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FILED

JUN - 7 2005

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR,

Petitioner,

v.

MONTANA STATE FUND

Respondent.

WCC No. 2002-0676

RESPONSE TO SUMMONS OF
SOUTHERN INSURANCE COMPANY

COMES NOW Southern Insurance Company and pursuant to the Summons issued by this Court on April 22, 2005, hereby sets forth the following defenses to Petitioner's attorney's request for certification of a common fund and enforcement of his attorney fee lien.

The plain language of 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, wherein a claimant was denied workers' compensation benefits as a result of the operation of Montana Code Annotated § 39-71-710. Southern Insurance Company requests dismissal from the above-referenced matter because it has not written any workers' compensation policies in the State of Montana dating back to and including calendar year 1974. If this Court refuses to dismiss Southern Insurance Company, then Southern Insurance Company asserts the following with respect to the common fund request of Petitioner's counsel:

1. The decision in *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019, does not create a common fund;

2. 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;

3. The issue in *Reesor* was limited to whether the age limitation on permanent, partial disability benefits set forth in Montana Code Annotated § 39-71-710 violated the Equal Protection Clause of the Montana Constitution. However, the attorney fee lien of Petitioner's counsel improperly seeks to expand the scope of the *Reesor* decision by applying it to all classes of claimants;

4. The decision in *Reesor* applies prospectively only pursuant to the *Chevron Oil* test of non-retroactivity, which was most recently modified by the Montana Supreme Court in *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, 325 Mont. 207, 104 P.3d 483;

5. The decision in *Reesor* cannot be applied retroactively because retroactive application would constitute an unconstitutional impairment of contract;

6. 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 Montana Code Annotated § 39-71-611(3) (2003) and Montana Code Annotated § 39-71-612(4) (2003);

7. If *Reesor* applies retroactively, the common fund attorney fee lien of Petitioner's counsel has no applicability to claims occurring on or after July 1, 1991 through June 30, 1995 because the language of Montana Code Annotated § 39-71-710 (1991 & 1993) did not provide for termination of partial disability benefits upon the receipt of social security retirement benefits, according to the Montana Supreme Court's decision in *Russette v. Chippewa Cree Housing Authority* (1994), 265 Mont. 90, 92-93, 874 P.2d 1217, 1218. Although Montana Code Annotated § 39-71-710 was amended in 1995 in response to *Russette*, PPD benefits were paid after retirement age under the 1991 and 1993 version of the Workers' Compensation Act;

8. If *Reesor* applies retroactively, settled files or files which were adjudicated are excluded from the implementation process;

9. If *Reesor* applies retroactively, the files of deceased claimants are excluded from the implementation process;

10. If *Reesor* applies retroactively, the doctrine of laches and/or the statute of limitations serve to bar any additional entitlement on claims which failed to timely present a challenge to Montana Code Annotated § 39-71-710;

11. If *Reesor* applies retroactively, Petitioner's counsel should be required to

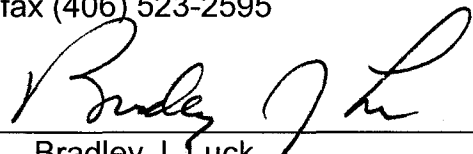
bear the financial burden of the identification and entitlement determination process, which includes the administrative and claims-related costs associated with obtaining sufficient medical and vocational information; and

12. Southern Insurance Company incorporates the defenses raised by the other insurers named in the global Summons and requests 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 6 day of June, 2005.

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By 
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CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Southern Insurance Company, hereby certify that on this 6th day of June, 2005, I mailed a copy of the foregoing *Response to Summons of Southern Insurance Company*, postage prepaid, to the following persons:

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


Sandra E. Codman