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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR,

Petitioner,

v.

MONTANA STATE FUND,

Respondent.

WCC No. 2002-0676

**STATE FUND'S OPENING BRIEF  
REGARDING EXISTENCE OF A  
COMMON FUND, EXISTENCE OF  
ASCERTAINABLE CLASS AND  
FUND, RETROACTIVITY, LACHES  
AND STATUTES OF LIMITATIONS  
ISSUES, AND CONSTITUTIONALITY  
OF APPLICATION OF COMMON  
FUND DOCTRINE.**

COMES NOW the Respondent, Montana State Fund ("State Fund"), and hereby files its Opening Brief Regarding Existence of a Common Fund, Existence of Ascertainable Class and Fund, Retroactivity, Laches and Statutes of Limitations Issues, and Constitutionality of Application of Common Fund Doctrine. For the reasons stated herein, the State Fund asserts that a common fund does not exist, and that there is neither an ascertainable class nor an ascertainable fund. Even if a common fund did exist under *Reesor*, this fund is not retroactive. If the Court does recognize a common

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fund, for any claimants who failed timely to present a challenge to the Montana Code Annotated, claims now presented are barred by laches and statutes of limitations. Finally, the State Fund contends that application of the Common Fund doctrine violates constitutional guarantees of "freedom of contract" and "taking without just compensation."

## I. INTRODUCTION

This case arises out of the Montana Supreme Court's decision in *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019, which held that the limitation on permanent partial disability (PPD) benefits for claimants receiving or eligible for Social Security or similar retirement benefits as set forth in Montana Code Annotated § 39-71-710 (1999) violated the Equal Protection Clause of the Montana Constitution. *Reesor*, ¶ 19. On January 20, 2005, Reesor's counsel filed a Notice of Common Fund Attorney Fee Lien, asserting a lien against all Plan I, II, & III workers' compensation insurers for all claimants injured between June 30, 1987,<sup>1</sup> and December 23, 2004. (See Notice of Common Fund Attorney Fee Lien). Following a February 3, 2005, status conference, this Court determined that, under *Russette v. State Compen. Ins. Fund* (1994), 265 Mont. 90, 874 P.2d 1217, any *Reesor* common fund may encompass only those claimants injured between July 1, 1987 and June 30, 1991, and those injured after June 30, 1995. (Minute Entry, Feb. 3, 2005, Status Conference). The Court also determined that claimants injured after June 30, 2003, may be included in the common fund class, but that attorney fees may not be taken with respect to such claimants.

## II. ISSUES

On March 14, 2006, this Court issued an Order delineating the following issues for briefing:

1. Does a common fund exist?
2. Is there an ascertainable class?
3. Is there an ascertainable fund?
4. If there is a common fund, is it retroactive?

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<sup>1</sup> This date should be July 1, 1987.

5. Do laches or statutes of limitations apply to claims which failed to timely present a challenge to Montana Code Annotated?
6. Does application of the common fund doctrine violate constitutional guarantees of "freedom of contract and taking without just compensation"?

### III. STATEMENT OF FACTS

On January 13, 2000, Dale Reesor was injured during the course and scope of his employment with Northwest Equipment in Cascade County, Montana. Reesor was sixty-five years old at the time of his injury, and had been receiving social security retirement benefits since May 24, 1999, his sixty-fifth birthday. Reesor filed a workers' compensation claim, and the State Fund, which was Northwest Equipment's workers' compensation insurer, paid temporary total disability (TTD) benefits to Reesor from January 22, 2000, through August 2, 2002. Reesor reached maximum medical improvement on May 10, 2002, and his doctor rated him at four percent permanent partial impairment. The State Fund paid out the impairment award portion of Reesor's entitlement between June 10, 2002, and September 15, 2002, for a total award of \$2,975.00. Under Montana Code Annotated § 39-71-710, Reesor was statutorily ineligible for additional PPD benefits enumerated in Montana Code Annotated § 39-71-703.

Reesor filed a petition for hearing before the Workers' Compensation Court, alleging Montana Code Annotated § 39-71-710, violated constitutional guarantees of equal protection by depriving him of a larger PPD award due to his age. This Court rejected Reesor's claim and held that Montana Code Annotated § 39-71-710, survived constitutional scrutiny because the deprivation of Reesor's additional PPD benefits was roughly offset by Reesor's eligibility for social security retirement benefits. *Reesor*, ¶ 1.

The Montana Supreme Court reversed the decision of this Court, holding that Montana Code Annotated § 39-71-710, unconstitutionally deprived Reesor of increased PPD benefits because of his age. *Reesor*, ¶ 19. On January 20, 2005, Reesor's counsel filed a Notice of Common Fund Attorney Fee Lien, asserting a lien against all Plan I, II, & III workers' compensation insurers for all claimants injured between June 30, 1987 and December 23, 2004. (See Notice of Common Fund Attorney Fee Lien). The Common Fund Attorney Fee Lien did not differentiate between PPD and permanent total disability (PTD) claimants. This Court later narrowed the time period requested in the lien, holding that, if a *Reesor* common fund existed, it may encompass only those

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claimants injured between July 1, 1987 and June 30, 1991, and those injured after June 30, 1995. (Minute Entry, Feb. 3, 2005, Status Conference). The Court also determined that claimants injured after June 30, 2003, may be included in the common fund class, but that attorney fees may not be taken with respect to such claimants. (Minute Entry, Feb. 3, 2005).

On March 14, 2006, this Court ordered briefing on various *Reesor* implementation issues, including the existence of a common fund, the retroactivity of *Reesor*, whether late-filed claims are barred by statutes of limitations or the doctrine of laches, and whether imposition of a common fund violates constitutional guarantees of freedom of contract and taking without just compensation. For the reasons described below, the State Fund submits that imposition of a common fund is inappropriate in this case for several reasons, including the lack of ascertainable class and fund, the fact that *Reesor* should not be applied retroactively, and constitutional concerns with application of a *Reesor* common fund. In addition, claims not timely filed must be barred under statutes of limitations and the doctrine of laches.

#### IV. ARGUMENT

##### A. A Common Fund Does Not Exist Under *Reesor*.

In *Murer v. State Compens. Mut. Ins. Fund* (1997), 283 Mont. 210, 942 P.2d 69, the Montana Supreme Court explained that, when a party creates a common fund directly benefiting "an ascertainable class of non-participating beneficiaries," and particularly when the individual does not have a sufficient economic stake in the outcome of his case to justify pursuing his rights without a common fund, that individual is entitled to reimbursement of attorney fees under the common fund. *Murer*, 283 Mont. at 222-223, 942 P.2d at 76.

As the *Murer* court explained, part of the rationale behind the doctrine is to allow a claimant to recover reasonable attorney fees from those who benefit from his pursuit of his rights:

[W]e conclude that when a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bear a portion of the litigation costs, including reasonable attorney fees. Accordingly, the party who creates the common fund is entitled, pursuant to the

common fund doctrine, to reimbursement of his or her reasonable attorney fees from that fund.

*Murer*, 283 Mont. at 223, 942 P.2d at 76.

*Murer*, however, did not suggest unlimited access to common fund entitlement. Rather, critical language from *Murer*, which underscores the purpose of the doctrine, explains where there may exist some parameters on the applicability of the common fund doctrine:

Application of the common fund doctrine is especially appropriate in a case like this where the individual damage from an institutional wrong may not be sufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong. The alternative to the doctrine's application is simply for the wrong to go uncorrected.

*Murer*, 283 Mont. at 222-223, 942 P.2d at 76.

In *Murer*, *Murer*'s individual economic stake in the outcome of the litigation was quite small because he was only challenging whether the temporary cap on his benefits applied to his claim. Unfortunately, the current trend in common fund litigation ignores one of the doctrine's purposes of providing an incentive to litigate issues whose economic benefits are minimal. Rather than apply the common fund doctrine to situations akin to *Murer*, attorneys are now seeking to invoke the doctrine every time they succeed on a legal matter, regardless of the economic stakes at issue in the precedent-setting litigation. Such an approach is a misapplication of the doctrine. Unlike in *Murer*, *Reesor*'s economic stake in his litigation was significant, and it justified the legal expense necessary to challenge the disparate treatment. As the Montana Supreme Court recognized in its *Reesor* decision, *Reesor* initially received a total impairment award of \$2,975.00; because of the Court's determination regarding Montana Code Annotated § 710's unconstitutionality, *Reesor*'s entitlement increased by \$20,081.25. *Reesor*, ¶ 5. *Reesor* was able to increase his impairment award ten times, more than enough to be "sufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong." *Murer*, 283 Mont. at 222-223, 942 P.2d at 76. Application of the common fund doctrine to this case would be inappropriate.

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**B. There Is Not An Easily-Ascertainable Class Of Non-Participating Beneficiaries, Nor Is There An Ascertainable Fund.**

**1. Satterlee limits any common fund class to PPD claimants.**

The Montana Supreme Court's holding in *Reesor* was limited to whether the age limitation on PPD benefits set forth in Montana Code Annotated § 39-71-710, violated the Equal Protection Clause of the Montana Constitution. *Reesor*, ¶¶ 2, 7. However, Reesor's counsel has not limited his lien to PPD claimants. Instead, Reesor's counsel attempts to apply *Reesor* to PTD claimants.

Under this Court's recent decision in *Satterlee v. Lumberman's Mut. Cas. Co.*, 2005 MTWCC 55, it is clear that any common fund class may include only PPD claimants. In *Satterlee*, this Court expressly held that Montana Code Annotated § 39-71-710, is constitutional as applied to PTD benefits. *Satterlee*, ¶ 32. Accordingly, Reesor's counsel's lien is overbroad, and must be limited by this Court to apply, at most, to eligible PPD claimants.<sup>2</sup>

**2. Even for PPD claimants, no ascertainable fund or class exists.**

In previous cases, including *Murer, Broeker v. Great Falls Coca-Cola Bottling Co.* (1996), 275 Mont. 502, 914 P.2d 967; *Rausch v. Hogan*, 2001 MT 123, 305 Mont. 382, 28 P.3d 460; and *Flynn v. State Compen. Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, the common fund claimants were more readily identifiable and their increased entitlement could be determined predominantly by a simple mathematical calculation without anything near the extensive procedures and proceedings involved in ascertaining additional entitlement under *Reesor*.

In *Murer*, the ability to determine, with certainty, the amount of money a non-participating beneficiary was entitled to receive influenced the Montana Supreme Court's decision to apply the common fund doctrine. See *Murer*, 283 Mont. at 223, 942 P.2d at 77 ("The State Fund, therefore, has been able to determine, with certainty, the number of absent claimants involved and the amount of money to which each individual claimant is entitled."). In recognition of that *Murer* requirement, this Court has reiterated in the pending common fund cases that the lack of an ability to mathematically calculate

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<sup>2</sup> The *Satterlee* Petitioners' Motion for Reconsideration of this Court's *Satterlee v. Lumberman's Mut. Cas. Co.*, 2005 MTWCC 55, is currently pending before this Court.

an absent claimant's increased entitlement eliminates the appropriateness of a common fund:

If when I go through these cases – The easiest case, for example, was the *Murer* case, because all that required, once you identified them and you identified the dates, it was simply a mathematical computation. So it was what we would call, I think, in the law a ministerial act to determine what those claimants were owed.

Transcr. Hrg. 18:16-22, *Wild v. State Fund* (June 25, 2003) (emphasis added). See also Transcr. of Proc. 24:24-25:1, *Ruhd v. Liberty Nw. Ins. Corp.*, WCC No. 2002-0500 (Dec. 8, 2003), ("The problem is, is each of those cases may vary factually and that is not a case – those cases are not appropriate for common fund.").

In this case, determination of any *Reesor* common fund entitlement will involve innumerable, time-consuming, highly-individualized determinations. Although Workers' Compensation Act § 703 provides a formula for determining PPD entitlement, the formula cannot be utilized until all the necessary medical and vocational information is gathered on each claimant. See Affs. Daniel Gengler (Apr. 11, 2006) (attached as "Ex. A"), Marvin Kraft (Apr. 11, 2006) (attached as "Ex. B"), Cristine E. McCoy (Apr. 12, 2006) (attached as "Ex. C"), and David Ogan (Apr. 12, 2006) (attached as "Ex. D"). Obtaining this information will be burdensome, time-consuming, and expensive, with hard costs potentially exceeding \$3 million in addition to a substantial amount of unquantified soft costs. Aff. Gengler ¶¶ 3, 4, 6. Disputes over impairment ratings or vocational restrictions will likely lead to mediation and eventual litigation, and determining entitlement under § 703 may require mini-trials in a vast majority of cases.

Determining entitlement to *Reesor* benefits will take more than a ministerial act and a simple mathematical computation because obtaining the missing information in each claim file will require substantial effort followed by subjective analysis. Missing medical and vocational information are going to take time to arrange for and gather, and disputes over wage loss and related earning capacity issues and the effect of subsequent injuries or diseases on the State Fund's liability will need to be litigated before PPD entitlement can be properly calculated. The process is unimaginably exacerbated by the requirement that each individual claim will require gathering or securing vocational information applicable to past status and an exercise of hindsight

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vocational and medical review.<sup>3</sup> Similar to the approach taken in class action cases, the State Fund urges this Court take the position that claims which require "highly individualistic determinations," or which require the Court to conduct a series of mini-trials for resolution, are inappropriate for the application of the common fund doctrine. See generally *Ostrof v. State Farm Mut. Automobile Ins. Co.*, 200 F.R.D. 521, 531-532 (D. Md. May 21, 2001 (discussing the concept as applied to class action claims). Because computing § 703 entitlement would involve "highly individualistic determinations" and would require a series of mini-trials for resolution, the State Fund asserts that no common fund exists as a result of the *Reesor* decision.

**C. Any Common Fund Resulting From The *Reesor* Decision Is Not Retroactive.**

- 1. All three *Chevron* factors are met.**

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<sup>3</sup> For instance, a representative claim would include a claimant, like *Reesor*, who received an impairment award several years ago. The file would first have to be located. Typically, the file would not contain sufficient vocational and medical work-up to consider entitlement to the largest potential additional PPD entitlement, wage loss. To determine the entitlement a vocational consultant would have to analyze, as of several years past, whether the claimant suffered a compensable wage loss due to the industrial injury as of the date of maximum healing. The process would involve an analysis of the time-of-injury job, if possible, and an analysis (or guesstimate) of the other employment positions the claimant might have been able to compete for given the past medical condition caused by the industrial injury. In order to determine capacity, retrospectively, medical input, again guessing at prior restrictions would be needed. This might entail a present medical exam or functional capacity testing to attempt to determine, again for years passed, the claimant's restrictions. This process is complicated by the normal aging process, later injury or disease. Once this part of the puzzle is pieced together on each claim a doctor would have to render an opinion whether the claimant, based on the restrictions due to the industrial injury, could do the jobs retrospectively analyzed and written up by a vocational consultant as being within the claimant's residual labor market. Then, research would need to be completed to attempt to attach wage potential to previous time periods for each job suggested as appropriate and medically approved. At the end of the process there is a significant likelihood of disagreement. Common fund counsel would feel compelled or be required to litigate each claim to the maximum. Clearly, from a technical and practical standpoint the process is unworkable, individual and contrary to any proper common fund basis.

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The general rule in Montana is that judicial decisions are applied retroactively. *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶ 29, 325 Mont. 207, ¶ 29, 104 P.3d 483, ¶ 29 (citing *Kleinhesselink v. Chevron, U.S.A.* (1996), 277 Mont. 158, 162, 920 P.2d 108, 111). The Montana Supreme Court allows for an exception to this general rule when there exists "a truly compelling case for applying a new rule of law prospectively only." *Dempsey*, ¶ 29. Pursuant to this exception, a decision will not apply retroactively if all three *Chevron* factors are met:

1. Whether the ruling to be applied retroactively establishes a new principle of law "by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed";
2. Whether retroactive application will further or retard the rule's operation; and
3. Whether retroactive application will result in a substantial inequity.

*Dempsey*, ¶ 30 (citing *Chevron Oil v. Huson*, 404 U.S. 97, 106-107 (1971)).

As set forth below, *Reesor* avoids retroactive application because all three *Chevron* factors weigh in favor of prospectivity.

- a. **The *Reesor* decision established a new principle of law whose result was not clearly foreshadowed.**

A judicial decision will avoid retroactive application if it overrules precedent or establishes a new principle of law by deciding an issue of first impression whose result was not clearly foreshadowed. *Dempsey*, ¶ 30. The result in *Reesor* was not foreshadowed. Prior to *Reesor*, PPD claimants were expressly prohibited by statute from receiving PPD benefits after reaching retirement age. See Mont. Code Ann. § 39-71-710. In 2001, in *Black v. MDMC/Benefis Healthcare*, this Court held that Montana Code Annotated § 710's denial of PPD benefits to injured workers who have taken social security retirement benefits, or are eligible to receive social security retirement benefits, did not violate the Equal Protection Clause of the Montana or United States Constitutions. See *Black v. MDMC/Benefis Healthcare*, 2001 MTWCC 47, Findings of Fact, Conclusions of Law & Judgment (Aug. 24, 2001). This Court recognized and relied upon *Black* in reaching its *Reesor* decision, going so far as to attach a copy of

*Black* to the *Reesor* Order. In other words, at the time of the *Reesor* litigation, the prevailing law in Montana was that workers receiving social security disability benefits were not entitled to continued receipt of PPD benefits.

The Montana Supreme Court's *Reesor* decision fundamentally altered the state of the law regarding payment of PPD benefits to workers receiving (or eligible to receive) Social Security disability benefits. Such a drastic change in the rights of claimants and the obligations of insurers was not "clearly foreshadowed." This point is underscored by the fact that the Montana Supreme Court decided *Reesor* by a narrow 4-3 majority. While Justices Leaphart, Cotter, and Nelson concurred in Justice Regnier's majority opinion, Justice Warner and Chief Justice Gray joined in the lengthy, comprehensive, well-reasoned dissent of Justice Rice. See *Reesor*. One can assume that a "clearly foreshadowed" result would have resulted in a 7-0 decision, or at least one decided by a majority more decisive than 4-3.

Critically, employers and insurers justifiably relied on the prevailing state of the law, governed by this Court's reasoned and well-researched pronouncement in *Black* and Montana Code Annotated § 39-71-710, to determine entitlement and set rates. When the Montana Supreme Court reversed this Court's reasoned judgment in *Reesor*, it fundamentally changed the law governing past entitlement and rates. It is apparent that *Reesor* established a new principle of law whose result was not clearly foreshadowed. Therefore, the first *Chevron* factor is satisfied.

**b. Retroactive application of the rule set forth in *Reesor* will not further the rule's operation.**

The second *Chevron* factor inquires into whether retroactive application of a judicial decision will or will not further the rule's operation. See *Dempsey*, ¶ 30. In evaluating the second factor, it is appropriate to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Dempsey*, ¶ 21 (quoting *Chevron*, 404 U.S. at 106-107). The Montana Supreme Court has summarized the issue as "whether the retroactive application of a rule of law will further or retard its operation." *Schmill v. Liberty Nw. Ins. Co.*, 2005 MT 144, ¶ 15, 327 Mont. 293, ¶ 15, 114 P.3d 204, ¶ 15.

The *Schmill* reference to only a portion of *Dempsey*'s direction on this *Chevron* element is unjustifiably restrictive. It invites the simplistic analysis expected from *Reesor* that it is elemental that every statute found to be unconstitutional must be

applied retroactively or the operation of the holding will be retarded as to some deserving claimants. If that were the rule, all holdings involving constitutional deficiency would be retroactive. Clearly, that is not the case. The *Dempsey* direction, in its breadth, must be considered.

Because the rule prior to *Dempsey* required only the presence of one of the *Chevron* factors to preclude retroactivity there is a paucity of authority on this rather vague and difficult to decipher element, giving rise to the need for thoughtful interpretation and development post *Dempsey*. The rule in that case was a product of a unique interpretive approach. Its implementation deserves no less.

The *Dempsey* articulation requires, by its terms, a case by case review. It is heavily reliant upon a consideration of the history of the rule and, in its essence, whether the new rule will be properly implemented with prospective application.

Here, we have a clear statute and specific interpretation from this very Court, *twice*, that it was properly applied to preclude PPD benefits to those considered retired as a matter of law. The holding was consistent with accepted principles of workers' compensation law. In fact, this Court noted that Larson's treatise, the gold standard for thoughtful analysis of workers' compensation issues and trends, presented a persuasive case for the constitutionality and propriety of § 710's limitation. *Black*, ¶ 38. In finding the statute acceptable from a constitutional and public policy standpoint this Court noted that it was consistent with legitimate state interests, the economic viability of the workers' compensation system and the coordination of benefits protecting our injured and elderly citizens. *Black*, ¶¶ 33-39.

This Court's previous analysis, even though rejected years later in this matter, weighs heavily on the consideration of the history, purpose and effect of the new rule. The entire system (claimants, insurers and their lawyers), justifiably relied upon the thoughtful analysis of this Court in *Black* and the holding supporting the viability of the statute. Significant law and proper policy supported the application of the statute. It need not be stricken retroactively to properly implement the new and unexpected rule. This Court (and three Justices of the Supreme Court) found that the statute was an appropriate legislative direction and reasonably coordinated with other benefits available to retired claimants. It would be inconsistent with the history, and contrary to the *Dempsey* direction, to now state that the only proper avenue of implementation would be to find that the new rule would be diminished absent retroactive application.

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In addressing the second factor in a legal malpractice case, the Montana Supreme Court recently stated:

Second, retroactive application would not further operation of the rule; the announcement of the new rule will still put parties convicted of criminal offenses on notice that they must file any malpractice claims against their attorneys within three years of discovering the act, error or omission.

*Ereth v. Cascade County*, 2003 MT 328, ¶ 30, 318 Mont. 355, ¶ 30, 81 P.3d 463, ¶ 30. See also *Miller v. Liberty Mut. Fire Ins. Co.*, 2003 MTWCC 6, ¶ 30 (holding that *Broeker* applied retroactively because applying it prospectively only would allow Liberty and other insurers to postpone the effect of a valid, clear statute simply by misinterpreting it).

In this case, as in *Ereth*, retroactive application will retard, rather than further, the rule's operation, by undermining rates carefully determined by the State Fund based on existing law, and thereby undermining the viability of the workers' compensation system. As in *Ereth*, *Reesor* established a new principle of law, one which was contrary to express statutory language and interpretive caselaw. Consistent with the reasoning in *Ereth*, retroactive application would not further operation of the *Reesor* holding because only now are workers' compensation claimants and attorneys aware of entitlement to PPD benefits under § 710 after they reach the age of 65. Further, the collective impact of this and other common fund cases must eventually force legislative action limiting future benefits to future claimants, or risk insolvency of the system.

Prospective application will not weaken the policy for allowing workers' compensation claimants already receiving social security disability benefits to receive PPD benefits because that entitlement now exists for all claims occurring on or after December 22, 2004. See *Reesor*. In fact, prospective application acknowledges the proper consideration and approval of § 710 by this Court and the system's acknowledgement and acceptance of that position from passage to invalidity several years later. Because a prospective application properly considers the history of the new rule, will not weaken it in any respect or retard its operation, the second *Chevron* factor is satisfied.

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**c. Retroactive application of the Reesor decision will result in substantial inequity.**

Under *Chevron* and *Dempsey*, the third factor to be considered is whether retroactive application of a judicial decision will result in a substantial inequity. See *Dempsey*, ¶ 30. In this Court's decision in *Stavenjord v. Montana State Fund*, 2004 MTWCC 62, this Court held that this third *Chevron* factor was met, and that retroactive application of this Court's original *Stavenjord* decision would result in substantial inequity with respect to "claims arising on and after June 30, 1987, and where MMI was reached after June 3, 1999." *Stavenjord*, ¶¶ 36, 45.<sup>4</sup> Similarly, in this case, substantial inequity would result to the State Fund, and this factor weighs against retroactive application of *Reesor*.

In one of its retroactivity cases, the United States Supreme Court suggested that, in examining the inequitable consequences of a retroactive application, the exclusive focus should be on the persons or entities who would be adversely affected by retroactivity rather than on the persons or entities who would be harmed by non-retroactive application. See *Florida v. Long*, 487 U.S. 223 (1988). Because Montana still recognizes the *Chevron* test originally laid down by the United States Supreme Court, language from *Long* provides helpful guidance.

As *Long* instructs, the analysis under the third factor should focus on the inequity the State Fund will experience if *Reesor* is applied retroactively; the focus should not be on the inequities that might result to certain claimants if *Reesor* is applied prospectively only. This approach makes sense because someone receiving a windfall with retroactive application would always benefit, thereby nullifying the standard.<sup>5</sup> Here, applying *Reesor* retroactively would be inequitable because it would result in substantial administrative and financial hardship to the State Fund and the entire Workers' Compensation system.

If *Reesor* is applied retroactively to July 1, 1987, all claimants similarly situated with *Reesor* over fourteen of the past nineteen years would be allowed to reopen

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<sup>4</sup> Petitioner Debra Stavenjord appealed this decision to the Montana Supreme Court and the State Fund cross-appealed. The appeal and cross-appeal have been fully briefed and argued and are currently pending before the Supreme Court.

<sup>5</sup> And, as acknowledged by this Court in *Black*, the statute properly coordinated with other benefit systems to provide society's intended safety net for injured and retired citizens.

portions of their claims. The State Fund would have to identify all of those claimants, locate their files, and then undertake the administrative burden of manually reviewing each file to determine what PPD information still needs to be obtained and how best to obtain it. If this process is judicially required, the State Fund will experience substantial hardships in locating files, retrieving files, accessing antiquated computer databases and obtaining missing information from claims files. Further, the State Fund and the Old Fund will suffer a severe financial impact due to the benefit costs, administrative costs and claims-related costs associated with implementing *Reesor* retroactively. The process will be repeated for each carrier doing business in the State over the years at issue.

**2. Locating and retrieving older files imposes a substantial hardship on the State Fund.**

Locating files stored on various media types is a labor-intensive, manual process which would pose an enormous administrative burden on the State Fund. Aff. McCoy ¶ 3. A file's media type is determined by what storage system was in place at the time the file was closed. Aff. Kraft ¶ 9. To determine the media type of a claim, the adjuster must make a file request from the State Fund's only records person, who will search the computer system to ascertain when the claim was active and on which media it is likely to be stored. Aff. McCoy ¶ 6. The records person will then check the records for each claim. Aff. McCoy ¶ 6. A simple search may take ten minutes, but a complex search on one file may take three hours or longer. Aff. McCoy ¶ 6.

Files that closed from 1976 through 1994 are stored on microfiche. Aff. Kraft ¶ 9. The state's Records Retention Division maintains the original microfiche. Aff. Kraft ¶ 8. Microfiche may be either copied to other microfiche or may be copied to paper by the State Auditor's Office. Aff. Kraft ¶ 10. After the State Fund personnel manually reviewed the microfiche and located the claim, each page of the claim would have to be printed. With its present staff, the maximum document production by the State Auditor's Office is about 600 pages per day and the average claim file is about 90 to 100 pages. Aff. Kraft ¶ 10. The State Fund also has two machines that allow it to print paper copies from microfiche. Aff. Kraft ¶ 10. With experienced operators and minimal equipment malfunction, it is reasonable to estimate each machine could produce an average of 100 pages per hour from microfiche to paper. Aff. Kraft ¶ 10.

Since July 1, 1995, all incoming fiscal year 1996 claim documents have been imaged, and all files that closed in 1995 or later are stored on optical imaging platters. Aff. Kraft ¶ 11. In 1999, the State Records Retention Committee approved the State

Fund's optical imaging system as its primary means of records retention. Aff. Kraft ¶ 12. Six months after that approval, the State Fund destroyed all of its paper files. Aff. Kraft ¶ 12. Optically imaged documents can be retrieved via the State Fund's computer system. Aff. McCoy ¶ 8. Entire files are printed via a FileNet printer, which can print several claim files per night. Aff. McCoy ¶ 8. Individual pages can be printed at any workstation at about eight pages per minute. Aff. McCoy ¶ 8.

Additionally, the Old Fund unit, which handles claims arising on or before June 30, 1990, stores paper files on site. Aff. McCoy ¶ 7. When these files are closed, the original documents are microfiched and the paper files are destroyed. Aff. McCoy ¶ 7. The adjuster in the Old Fund unit retrieves paper files, which can be disassembled and photocopied. Aff. McCoy ¶ 7. However, open files in the Old Fund unit with claims may be lengthy files consisting of several volumes and thousands of pages, making the location and retrieval process of Old Fund files as cumbersome as locating and retrieval of State Fund files. Aff. McCoy ¶ 7.

Thus, the time required to retrieve files depends on the media type on which the file is stored, the date of the claim, when the claim was active, and how long the claim was active. Because claims which have been closed and re-opened may be stored on multiple or all media types, a *Reesor* review may include a review of a claim file with information stored on all media types. This labor-intensive process of identifying, reviewing, retrieving and printing claims covering nearly fifteen years of claims activity would impose a substantial administrative and logistical hardship on the State Fund, making retroactive application improper under the *Chevron* test.

- a. **Difficulties in accessing information on the State Fund's antiquated DBO2 computer system, as well as problems with computer coding errors and the transfer of information from one computer system to another, impose a substantial hardship on the State Fund.**

Prior to July 1, 1987, and until February of 1997, claim summary information was kept on DBO2, the mainframe. Aff. Ogan ¶ 3. The DBO2 system was used to transfer claim information to the Department of Labor & Industry. Aff. Ogan ¶ 3. In February of 1997, the information on the DBO2 system was transferred to CMS, a system which integrates a database and imaging software and stores claim summary information. Aff. Ogan ¶ 4. However, DBO2 and CMS do not interface, so much of the information that was compacted for transfer from DBO2 could not be disassembled in the CMS system. Aff. Ogan ¶ 4.

STATE FUND'S OPENING BRIEF REGARDING EXISTENCE OF A COMMON FUND,  
EXISTENCE OF ASCERTAINABLE CLASS AND FUND, RETROACTIVITY, LACHES  
AND STATUTES OF LIMITATIONS ISSUES, AND CONSTITUTIONALITY OF  
APPLICATION OF COMMON FUND DOCTRINE