Employer.

ORDER AND JUDGMENT CONCERNING CLASS ACTION, RETROACTIVITY, AND COMMON FUND

Summary: On appeal of this case, the Montana Supreme Court held that an independent contractor exemption does not conclusively bar a worker from claiming he was an employee and from seeking workers' compensation benefits. It remanded the matter for further proceedings consistent with its decision. *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116, 315 Mont. 441, 6 P.3d 865. On remand, the individual entitlement of the claimant to workers' compensation benefits was settled and that settlement was approved. Claimant now seeks common fund attorney fees and to amend his original petition to add class action allegations

Held: The request to amend the petition comes too late and is denied. Moreover, the class action request would be denied even if properly before the Court since the claimant cannot show that common questions of law and fact are predominant as to the proposed class or that a class action is superior to individualized litigation. Even though the Court determines that the Supreme Court's decision is retroactive, claimant is not entitled to common fund attorney fees. Although the Supreme Court's decision established a precedent which may aid the workers' compensation claims of some workers, it did not establish the entitlement of any readily identifiable workers to benefits, therefore no

common fund was created.

Topics:

Pleading: Amendments. A motion to amend a petition is untimely where a final decision and judgment on the original petition have already been entered.

Class Actions. In determining whether an action may proceed as a class action in the Workers' Compensation Court, the Court is guided by Rule 23 of the Montana Rules of Civil Procedure. *Murer v. Montana State Compensation Mutual Ins. Fund*, 257 Mont. 434, 436, 849 P.2d 1036, 1037 (1993) (*Murer I*).

Class Actions. Where the claimants have no connection with insurers other than the insurers providing coverage for their individual claims, a proposed class consisting of all other insurers will not be certified since the typicality requirement of Rule 23(a), Mont. R. Civ. P., is not met. *Murer v. Montana State Compensation Mutual Ins. Fund*, 257 Mont. 434, 436, 849 P.2d 1036, 1037 (1993) (*Murer I*).

Class Actions. A class will not be certified unless common questions of law and fact predominate over individual questions and a class action would be superior to individual litigation.

Attorney Fees: Common Fund. To determine attorney fees under the common fund doctrine, a court must first identify the individuals entitled to further benefits and the amounts of the benefits due.

Attorney Fees: Common Fund. In order to award common fund attorney fees, the Court must first find that a common fund exists.

Attorney Fees: Common Fund. For a common fund to exist, the judicial decision allegedly giving rise to a common fund must do more than establish a favorable precedent that other litigants can take advantage of. It must also establish the right of readily identifiable persons to specific benefits or damages.

Attorney Fees: Common Fund. No common fund was created by the decision in *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116, 315 Mont. 441, 6 P.3d 865, since that decision does not entitle any readily

identifiable claimants to workers' compensation benefits. At most, it established a precedent which will enable some claimants to pursue individual claims for benefits.

Courts: Retroactivity of Decisions. Montana appears to still follow the *Chevron* test in determining whether judicial decisions in civil matters apply retroactively. *Schmill v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 47.

Courts: Retroactivity of Decisions. Applying the three *Chevron* factors, the Court finds that the decision in *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116, 315 Mont. 441, 6 P.3d 865, is retroactive.

¶1 On appeal from this Court's original decision in this case, 2002 MTWCC 6, the Supreme Court held that the independent contractor (IC) exemption issued to the claimant in this case was not conclusive of his employment status and that in fact he was an employee and therefore entitled to workers' compensation benefits with respect to an on-the-job injury. *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116, 315 Mont. 441, 6 P.3d 865. The Court remanded for "further proceedings consistent with this Opinion."

¶2 After remand, the parties settled the claimant's individual entitlement to workers' compensation benefits. However, the claimant's attorney now moves to amend the petition to seek class action status and asks the Court to certify classes of both claimants and insurers. He also seeks common fund attorney fees.

Issues

¶3 The matters to now be decided are:

¶3a Whether the motion to amend should be permitted.

¶3b If so, whether class certification is appropriate.

¶3c Whether a common fund was created as a result of the Supreme Court's decision.

¶3d Whether the Supreme Court's decision is retroactive.

¶4 Other issues have been identified by Liberty Northwest Insurance Corporation (Liberty), but those issues need not be addressed in light of my resolution of the first three issues. I also note that those additional issues, such as the statute of limitations defenses to individual claims and whether settled cases should be excluded from any common fund,

are essentially implementation issues which can be addressed as they arise during the implementation phase of the case if that phase is ever reached. Similar implementation issues have arisen in administering other common fund cases, specifically in the proceedings following *Murer v. State Compensation Ins. Fund,* 283 Mont. 210, 222, 942 P.2d 69, 76 (1997) *(Murer III); Broeker v. State Compensation Mutual Ins. Fund,* 275 Mont. 502, 914 P.2d 967 (1996); and *Rausch v. State Compensation Ins. Fund,* 2002 MT 203, 311 Mont. 210, 54 P.3d 25. In each of those cases, the parties and the Court were able to resolve the specific implementation issues by agreement or through rulings to which the parties ultimately acquiesced. Finally, I note that implementation of issues which the parties have not presently contemplated may arise in administering any common fund. For all of these reasons, I find that the other issues raised by Liberty are not presently ripe for decision.

Discussion

I. Introduction

¶5 In my recent decision in *Schmill v. Liberty Northwest Ins. Corp.,* 2004 MTWCC 47, I laid out a framework for analyzing both the retroactivity and common fund issues. I reaffirm that framework.

II. Motion to Amend

¶6 In seeking class action status, the claimant asks the Court to certify not only a class of claimants but also a class of respondents. The proposed claimants' class consists of those claimants who have been denied benefits because they held independent contractor (IC) exemptions.[1] The proposed class of respondents consists of all those insurers which have denied benefits to claimants based on IC exemptions.

¶7 Since the claimant is seeking class certification only with respect to the claimants who have been denied benefits, the proposed class encompasses only workers who have

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[1]The proposed amended petition, Ex. A to Motion to File Amended Petition for Hearing, describes the class of claimants as follows:

> Each person injured due to an industrial injury or occupational disease and who was, in fact, an employee **denied** benefits because of an Independent Contractor exemption. (*Id.* at 2, emphasis added.)

applied for benefits. The number of such claimants may not be significant. In a 1997 decision, *Bouldin v. Uninsured Employers' Fund,* 1997 MTWCC 68, this Court held that the IC exemption is conclusive and bars a workers' compensation claim whether or not the worker was in fact an employee. That decision was not appealed and stood unchallenged until 2001, when the petitions in this case and in *Wild v. State Compensation Ins. Fund,* 2002 MTWCC 9, were prosecuted.

¶8 The original petition filed in this case was brought by a single claimant. That petition did not contain any class allegations or request for class certification. A final determination and judgment was made and entered on the original petition. While the Supreme Court reversed and remanded the case for "further proceedings consistent with this Opinion," those "further proceedings" do not contemplate an expansion of this case into a class action. The sole questions addressed and raised on appeal were the effect of the IC exemption and the claimant's entitlement to benefits. The further proceedings contemplated on remand involve enforcing the claimant's entitlement to benefits.

¶9 The claimant seeks to expand the proceedings by amending his petition despite the fact that judgment has been entered on the merits of the claimant's original petition. There is no provision either in this Court's rules or the Rules of Civil Procedure allowing an amendment to a petition after a decision has been rendered and judgment entered. Rule 24.5.316 of this Court provides that any motion to amend the petition must be filed within the time provided by the Court's scheduling order; the deadline fixed in the scheduling order expired long ago. Rule 15 of the Montana Rules of Civil Procedure, which governs amendments to pleadings in district court actions, is of no help to the claimant: It similarly does not provide for amendments following judgment.

¶10 My prior decisions in *Flynn v. State Compensation Ins. Fund,* 2003 MTWCC 55 and *Schmill v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 47, do not undermine my decision concerning the untimeliness of the claimant's motion to amend in this case. Those cases involved requests for common fund attorney fees which had not been pled in the original petitions. As I noted in those decisions, the right to common fund fees arises only after the substantive litigation is completed. Moreover, it arises automatically as a lien on benefits due to the claimants benefitted by the substantive decision. *Flynn*, ¶¶ 10-14. Class actions do not arise automatically as the result of successful litigation and are subject to specific pleading and procedural requirements.

¶11 I therefore hold that the claimant's motion to amend his petition to add class action allegations is untimely and must be denied.

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III. Merits of Class Action Request

¶12 Assuming the claimant's motion to add a request for class action status is timely, I address the merits of the request.

¶13 As in *Murer I*, discussed below, the claimant herein is seeking certification of both a class of claimants and a class of respondents. The class of claimants which he urges should be certified consists of claimants holding IC exemptions who have been denied benefits on account of the exemptions. *See* ¶ 6. The proposed class of respondents consists of:

> Each insurer, agent or self insured employer who wrote insurance or adjusted claims in Montana at any time since 1996 and denied a claim based on an Independent Contractor exemption.

(Proposed Class Action Petition for Hearing, ¶ 8.)

¶14 Although the Workers' Compensation Court has no formal rule governing class actions, it looks to the Montana Rules of Civil Procedure to determine whether a class action is appropriate. *Murer v. Montana State Compensation Mutual Ins. Fund*, 257 Mont. 434, 436, 849 P.2d 1036, 1037 (1993) (*Murer I*). In *Murer I* the Supreme Court said:

> "Although the Workers' Compensation Court rules do not provide for class action certification, the Workers' Compensation Court applied Rule 23, Mont. R. Civ. P., to this question. We have previously approved the Workers' Compensation Court seeking guidance from the Montana Rules of Civil Procedure."

Id.

¶15 *Murer* involved a challenge to the State Fund's application of caps on benefits enacted in 1987 and 1989. The State Fund took the position that the caps applied to benefits paid after June 30, 1991 to claimants injured between July 1, 1987 and June 30, 1991, since the cap was in effect at the time of the claimants' injuries. The claimants urged that the State Fund's interpretation was wrong and that all benefits paid after June 30, 1991, should be paid at the higher, non-capped rates. They sought the rate increase on their own behalf and on behalf of all other similarly situated claimants.

¶16 *Murer I* is important not only because it establishes Rule 23, Mont. R. Civ. P., as the basis for deciding class action requests in the Workers' Compensation Court, but also because it is the only case which has ruled on a class action request in a workers'

compensation case. I therefore look to that decision for initial guidance in determining the probable merits of the request in this case.

¶17 The question in *Murer I* was whether this Court erred in denying class certification. Two classes were at issue. The first was a proposed class of claimants injured between July 1, 1987 and June 30, 1991, and receiving benefits after June 30, 1991. The other was a proposed class of respondents consisting of all workers' compensation insurers in Montana. This Court denied certification with respect to both classes and the Supreme Court affirmed based on Rule 23(a), Mont. R. Civ. P., which requires:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

¶18 The decision in *Murer I* turned on subsection (3) of Rule 23(a), commonly referred to as the "typicality" requirement. This Court found that the typicality requirement had not been met. The Supreme Court agreed, writing as follows:

> There would be many different situations among the estimated two thousand claimants who would be included within this class action so that the typicality of the Rule requirement could not be met. Claimants would include unrepresented claimants and those who are already represented by other attorneys, who are suffering either from an industrial injury or occupational disease; claimants whose cases are either open or have been settled; claimants who may be entitled to either a temporary total or permanent total wage supplement impairment, rehabilitation, or death benefit; and different rates for various claimants, depending on whether they were injured or were disabled by an occupational disease. There would be other variables relative to the award of attorney fees and the imposition of penalties with two thousand claimants and two hundred insurers. There are times when competent counsel are not able to fairly and adequately protect the interest of the class.
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> Generally in the application of the typicality requirement of Rule 23(a)(3), the plaintiffs are not entitled to bring a class action against defendants with whom they have had no dealings. There are numerous defendants in this action with which the plaintiffs have had no dealing. . . .

257 Mont. at 437-38, 849 P.2d at 1038. In the final paragraph of *Murer I*, the Court held:

> We therefore conclude there is no showing of sufficient juridical links among the defendants from which we can determine that the Workers' Compensation Court abused its discretion in denying certification for failure to comply with the prerequisite of Rule 23(a)(3), M.R.Civ.P.
>
> Affirmed.

257 Mont. at 439, 849 P.2d at 1039.

¶19 The final holding in *Murer I*, together with the Court's earlier discussion, is determinative as to the present claimant's request for certification of a class of respondents. As in *Murer*, the claimant is requesting that all workers' compensation insurers be brought into the action even though he has no links to those insurers. For the reasons set out in *Murer I*, that request must be denied.

¶20 The request for certification of a claimant's class is more difficult, initially because of ambiguity created by the final paragraph of *Murer I* and secondarily because of the Supreme Court's later decision in *Murer v. State Compensation Mutual Ins.*, 283 Mont. 210, 222, 942 P.2d 69, 76 (1997) (*Murer III*).

¶21 The last paragraph of *Murer I* is the ultimate holding in the case and is premised solely on the failure to meet the typicality requirement with respect to the proposed class of respondents. That limiting holding makes the precedential effect of the Court's discussion regarding the class of claimants unclear. On the one hand, the Court sets out a number of variables affecting the potential benefits of the proposed class of claimants, followed by a concluding sentence suggesting that the variables are too great to certify that class. The concluding sentence was, "There are times when competent counsel are not able to fairly and adequately protect the interest of the class." 257 Mont. at 438, 849 P.2d at 1038. Moreover, the Court could have certified the proposed class of claimants, or even a portion of that proposed class, without certifying the proposed class of respondents. On the other hand, the Court did not separately hold that the proposed class of claimants could not be certified, only that the Workers' Compensation Court did not abuse its discretion in denying certification since there were insufficient "judicial links among the defendants." 257 Mont. at 439, 849 P.2d at 1039.

¶22 The lack of a clear and unequivocal holding that the proposed class of claimants did not meet the typicality requirement is even more troublesome in light of the Supreme Court's third *Murer* decision, *Murer v. State Compensation Ins. Fund*, 283 Mont. 210, 222,

942 P.2d 69, 76 (1997) (*Murer III*), holding that a common fund was created by the second *Murer* decision, *Murer v. Montana State Compensation Ins. Fund*, 267 Mont. 516, 885 P.2d 428 (1994) (*Murer II*). It is difficult to see how a common fund can exist if the typicality requirement applicable for class actions is not met. In the decision giving rise to *Murer III*, I held that the common fund doctrine was inapplicable precisely because of a lack of typicality among claimants, even citing the Supreme Court's language in *Murer I*. I pointed out:

> One of the basic features of common fund and substantial benefit cases is the nature of the entitlements of the persons benefitted by the litigation. Generally, that entitlement has been close to automatic. At least it has been subject only to simple verification and/or amenable to simple mathematical computation. See Boeing, 444 U.S. at 479. In Boeing the debenture owners merely had to establish their ownership of debentures. In Greenough the bondholders had only to establish their ownership of bonds. In Sprague the trustees and their beneficiaries only had to establish their interests as trustees and beneficiaries. In Mills and Hall the benefit of the litigation was simply the vindication of the rights of equity owners of a corporation and of members of a union. In Means the efforts of lead counsel led to actual settlement of the claims of the benefiting plaintiffs. In each of these cases, the claims of the persons ultimately bearing the litigation expenses were fully resolved without the need for any additional or ancillary litigation.
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> The entitlements of the non-participating claimants in this case are not so readily determined. In Murer v. State Compensation Mut. Ins. Fund, 257 Mont. 434, 437, 849 P.2d 1036, 1038 (1993), the Supreme Court enumerated some of the differences among claimants:
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> > There would be many different situations among the estimated two thousand claimants who would be included within this class action so that the typicality of the Rule requirement could not be met. Claimants would include unrepresented claimants and those who are already represented by other attorneys, who are suffering either from an industrial injury or occupational disease; claimants whose cases are either open or have been settled; claimants who may be entitled to either a temporary total or permanent total wage supplement impairment, rehabilitation, or death benefits; and different rates for various claimants, depending on whether they were injured or were disabled by an occupational disease. There would be other variables relative to the award of attorney fees and the

> imposition of penalties with two thousand claimants and two hundred insurers. There are times when competent counsel are not able to fairly and adequately protect the interest of the class.
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> While only one insurer is now involved in the present case, and petitioners are seeking attorney fees only with respect to claims against that insurer, there are still approximately 1,100 claimants involved. (3/24/95 Tr. at 7.) Moreover, several of the claims in this case have additional issues which must be resolved, such as the effect of written settlements on some of the petitioners' entitlements.

Murer v. State Compensation Ins. Fund, 1995 MTWCC 39A-1, Order Denying Attorney Fees Under Common Fund Doctrine at 7 (August 7, 1995). Nonetheless, in *Murer III* the Supreme Court held that the common fund doctrine applied.

¶23 A finding that a common fund exists has consequences which are very similar to those in a class action. Before common fund fees can be determined, all claimants entitled to benefits under the substantive Court decision must be identified and the additional benefits due each of them must be determined. The same would be true if a class consisting of the benefitted claimants had been certified in the first place. The difference between the two remedies may simply be who pays attorney fees.

¶24 In *Murer III* the Supreme Court made no attempt to reconcile its denial of class action status in *Murer I* with its determination that a common fund existed. Moreover, in discussing *Murer I*, the Court in *Murer III* seemed to view *Murer I* as resting on different grounds than those quoted verbatim earlier in this decision. Discussing *Murer I*, the Court said:

> Claimants initiated this litigation as representatives of a class of injured claimants similarly situated. However, the Workers' Compensation Court concluded that
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> > a final judgment will have the same effect as a class action without the unnecessary complications. The Court is convinced that the regulatory agency (D.O.L.I.) and the supervision of the courts sufficiently protects all claims.
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> > . . . .
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> On that basis, the Workers' Compensation Court, denied class certification

and, on appeal, we affirmed. *Murer v. State Fund* (1993), 257 Mont. 434, 849 P.2d 1036 (*Murer I*).

Murer III at 215, 942 P.2d at 72. While the decision in *Murer I* briefly points out that trial courts, including and especially the Workers' Compensation Court, have discretion to determine the most efficient manner of resolving litigation, *Murer I* at 436, 849 P.2d at 1037, *Murer I* did not quote or even refer to the language from the Workers' Compensation Court decision which is quoted in *Murer III*. In *Murer I* the Court noted that one of the reasons the Workers' Compensation Court denied certification was because it found that the proposed class did not comply with Rule 23(a), Mont. R. Civ. P. It then affirmed that finding. By reaching back to and quoting from the original Workers' Compensation Court decision regarding the effect of a final judgment without class certification, and then concluding that the decision in *Murer I* rested "[o]n that basis," *Murer III* at 215, 942 P.2d at 72, I can only wonder if *Murer III* limits, if not implicitly rejects, the typicality discussion in *Murer I*, at least as to the proposed class of claimants.

¶25 Each class action request must nevertheless be analyzed on its own merits Moreover, the typicality requirement is only one of six elements which must be met under Rule 23(a) and (b)(d). Those six requirements are:

1. The class must be so numerous that joinder of all members is impractical.

2. There must be questions of fact or law common to the class.

3. The claims or defenses of the representative parties must be typical of the claims or defenses of the proposed class.

4. The representative parties will fairly and adequately protect the interest of the proposed class.

5. The questions of law or fact common to the members of the class predominate over questions of the individual members.

6. The class action is superior to other methods of adjudicating the controversy.

McDonald v. Washington, 261 Mont. 392, 400, 862 P.2d 1150, 1155 (1993).

¶26 In this case and in *Wild v. State Compensation Ins. Fund,* 2003 MT 115, 315 Mont. 425, 68 P.2d 855, the Supreme Court held that the IC exemption does not bar a claim by an injured worker where the employer has not made an initial good faith effort to determine

whether the worker is in fact an independent contractor or where the employer thereafter fails to treat the worker as an independent contractor. In *Wild* the claimant was one of several roofers employed on a roofing job and was paid by the hour. He was given the option of working as an employee or an independent contractor and was paid an additional $5 an hour because he chose the latter. The situation in this case was nearly identical: The employer offered the claimant the option of signing on as an employee or independent contractor. As an independent contractor he received a higher hourly wage but performed the same work as employees.

¶27 Approximately 29,000 Montana workers held IC exemptions in fiscal year 2002.[2] The precedent established by the Supreme Court decisions in *Mathews* and *Wild* does not establish the entitlement of any of those workers to workers' compensation benefits. To benefit from the *Mathews* and *Wild* decisions, a worker holding an IC exemption must prove as a matter of fact that he or she is in fact an employee.[3] *State ex rel. State*

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[2]The Workers' Compensation 2002 Annual Report published by the Department of Labor and Industry, which is the latest report available at the time of the present decision, reports a total of 29,204 active independent contractor exemptions for fiscal year 2002.

[3] Even though there is a presumption that a worker is an employee, § 39-71-120(2), MCA, that presumption is seriously eroded where the worker swears under oath that he or she is an independent contractor. Rule 24.35.111 of the Department of Labor and Industry, which implements the statute governing IC exemptions, provides:

> **24.35.111 APPLICATION FOR INDEPENDENT CONTRACTOR EXEMPTION** (1) As provided by 39-71-401(3), MCA, a sole proprietor, working member of a partnership, working member of a limited liability partnership, or working member of a member-managed limited liability company who represents to the public that the person is an independent contractor shall elect to be bound by the provisions of a workers' compensation plan but may apply for an exemption from the Workers' Compensation Act. In order to obtain an independent contractor exemption, an applicant must:
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> (a) submit a department application affidavit form bearing the applicant's notarized signature in which the applicant swears or affirms under oath that the statements contained in the form are true and accurate to the best of their ability; and
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> (b) pay a fee, as required by ARM 24.35.121.
>
> (2) The department application affidavit form requires the applicant

Compensation Mut. Ins. Fund v. Berg, 279 Mont. 161, 182, 927 P.2d 975, 987 (1996). The worker must then prove that either the employer did not make an initial good faith inquiry into whether the worker was in fact an independent contractor or thereafter treated the worker in a manner inconsistent with IC status. Then, the worker must still prove that he or she was in fact injured in the course and scope of employment.

¶28 Given the hurdles that each individual claimant must surmount even with the benefit of the *Mathews* and *Wild* decisions, it is unlikely that the typicality requirement is met. The claimants in *Mathews* and *Wild* had easy cases factually. Other independent contractor cases must be determined based on their own unique facts.

¶29 Moreover, as set out in requirements five and six for class actions, ¶ 26, the claimant herein must satisfy the Court that "questions of law or fact common to the members of the class predominate over questions of the individual members" and that a "class action is superior to other methods of adjudicating the controversy." The only question of fact or law that is common is the question concerning the conclusiveness of the IC exemption. Questions of fact unique to individual claimants predominate over that

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to provide their correct name and social security number and to make the following representations for each trade, occupation, profession or business for which the applicant is seeking an independent contractor exemption:

(a) that the applicant is engaged in an independently established trade(s), occupation(s), profession(s) or business(es) which are specifically identified;

(b) that the applicant currently files or, if a new business is formed, will be filing the appropriate federal and state tax returns for the year in which the exemption is in effect and pays self-employment taxes on the income earned as an independent contractor;

(c) that the applicant has or will have a contract or accepted bid proposal;

(d) that the applicant has documents such as printed invoices, business cards, current business licenses, permits, advertisements, etc., which support a finding of an independently established trade, occupation, profession or business;

(e) that the applicant supplies substantially all of the tools and equipment necessary for the performance of the contract;

(f) that the applicant controls the details of how to perform the contracted for services and that the employer retains only the control necessary to ensure the bargained for end result;

. . . .

question. Each case will have to be decided individually based upon its own facts. Thus, class certification is not superior to individual litigation.

¶30 I therefore conclude that the claimant cannot prevail in his request for class certification.

IV. Common Fund

¶31 Liberty raises numerous arguments in opposition to the claimant's request for common fund attorney fees. Those arguments include lack of jurisdiction, failure to plead common fund fees, due process, *res judicata*, and equitable estoppel. All of these defenses were addressed and rejected in this Court's decision in *Schmill v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 47.

¶32 However, the common fund doctrine requires more than the establishment of a precedent which may benefit others; the precedent must in fact "create a common fund which directly benefits an ascertainable class of nonparticipating beneficiaries." *Murer III* at 223, 942 P.2d at 76. Unlike *Murer III*, where "claimants established a vested right on behalf of the absent claimants to directly receive immediate monetary payments of past due benefits underpayments," *id.*, in this case the *Mathews'* decision does not establish a direct entitlement to benefits on behalf of other readily ascertainable claimants. The decision established no more than a precedent which may aid some workers in the pursuit of their individual claims for benefits. Therefore, no common fund has been created. Lacking a common fund, the claimant's attorney is not entitled to common fund attorney fees.

V. Retroactivity

¶33 Finally, Liberty urges that the *Mathews* decision should be applied prospectively only.

¶34 In my recent decision in *Schmill v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 47, I reviewed the current status of the law governing retroactive application of judicial decisions in civil cases.[4] I concluded that the three-part test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), still applies in Montana. The *Chevron* test is most recently

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[4]Retroactivity of criminal decisions was not surveyed since those cases typically involve whether a decision should be applied to other criminal cases in which judgments have already become final or in which the time for appeal has expired. E.g., *Schriro v. Summerlin,* United States Supreme Court Slip Opinion (June 24, 2004).

summarized in *Ereth v. Cascade County,* 2003 MT 328, 318 Mont. 355, 81 P.3d 463 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."

2003 MT 328, ¶ 29 (quoting from *Riley v. Warm Springs State Hosp.,* 229 Mont. 518, 521, 748 P.2d 455, 457 (1987)).

¶35 In applying the first factor, consideration must be given to this Court's prior decision in *Bouldin v. Uninsured Employers' Fund,* 1997 MTWCC 58, which held that an IC exemption is conclusive as to employment status and bars any workers' compensation claim. That decision was not appealed and was the governing precedent for six years, i.e., until *Mathews* and *Wild* were decided. *Mathews* and *Wild* did not "overrule" prior precedent since the *Bouldin* decision was of an inferior court and the Supreme Court had not previously addressed the issue. However, the *Bouldin* decision, and the fact that it went unchallenged for several years, supports a conclusion that the decisions in *Mathews* and *Wild* were "not clearly foreshadowed." Moreover, section 39-71-401(3), MCA (1999), lent strong support to the result in *Bouldin* and in this Court's prior decisions in *Mathews* and *Wild.* The subsection provides:

> (c) When an application [for an IC exemption] is approved by the department, it is conclusive as to the status of an independent contractor and precludes the applicant from obtaining benefits under this chapter.

The Supreme Court found this provision in conflict with other provisions of the Workers' Compensation Act and declined to apply it literally.[5] *Wild* at ¶¶ 20-22. The fact, however, that the decision rested on reconciling conflicting provisions is further support for a conclusion that the *Mathews* and *Wild* decisions were not clearly foreshadowed. I therefore

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[5]The Court did not consider or discuss the possible application of the rule of statutory construction "that when a general and particular provision of statute are inconsistent, the particular provision will prevail." *State ex rel. Needham v. Justice Court,* 119 Mont. 89, 97, 171 P.2d 351, 355 (1946); *see also Sun Ins. Co. of New York v. Diversified Engineers, Inc.,* 240 F.Supp. 606 (D. Mont. 1965).

conclude that the first factor favors non-retroactive application of the decisions.

¶36 Application of the rule retrospectively would, however, further the rule announced in *Wild* and *Mathews*. Failure to apply the rule retroactively would deprive some injured workers, who are employees, benefits that are otherwise due them. Factor two therefore favors retroactive application.

¶37 Finally, I consider the "equity" of retroactive application. In analyzing this factor, I note that the likely workers who will benefit from retroactive application are those workers with IC exemptions who have notified their employers within thirty days of their work-related injuries, § 39-71-603, MCA, and have either already filed a workers' compensation claim or still have time to submit a claim within the period prescribed by section 39-71-601, MCA, usually one year following the injury. While untimeliness of notice and the untimeliness of a written claim are affirmative defenses that may be waived, it is unlikely that insurers would engage in any wholesale waiver of those or other defenses. Thus, applying *Mathews* and *Wild* retroactively will have very limited impact. Moreover, insurers can hardly argue surprise with respect to claims that are timely made. Equity favors retroactive application.

¶38 Weighing all three *Chevron* factors, I conclude that the decisions in *Mathews* and *Wild* are retroactive.

JUDGMENT

¶39 The rule announced in *Mathews v. Liberty Northwest Ins. Corp,* 2003 MT 116 and *Wild v. State Compensation Ins. Fund,* 2003 MT 115, regarding the non-conclusiveness of IC exemptions is retroactive, however, the claimant's request for leave to add a class action claim and certify the proposed class is **denied**. His request for common fund attorney fees claim is also **denied**. Since his individual claim has been settled, and that settlement approved, the claimant's remaining post-remand motions and claims are **dismissed with prejudice**.

¶40 This JUDGMENT is certified as final for all purposes.

DATED in Helena, Montana, this 8th day of July, 2004.

(SEAL)

JUDGE

Mr. Geoffrey C. Angel
Mr. Larry W. Jones
Submitted: June 11, 2004