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

**2008 MTWCC 28**

**WCC No. 2002-0676**

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**DALE REESOR**

**Petitioner**

**vs.**

**MONTANA STATE FUND**

**Respondent/Insurer.**

FILED

JUN - 4 2008

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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ORDER ADOPTING ORDER OF SPECIAL MASTER

¶ 1 Issues in the above-entitled matter were duly briefed before Special Master Jay Dufrechou, who considered the evidence and prepared and submitted his Order for consideration by the Court. These issues are fully set forth in the Special Master's Order.

¶ 2 Thereupon, the Court considered the record in the above-captioned matter, considered the Order of the Special Master, and does hereby make and enter the following Order.

¶ 3 IT IS ORDERED the "Findings and Conclusions by Special Master on Common Fund Issues" are adopted as follows:

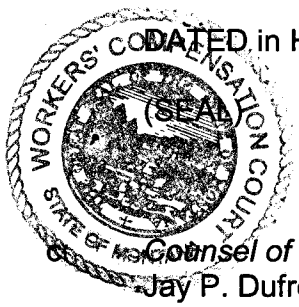
¶ 3a No common fund exists.

¶ 3b Reesor applies retroactively.

¶ 3c Payment on open claims is not barred on timeliness grounds.

¶ 3d Application of the common fund doctrine does not violate constitutional guarantees of "freedom of contract and taking without just compensation."

DATED in Helena, Montana, this 4th day of June, 2008.




(SEAL)

JUDGE

*Counsel of Record via Website*
Jay P. Dufrechou

DOCKET ITEM NO. 470

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

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FINDINGS AND CONCLUSIONS BY SPECIAL MASTER
ON COMMON FUND ISSUES

¶ 1 Pending before the Workers' Compensation Court (WCC) are various issues identified in the Amended Order Delineating Issues and Setting Briefing Schedule filed April 14, 2006. Those issues are:

¶ 1a Does a common fund exist?

¶ 1b Is there an ascertainable class?

¶ 1c Is there an ascertainable fund?

¶ 1d If there is a common fund, is it retroactive?

¶ 1e Do laches or statutes of limitations apply to claims which failed to timely present a challenge to Montana Code Annotated?

¶ 1f Does application of the common fund doctrine violate constitutional guarantees of "freedom of contract and taking without just compensation"?

## I. No Common Fund Exists

¶ 2 In *Stavenjord v. Montana State Fund* (*Stavenjord II*)[1], the Montana Supreme Court held that no common fund exists in a situation closely analogous

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[1] 2006 MT 257.

to this matter. The underlying determination in *Stavenjord v. Montana State Fund (Stavenjord I)*[2] was that § 39-72-405(2), MCA, was unconstitutional in that it denied occupational disease claimants the permanent partial disability benefits available to injury claimants under § 39-71-703, MCA.

¶ 3 *Stavenjord II* found that the rule of law announced in *Stavenjord I* was retroactive to any claim arising on or after June 30, 1987, if the claim remained open, with "open" defined as not previously finalized and closed by either Court order or settlement and release. This meant that individuals with open claims who qualified for an increase in benefits under *Stavenjord I* were entitled to those benefits.

¶ 4 Although retroactive entitlement existed, *Stavenjord II* refused to find that *Stavenjord I* created a common fund. In reviewing the criteria for a common fund, the Supreme Court emphasized that a common fund existed if the legal precedent created a class of claimants whose benefits could be calculated with mathematical certainty, based on the precedent established. The Court explained:

> ¶25 The elements for establishing a common fund are appropriately straightforward. Application of the doctrine is, however, not warranted in every case that establishes a new rule of law from which other claimants may derive a benefit. In *Murer III,* the earliest of our recent common fund worker' compensation cases, we emphasized that claimants there accomplished "significantly more than just the establishment of a favorable legal precedent. Additionally, claimants established a *vested right* on behalf of the absent claimants to directly receive immediate monetary payments of past due benefits underpayments; and based on the establishment of those vested rights, the State Fund became legally obligated to make the increased benefits payments." *Murer III*, 283 Mont. at 223, 942 P.2d at 76-77 (emphasis added). Similarly, in *Rausch*, the result of the claimant's efforts was the immediate payment of an undisputed impairment award, the payment of which would have otherwise been delayed until the respective claimants reached retirement age. Thus, the dispute in *Rausch* centered not upon eligibility or amount of the benefit, but rather on the timing of the payment. ¶ 10.
>
> ¶26 In *Murer III*, we concluded that the common fund doctrine properly applied due in part to the certainty with which State Fund identified absent claimants and mathematically calculated the increased benefits to which absent claimants were entitled. (*See Murer v. State Compensation Mut. Ins.*, 267 Mont. 516, 885 P.2d

[2] *Stavenjord v. Montana State Fund*, 2003 MT 67 *(Stavenjord I)*.

> 428 (1994) (*Murer II*) for the mandate underlying our discussion in *Murer III* regarding implementation of the common fund). As a result of our *Murer II* decision, State Fund: (1) identified absent claimants; (2) notified those claimants of their rights pursuant to *Murer II*; (3) calculated with *mathematical certainty* the increased benefits due each absent claimant; and (4) made payments to those claimants. *Murer III*, 283 Mont. at 223, 942 P.2d at 77 (emphasis added). State Fund was, "able to determine, *with certainty*, the number of absent claimants involved and the amount of money to which each individual claimant was entitled." *Murer* III, 283 Mont. at 223, 942 P.2d at 77 (emphasis added).[3]

¶ 5 In contrast to the situation required for a common fund, the Supreme Court found that *Stavenjord I* did not create a class of identifiable claimants whose benefits could be calculated with certainty based merely on the legal precedent. The Court explained:

> ¶27 Here, by contrast, benefits due to non-participating *Stavenjord* beneficiaries will not be readily identifiable on superficial review of case files, nor can benefits due be calculated with certainty by way of a mathematical formula. The result of this case will not be that all eligible claimants will automatically be due a sum certain for unpaid PPD benefits. Rather, the parties here stipulated that it may be necessary for claimants' claim files to be updated or augmented in order to determine what PPD benefits each claimant is due under *Stavenjord I*. Thus, the "identifiable monetary fund or benefit" which is the first of the three elements of the common fund doctrine required is absent here. *See* ¶ 24, and *Ruhd*, ¶ 16. Moreover, because each claimant's situation will be unique, there will be no simple universal formula that can be applied to all non-participating claimants to determine to what additional money they are entitled. It also bears noting that many of these claimants are represented by counsel, and will require further assistance from their attorneys. A common fund reduction in fees to benefit Stavenjord's counsel would create a disincentive for non-participating claimants' counsel, and could thereby threaten a claimant's prospects for an aggressively negotiated benefit recovery.
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> ¶28 We have previously said the common fund doctrine is applied properly where the potential economic returns from individual claims are insufficient to warrant litigation, and as a result wrongful acts go uncorrected. Application of the common fund doctrine is "especially appropriate" where "individual damage from an institutional wrong may not be sufficient from an economic

[3] *Stavenjord II, supra,* ¶¶ 25, 26.

> viewpoint to justify the legal expense necessary to challenge that wrong." *Murer III*, 283 Mont. at 222-23, 942 P.2d at 76. Stavenjord's claim resulted in a $17,027.00 difference between the $10,000.00 in benefits to which she was entitled under the ODA, and the $27,027.00 in PPD benefits to which we concluded she was entitled. *Stavenjord I*, ¶¶ 9-10. While we acknowledge that Stavenjord and her counsel likely incurred significant expense in pursuing her case through the appeal process, the fact is that eligible claimants *do* have the financial incentive to pursue *Stavenjord* benefits, provided they and their counsel expend the time and effort required to reap the benefit of our decision. Because more work remains to be done before most claimants may successfully obtain their respective *Stavenjord* benefits, the concern with unjust enrichment to non-participating beneficiaries that underlies the common fund doctrine's intended purpose is largely absent here. We therefore conclude that the WCC erred in determining that *Stavenjord I* created a common fund. Thus, Stavenjord's counsel is not entitled to recover fees from cases brought by other claimants in pursuit of *Stavenjord*-type PPD benefits.[4]

¶ 6 *Reesor* involves the same category of benefits that were at issue in *Stavenjord,* namely permanent partial disability benefits under § 39-71-703, MCA of the Workers' Compensation Act. In its opinion in this case, the Supreme Court found unconstitutional the portion of § 39-71-710, MCA, which denied permanent partial disability benefits, other than an impairment award, to claimants who, due to age, received or were eligible to receive Social Security retirement benefits or their equivalent.[5] As the Supreme Court found, § 39-71-710, MCA, worked unconstitutionally to deny retirement-age claimants "expanded PPD benefits based on other enumerated factors set forth in § 39-71-703, MCA, specifically, age, education, lifting restrictions and wage loss."[6]

¶ 7 The reasons for denying common fund status articulated in *Stavenjord II* apply equally here in *Reesor.* As in *Stavenjord II*, the result of the Supreme Court's holding in *Reesor* "will not be that all eligible claimants will automatically be due a sum certain for unpaid PPD benefits."[7] Just as in *Stavenjord*, claimants benefiting from the *Reesor* decision will be eligible for additional benefits depending on various factors that will require evidence varying from beneficiary to beneficiary, specifically, evidence regarding age, education, lifting restrictions and wage loss. While factors of age and education may be readily ascertainable

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[4] *Stavenjord II, supra,* ¶¶ 27, 28.

[5] *Reesor v. Montana State Fund,* 2004 MT 370.

[6] *Id.*,¶ 5.

[7] *Stavenjord II*, ¶ 27.

from file reviews, determining appropriate lifting restrictions and wage loss will likely involve, in many if not all cases, seeking additional evidence outside the file. New expert medical or vocational opinions may be necessary. The "identifiable monetary fund or benefit" requisite for common fund status is not present, nor is there any simple universal formula that can be applied to determine benefits.

¶ 8 Just as in *Stavenjord*, the determination of the value of benefits under § 39-71-703, MCA, may require additional legal work on behalf of *Reesor* claimants. Even when files contain sufficient information for an insurer to take a position on additional benefit entitlement under the factors of age, education, lifting restrictions and wage loss, individual claimants may well believe the insurer's initial determination is not correct, and may argue, in particular, for higher benefits for lifting restrictions and wage loss than those recognized by the insurer.

¶ 9 As in *Stavenjord II,* some claimants benefiting from *Reesor* are already represented by counsel other than *Reesor* counsel. In *Stavenjord II,* the Supreme Court noted that existing counsel should have incentive to aggressively seek additional benefits under § 39-71-703, MCA. In particular, the Court noted that the named claimant would have an increase in benefits of $17,027.00, which illustrated that "eligible claimants *do* have the financial incentive to pursue *Stavenjord* benefits, provided they and their counsel expend the time and effort required to reap the benefit of our decision."[8]

¶ 10 In *Reesor,* the Supreme Court noted that Reesor had been limited to $2,975.00 pursuant to § 39-71-710, MCA, but that a similarly situated younger person would receive $23,056.25 under § 39-71-710, MCA, a differential of $20,081.25. This is an analogous sum to that noted in *Stavenjord*, which only makes sense in that the same category of benefits is at issue in *Reesor* as in *Stavenjord.* The same incentive exists for individual counsel to seek additional benefits for claimants in *Reesor* as it did in *Stavenjord.* Under the Supreme Court's reasoning in *Stavenjord II*, this argues against finding a common fund.

¶ 11 Thus, under *Stavenjord II*, common fund status must be denied in *Reesor.* In light of this conclusion, it is not necessary to address separately the questions stated in 1b and 1c above (whether, respectively, there is an ascertainable class or an ascertainable fund).[9]

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[8] *Id.,* ¶ 28.

[9] The Special Master is mindful of additional orders from the Montana Supreme Court and the Workers' Compensation Court following the Supreme Court's decision in *Stavenjord II.* Specifically, following a Petition for Rehearing filed by *Stavenjord* counsel, the Supreme Court issued an Order, filed November 9, 2006, stating as follows:

> Debra Stavenjord, by counsel (Stavenjord), has filed a Petition for Rehearing. She seeks rehearing and reversal of this Court's unanimous decision to deny

## *II. Reesor* Applies Retroactively

¶ 12 Even though common fund status was denied in *Stavenjord II*, the Supreme Court found the decision "retroactive."[10] This means that insurers have the obligation to pay occupational disease claimants with open claims in accordance with the *Stavenjord* rule, but the process will not proceed as one piece of litigation with each beneficiary represented by *Stavenjord* counsel.[11]

¶ 13 In *Stavenjord II*, the Supreme Court clarified that what has been termed "retroactivity" in the common fund litigation is the norm, with "prospective-only"

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> Common Fund status in this matter. The State Fund objects to the Petition. We decline to grant the Petition. However, should the Workers' Compensation Court determine that it will be impracticable or impossible for it to comply with our remand Order without the assistance of a Common Fund counsel, then and in that event the Workers' Compensation Court may enter an order to such effect, which order would then be amenable to review on appeal.

On January 15, 2008, the WCC issued an *Order Regarding Identification and Notification of Potential Beneficiaries*, 2008 MTWCC 4. The WCC concluded it was impossible for it to comply with the remand order if it was the Supreme Court's intention to include within the class of potential *Stavenjord* beneficiaries all claimants who may benefit from the decision, regardless of insurer (as was the situation with the "global common fund liens" applicable in *Rausch v. State Compensation Ins. Fund,* 2002 MT 203 (see, *Ruhd v. Liberty Northwest Ins. Corp.,* 2004 MT 236) and *Schmill v. Liberty Northwest Ins. Corp. (Schmill II),* 2005 MT 144.) While the WCC had been informed of the procedure planned by Montana State Fund for identifying potential *Stavenjord* beneficiaries, the WCC could "not conclude that this procedure is appropriate for the several hundred other workers' compensation insurers in Montana who may have claimants entitled to *Stavenjord*-type benefits." *Id.*, 2008 MTWCC 4, ¶12. The WCC also questioned whether it would have "jurisdiction to order State Fund to undertake an identification and notification procedure since, with no adversarial party remaining, there is no case or controversy" before the WCC. In these circumstances, the WCC found that the question of whether "it is impracticable or impossible for this Court to comply with the Supreme Court's remand order without the assistance of Common Fund counsel" was moot. The WCC also noted "parenthetically that, even assuming this Court could benefit from the assistance of common fund counsel, I am unable to find any authority by which this Court would be empowered to appoint common fund counsel to a case in which common fund status has been denied." *Id.*, 2008 MTWCC 4, ¶15.

State Fund moved for Reconsideration of this order. Reconsideration was denied by *Order Denying Respondent's Motion for Consideration,* 2008 MTWCC 17, filed April 24, 2008. On April 28, 2008, counsel for *Stavenjord* appealed the WCC's orders of January 15 and April 24, 2008.

Although this complex legal posture leaves open the possibility that the Supreme Court will reverse its determination in *Stavenjord II* and designate a common fund in that case, the *Stavenjord II* decision remains and is clearly applicable to the present proceeding.

[10] 2006 MT 257, ¶14.

[11] See Fn. 7 above for the post-*Stavenjord* orders and appeal that may leave the door open for common fund status in *Stavenjord.*

application of a judicial decision requiring unusual circumstances. As the Court indicated, after *Dempsey v. Allstate Ins. Co.*,[12] 2004 MT 391, and *Schmill v. Liberty Northwest (Schmill II)*[13], "it is now well-settled that a party arguing for purely prospective application of this Court's jurisprudence must show that all three factors of the *Chevron* [*Oil Co. v. Huson*][14] test are met."[15]

¶ 14 The Court explained:

> ¶9 There exists a strong presumption in favor of retroactive application of new rules of law. *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶ 15, 325 Mont. 207, ¶ 15, 104 P.3d 483, ¶ 15. In *Dempsey*, we reaffirmed our general rule that "we give retroactive effect to judicial decisions," while allowing for "an exception to that rule when faced with a truly compelling case for applying a new rule of law prospectively only." *Dempsey*, ¶ 29 (citation omitted). Recently, we concluded that we would recognize an exception to retroactive application of this Court's rulings only when all three factors first articulated by the U.S. Supreme Court in *Chevron* are met. *Schmill II*, ¶ 13, referencing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971). In *Dempsey*, we said that *Chevron*'s guidelines for evaluating the efficacy of prospective application of this Court's jurisprudence remain "viable as an exception to the rule of retroactivity." *Dempsey*, ¶ 30. (*See Dempsey*, ¶¶ 21-31 for a temporal overview of *Chevron*'s application in federal and Montana state courts.)
>
> ¶10 To overcome the strong presumption favoring retroactivity, the *Chevron* exception requires: First, that the decision to be applied [prospectively] must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . 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." Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of [prospective application]." *Schmill II*, ¶ 13, citing

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[12] 2004 MT 391.

[13] 2005 MT 144.

[14] 404 US 97, 92 S. Ct. 349 (1971).

[15] *Stavenjord II*, *supra*, ¶11.

> *Dempsey*, ¶ 21, quoting *Chevron*, 404 U.S. at 106-07, 92 S. Ct. at 355. Only twice has application of *Chevron* and its progeny resulted in a purely prospective application of this Court's rulings on questions of state law. *See Ereth v. Cascade County*, 2003 MT 328, 318 Mont. 355, 81 P.3d 463, and *Seubert v. Seubert*, 2000 MT 241, 301 Mont. 382, 13 P.3d 365, both of which predated the exhaustive analysis of the question of retroactivity published in *Dempsey,* and addressed again in *Schmill II*. Moreover, prospective application in both cases rested on cursory analyses of the *Chevron* factors. In any event, our decisions in *Dempsey* and *Schmill II* have now resolved any uncertainty there might have been regarding proper application of the *Chevron* factors in a retroactivity analysis.[16]

¶ 15 In *Stavenjord II*, with respect to the first *Chevron* factor, the Supreme Court concluded that *Stavenjord I* decided an issue of first impression, but the holding was "clearly foreshadowed" by the decision in *Henry v. State Compensation Ins. Fund.*[17] Although this conclusion on the first factor was alone sufficient to deny "prospective-only" application, the Court also addressed the second *Chevron* factor, stating as follows:

> Nonetheless, we note that analysis under *Chevron*'s second requirement also favors retroactive application. As articulated by the WCC, "Applying the decision retroactively promotes the rule of law announced in the decision by assuring that all persons denied their constitutional rights are treated equally." *Chevron* requires us 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." *Schmill II*, ¶ 13 (citations omitted). The purpose and effect of our ruling in *Stavenjord I* is clearly to provide equal protection under the law to partially disabled workers, regardless of whether they suffer an injury or from an occupational disease. Restricting *Stavenjord*'s application to claims arising after our decision in that case furthers neither the purpose nor the effect of our ruling. We see no justification for creating an "arbitrary distinction between litigants based merely on the timing of their claims." *Dempsey*, ¶ 28. Therefore, we conclude that *Chevron*'s second factor is not met. Accordingly, our decision in *Stavenjord I* will be applied retroactively subject to the limitations set forth below.[18]

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[16] *Stavenjord II, supra,* ¶¶ 9, 10.

[17] 1999 MT 126 (In the context of rehabilitation benefits, *Henry* held there was no rational basis for providing more benefits to injured claimants than to claimants suffering from an occupational disease.)

[18] *Stavenjord II, supra,* ¶ 14.

¶ 16 Before turning to "retroactivity" of *Reesor*, the Special Master notes the Supreme Court's similar analysis of "retroactivity" in *Schmill v. Liberty Northwest (Schmill II).*[19] Finding the second *Chevron* factor dispositive, the Court explained:

> ¶15 This Court has boiled [the *Chevron*] language down to simply asking whether the retroactive application of a rule of law will further or retard its operation. *See Benson v. Heritage Inn, Inc.*, 1998 MT 330, ¶ 25, 292 Mont. 268, ¶ 25, 971 P.2d 1227, ¶ 25; *Riley v. Warm Springs State Hosp.*, (1987), 229 Mont. 518, 521, 748 P.2d 455, 457; *LaRoque v. State* (1978), 178 Mont. 315, 320, 583 P.2d 1059, 1062.
>
> ¶16 The rule of *Schmill I* in question here is that, under an equal protection analysis, the ODA cannot allow for apportionment deductions for nonoccupational factors if the WCA does not allow for such deductions. A retroactive application of this rule will allow for workers whose occupational diseases arose before our decision in *Schmill I* to receive full workers' compensation awards. It will place them on an equal footing with workers whose occupational diseases arise after *Schmill I*, thus furthering the rule's aim of equal compensation between the ODA and WCA claimants. Further, a retroactive application will not retard the rule's operation. Future claimants will not find it more difficult to receive non-apportioned awards if *Schmill I* applies retroactively. We conclude that since *Schmill I* does not satisfy the second *Chevron* factor, the decision applies retroactively.

¶ 17 Turning to the present case, the Special Master finds it impossible to conclude that the second factor can be met in *Reesor*, where it was not met in *Stavenjord* or *Schmill*. Both prior decisions concluded that workers' compensation claimants with "open" claims should receive the benefit of new rules of workers' compensation law. Though the constitutional principle in *Reesor* is not identical to that in *Schmill* or *Stavenjord*, all three cases involve equal treatment of similarly situated individuals with open workers' compensation claims. As in the two prior cases, the rule of *Reesor* will be served through even-handed treatment of all claimants with open claims who are potentially entitled to *Reesor*-type benefits.

¶ 18 Though this determination on the second *Chevron* factor is alone sufficient to deny "prospective-only" application, the first and third factors will also be addressed. Again, the first factor required for a "prospective-only" application is

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[19] 2005 MT 144.

that the decision established "a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Stavenjord II*, ¶10. In the *Schmill* and *Stavenjord* cases, the equal protection problem of distinctions between benefits available under the Workers' Compensation and Occupational Disease Acts was foreshadowed by *Henry v. State Compensation Ins. Fund, supra*. Not involving a distinction between those two benefit schemes, *Reesor* was not foreshadowed by *Henry*, except perhaps by the suggestion that the Montana Supreme Court pays close attention to the constitutionality of distinctions drawn in workers' compensation laws.

¶ 19 Arguing against retroactive application of *Reesor,* State Fund contends that the Supreme Court's *Reesor* decision overruled clear past precedent and was not foreshadowed. The insurer points to the WCC's decision in *Black v. MDMC/Benefis Healthcare*,[20] which held, contrary to *Reesor*, that § 39-71-710 did not unconstitutionally deny permanent partial disability benefits to claimants who receive, or are entitled to receive, Social Security retirement benefits. While the *Black* decision did indicate the *WCC's* opinion on the issue, *Black* was settled on appeal, without decision by the Montana Supreme Court. Rather than confirming that Montana law was settled with the clear precedent of *Black,* that litigation signaled the likelihood that the constitutionality of § 39-71-710, MCA, would be challenged by other claimants and that the matter would eventually reach the Montana Supreme Court. While the Supreme Court's decision in *Reesor* may not have been a foregone conclusion, the prior challenge in *Black,* and the Supreme Court's willingness to enforce equal protection principles in workers' compensation statutes, undercut the insurer's argument that *Reesor* was not foreshadowed. At the very least, the first *Chevron* factor as applied to *Reesor* does not cut strongly for the insurer.

¶ 20 *Chevron*'s third factor involves weighing "the inequity imposed by retroactive application."[21] The "retroactivity" holding in *Stavenjord II* and *Schmill II* require Montana workers' compensation insurers to review "open" claims with regard to additional benefit entitlement under § 39-71-703, MCA. The review required by "retroactivity" in *Reesor* is unlikely to be any more onerous than in *Stavenjord* and *Schmill*. With regard to actual payment of *Reesor* benefits, given the relatively fewer people of retirement age in the workforce than of other ages, the burden of additional benefits is not likely any greater than in *Schmill* or *Stavenjord*. The Special Master finds that the third *Chevron* factor does not favor prospective application.

¶ 21 For the foregoing reasons, the Special Master finds and concludes that *Reesor* applies "retroactively," meaning that *all* insurers and self-insured

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[20] 2001 MTWCC 47.

[21] *Stavenjord II,* ¶10, citing *Schmill II*, ¶ 13 and *Dempsey*, ¶ 21, quoting *Chevron*, 404 U.S. at 106-07, 92 S. Ct. at 355.

employers must identify and pay claimants with "open" claims entitled to *Reesor*-type benefits. However, because no common fund exists, this process will not proceed as a global common fund administered by the WCC with the assistance of common fund counsel and insurers *en masse*. Rather, payment of *Reesor*-type benefits will proceed on a case by case basis, with individual cases reaching the WCC only if the parties do not resolve *Reesor*-type claims on their own or through the mediation process provided by the Department of Labor and Industry.

## III. Payment on Open Claims is Not Barred on Timeliness Grounds

¶ 22 Prior to *Reesor*, insurers could rely on § 39-71-710 to deny claims for permanent partial disability benefits beyond the impairment award to claimants identified by that statute. It was not until *Reesor* that claimants had a clear means to assert rights for additional benefits under the statute. Under such circumstances, it is difficult to imagine how claimants could be deemed to have inappropriately sat on their rights. Further, as discussed in *Schmill v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 27, benefit entitlements in workers' compensation/occupational disease cases generally remain open indefinitely, barring procedures indicating finality as discussed at length in that decision. Payment of *Reesor*-type benefits on open claims is not barred on timeliness grounds.

## IV. Application of the Common Fund Doctrine Does Not Violate Constitutional Guarantees of "Freedom of Contract and Taking Without Just Compensation"

¶ 23 Respondent State Fund argues that the construction of § 39-71-710 became part of contracts entered into by Respondent and its policy-holders and that it relied on the constitutionality of that section in writing policies. In addition, under this circumstance, Respondent contends that requiring payment of additional permanent partial disability benefits may constitute unconstitutional taking of private property without just compensation.

¶ 24 As Petitioner aptly points out, courts routinely interpret statutes in ways that cost people or institutions more money than anticipated. Making reference to prior "retroactive" workers' compensation cases, Petitioner argues:

> In *Murer v. State Fund* (1994) 267 Mont. 516, 885 P.2d 428 (*Murer II*), and *Murer v. State Fund* (1997) 283 Mont. 210, 942 P.2d 69 (*Murer III*), the Montana Supreme Court adjudicated benefits in 1994 and 1997 that related to temporary caps from 1987 and 1989. In *Rausch et al. v. State Fund* (2002) 311 Mont. 210, 54 P.2d 25, the Montana Supreme Court adjudicated in 2002 impairment benefits under the 1991 and 1997 Workers' Compensation Acts. In *Flynn v. State Fund*, 2002 MT 203, 311 Mont. 410, 54 P.3d 25, the

> Montana Supreme Court adjudicated benefits in 2002 that related to prorated attorneys fees that were incurred in 1996. In each of these cases, as in every case, the Court reached back to make pronouncements about laws and events that happened in the past. This is not unique, nor is it prohibited....[22]

¶ 25 The Supreme Court has found "retroactivity" in *Stavenjord* and *Schmill,* requiring payment of benefits on all "open" claims impacted by those decisions. Each of the aforementioned cases requires payment of benefits arguably not anticipated under the legislation in effect at the time. Where the Supreme Court has mandated such payments in other cases, the Special Master cannot conclude that the Court would hold "retroactive" payment of *Reesor* benefits to be an unconstitutional taking or impairment of contract.

DATED in Helena, Montana, this 2nd day of June, 2008.

Jay P. Dufrechou
Special Master

[22] Petitioner's Brief on Common Fund Issues, p. 21.