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FILED

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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF
MONTANA**

WCC No. 2002-0676

DALE REESOR

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

LIBERTY'S ANSWER BRIEF

Reesor has filed his Petitioner's Brief on Common Fund Issues, and this is Liberty's response. In its earlier brief, incorporating by reference the State Fund brief, Liberty believes it has addressed all the issues raised by Petitioner with the exception of his argument at P.13 regarding what he identifies as "accrued benefits." Specifically, Petitioner argues "Elderly claimants entitled to additional Reesor benefits have a vested right that accrued at maximum medical improvement, despite subsequent injury or death."

He relies on two cases in support of this claim, which, as set forth below, has no support in law. Petitioner relies on Breen v. Industrial Accident Board, 150 Mont. 463, 436 P.2d 701 (1968) and Monroy v. Cenex, 246 Mont. 365, 805 P.2d 1343 (1990).

The Breen case involved a widow whose spouse died after excessive drinking and the use of sleeping capsules; the widow tried to relate the death to an injury on December 12, 1960 which she claimed resulted in continual pain, for which he took, the argument went, Nembutal capsules. The combination she argued resulted in his suffocation. The Court rejected the argument but also made the following holding:

But we do not construe this statute as terminating liability for compensation accrued prior to death but unpaid at the time of death. Here we have certain periods of time between the date of the industrial accident and the date of death for which neither temporary total nor permanent partial disability compensation has been paid. If disability existed during those periods of time, compensation is payable even after death because the benefits had accrued prior to death but were unpaid.

Breen, 150 Mont. at 475, 536 P.2d at 707-708.

In Monroy, the claimant had an accepted liability claim and thereafter was found to be at maximum medical improvement with a 37% whole person impairment on April 5, 1988. The claimant died on July 1, 1988 and the impairment rating was unpaid. The death was from non-occupational causes. The estate claimed an entitlement to the impairment award which was called a Holton award.

After distinguishing Breen, the Court made the following holding:

We here distinguish Breen and Hendricks, on the grounds that neither case shows that the liability of the insurer for permanent partial disability benefits had *accrued* prior to the date of death, and because in any event they preceded the holding of this Court in Holton. It appears clear that the Workers' Compensation Court, the Workers' Compensation insurance industry, and the legislature have accepted the implication in Holton, that an award of permanent partial disability benefits based on the doctor's medical impairment rating establishes minimum liability, which is irreducible, except for present value of lump-sum advances under the present statute § 39-71-703(1)(a)(iii), MCA, when applicable.

Monroy, 246 Mont. at 371, 805 P.2d at 1346-1347.

In affirming the estate's entitlement to the Holton award, the Court gave the following rationale.

We therefore hold that the Workers' Compensation Court was correct in determining the Monroy's right to permanent partial disability benefits based upon his physical impairment rating was an irreducible minimum of payments to which he was entitled and which accrued at the time of his maximum healing. Since the date of the accrual was before Monroy's death, his right to the unpaid benefits are an asset in his estate.

As the Workers' Compensation Court pointed out, this holding does not neuter § 39-71-726, MCA. The statute continues to be effective where no settlement has been reached, the impairment has been fully paid, when total or partial disability benefits continue because maximum healing has not occurred, or when death from an unrelated cause would terminate such benefits.

Breen, 246 Mont. at 372, 805 P.2d at 1347.

Of special significance in the above quote is the last phrase in which the Court affirms under MCA 39-71-726 liability ends for workers' compensation benefits "when death from an unrelated cause would terminate such benefits."

Both cases stand for a very simple proposition. When the elements that create an entitlement to workers' compensation benefits are present before a claimant's death, then the benefits are owed even after the death of the injured worker. Monroy dramatically demonstrates this because the elements were very simple; (1) accepted liability, (2) maximum medical improvement, (3) undisputed impairment rating and (4) death after the first three elements creating the entitlement came into existence.

In the instant case, this Court's AMENDED ORDER DELINEATING ISSUES AND SETTING BRIEFING SCHEDULE filed April 14, 2006 set forth the first set of elements that have yet to be established and the logistical difficulties in attempting to ascertain individual Reesor claimants as set forth in the affidavit to Liberty's brief and the affidavits to the State Fund brief show the additional elements that have not been satisfied.

If at some point in this litigation a common fund is found and its elements established (e.g., extent of retroactive application), then and only then can there be Reesor claimants. Prior to this occurring there are no Reesor claimants. Stated differently, until this occurs, there are no persons to whom Reesor benefits accrue or in whom they can vest.

DATED this 26 day of May, 2006.



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CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on this ~~26th~~ day of May, 2006, I mailed a copy of the foregoing LIBERTY'S ANSWER BRIEF, postage prepaid, to the following persons:

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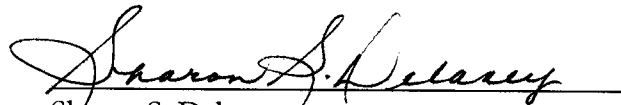
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