

**FILED**

JUN 20 2005

OFFICE OF  
WORKER'S COMPENSATION JUDGE  
HELENA, MONTANA

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR,

Petitioner,

-vs-

MONTANA STATE FUND,

Respondent/Insurer.

WCC No. 2002-0676

**ANSWER OF FAIRMONT  
INSURANCE COMPANY, TIG  
INSURANCE COMPANY, and TIG  
PREMIER INSURANCE COMPANY**

Fairmont Insurance Company, TIG Insurance Company, and TIG Premier Insurance Company, answer the Petitioner's claim as follows:

- 1) Petitioner's attorney fee lien indicates he is seeking common fund attorney fees on every Workers' Compensation claim with a date of injury occurring on or after July 1, 1987, through December 22, 2004, when a claimant was denied Workers' Compensation benefits those carriers do not believe the decision in *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019, creates a common fund;

- 2) Common fund does not exist because the purported non-participating beneficiaries of the decisions in this case and in **Reesor** are not ascertainable;
- 3) A common fund does not exist in this case because the decisions in this case and in the **Reesor** case are no more than favorable precedent to future litigants seeking permanent partial disability benefits under Montana's Workers' Compensation Act;
- 4) The failure of Petitioner's counsel to plead *ab initio* an entitlement to common fund attorney fees or class certification in the pre-remand proceedings bars his post-remand request for common fund fees;
- 5) A common fund does not exist in this case because the process of identifying unascertainable beneficiaries places an impermissible and undue burden on insurance companies who wrote Workers' Compensation policies in Montana;
- 6) The issue in **Reesor** was limited to whether the age limitation on permanent, partial disability benefits set forth in § 39-71-710, MCA, violated the Equal Protection Clause of the Montana Constitution. The attorney fee lien in this case, however, improperly seeks to expand the scope of the **Reesor** decision by applying it to all classes of claimants;
- 7) A common fund does not exist in this case because the participating litigant, Dale Reesor, did not create, preserve or increase an identifiable monetary fund or benefit in which all non-participating beneficiaries maintain an interest;
- 8) The decision in **Reesor** applies prospectively only pursuant to the Chevron Oil test of non-retroactivity, which was modified by the Montana Supreme Court in **Dempsey v. Allstate Ins. Co.**, 2004 MT 391, 325 Mont. 207, 104 P.3d 483; **Reesor** cannot be applied retroactively. This would constitute an unconstitutional impairment of contract;
- 9) If **Reesor** applies retroactively, the common fund attorney fee lien of Petitioner's counsel has no applicability to claims occurring on or after April 21, 2003, because of the legislative prohibition on common fund attorney fees set forth in § 39-71-611(3)(2003) MCA, and § 39-71-612(4)(2003) MCA.
- 10) If **Reesor** applied retroactively, the common fund attorney fee lien of Petitioner's counsel has no applicability to claims appearing on or after July 1, 1991, through June 30, 1995 because the language of MCA § 39-71-710 (1991 and 1993) did


**ANSWER OF FAIRMONT INSURANCE COMPANY, TIG INSURANCE COMPANY, and TIG PREMIER INSURANCE COMPANY**

not provide for termination of partial disability benefits upon the receipt of Social Security retirement benefits. See, *Russette v. Chippewa Cree Housing Authority* (1994), 265 Mont. 90, 92-93, 874 P.2d 1217, 1218.

- 11) If *Reesor* retroactively, settled files or files which were adjudicated are excluded from the implementation;
- 12) If *Reesor* applies retroactively, the files of deceased claimants should be excluded from the implementation process;
- 13) If *Reesor* applies retroactively, Petitioner's counsel should be required to bear the financial burden of the identification and entitlement determination process, which includes the administrative and claims-related costs associated with obtaining sufficient medical and vocational information;
- 14) In the event a common fund is found to exist in this case, the beneficiary should be liable for payment of the attorney's fees and not this Respondent;
- 15) This Respondent incorporates the defenses raised by all other insurers named in the global Summons and request the right to add additional defenses throughout the duration of the post-remand proceedings, especially since many of the implementation issues will not be discovered unless *Reesor* is applied retroactively and the parties actually begin the implementation process.

DATED this 26 day of June, 2005.

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

By:   
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**ANSWER OF FAIRMONT INSURANCE COMPANY, TIG INSURANCE COMPANY, and TIG  
PREMIER INSURANCE COMPANY**

**CERTIFICATE OF MAILING**

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

Thomas J. Murphy  
Murphy Law Firm  
P.O. Box 3226  
Great Falls, MT 59403-3226

DATED this 26 day of June, 2005.

  
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UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

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