

**FILED**

JAN 30 2006

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

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Attorneys for Petitioner

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

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DALE REESOR,	)	
Petitioner,	)	WCC No. 2002-0676
	)	
vs.	)	Petitioner's Motion to Compel
	)	Discovery Responses From
MONTANA STATE FUND	)	The Montana State Fund And
Respondent/Insurer	)	The Liberty Companies
	)	

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COMES NOW the petitioner, Dale Reesor ("Reesor"), to move the Court for an order compelling the Montana State Fund and the "Liberty Companies"<sup>1</sup> to answer discovery requests propounded on December 12, 2005. Both Insurers filed objections on December 30, 2005, and both companies requested protective orders (attached hereto as Exhibit A).

**History**

Mr. Reesor is an injured worker who, because of an arbitrary age limitation, received a severely decreased PPD benefit pursuant to §39-71-710 MCA (1999). In an appeal to the Montana Supreme Court, Reesor successfully argued that there was no rational governmental interest served by denying equal PPD benefits to older workers. The Supreme Court found that §39-71-710 MCA (1999) contravened public policy,

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<sup>1</sup> By referring to the "Liberty Companies," Petitioner includes Liberty Ins. Underwriters Inc.; Liberty Insurance Corp; Liberty Mutual Fire Insurance Co.; Liberty Mutual Insurance Co.; Liberty Northwest Ins. Corp; LM General Insurance Company; LM Insurance Corporation; LM Personal Insurance Company; LM Property & Casualty Ins. Co.; Wausau Business Ins. Co.; Wausau Underwriters Ins. Co.; One Beacon American Ins. Co.; and One Beacon Ins. Co.

which requires PPD to "bear a reasonable relationship to actual wages lost." Reesor v. State Fund 103 P.3d 1019, 325 Mont. 1, 2004 MT 370.

The Supreme Court decided Reesor on December 22, 2004. Thereafter, Reesor was remanded back to this Court for further prosecution. Unfortunately, there has not been any substantive progress in the case during the past thirteen months.

The parties are proceeding with a common fund action, so Judge McCarter required service of process on all workers' compensation insurance companies that were licensed to provide workers' compensation insurance in Montana between July 1, 1987 and December 22, 2004. The Workers' Compensation Court sent out 637 summonses to the Insurers identified by the Department of Labor. Of the 637 Insurers served, 285 insurance companies appeared; and of the 285 insurance companies that appeared, Reesor stipulated to the dismissal of 80 companies (which did not write insurance in Montana). That left 352 insurance companies that did not respond to the Court's summonses. At that point, further progress halted. Ostensibly, the party Insurers were waiting for the non-responsive Insurers to appear. With the procedural delay at one year, Reesor found the quandary unworkable; therefore, on November 23, 2005, Reesor asked this Court to allow the common fund to proceed against the party Insurers. By far and away, the two largest party Insurers are the State Fund and the Liberty Companies.

On December 6, 2005, this Court allowed Reesor to proceed against the party Insurers without requiring counsel to renounce ("state that he will not pursue") future common fund actions against non-responsive Insurers. The Court agreed that it would not prejudice the parties, nor would it prejudice the non-responsive Insurers, if the Court allowed the common fund case to proceed.

Therefore, on December 12, 2005, Reesor served the disputed discovery requests that are the subject of this motion. The Montana State Fund objected to the discovery requests on December 30, 2005, and essentially said that the discovery requests were premature and unduly burdensome. The Liberty Companies responded in kind on December 30, 2005, and both parties moved for protective orders. This is Reesor's motion to compel discovery against the two Insurers, and a response to their motions for protective orders.

### **Argument**

In Reesor, the common fund is struggling against time. The Insurers appear to be delighted to stall every phase of the litigation. In fact, the Insurers appear to be creating new phases of litigation that are not necessary. For instance, the State Fund objects stating that it should not be required to answer discovery requests about the number of Reesor claimants, because that should be part of the "remediation process." What is the remediation process, and when did that "process" become something that could prevent

a party from discovering vital information? This information is important, and Reesor asks this Court to order the Insurers to provide it.

Reesor submits that the Insurers are dragging this case out, because, with time, it will be harder to find the claimants. Sadly, with more time, it is also true that many of these elderly claimants will die. By definition, a Reesor claimant is over the age of 65 at the time of her injury. Therefore, this common fund is comprised of claimants ranging in ages from 67 to age 83. Obviously, this is a group with a high mortality rate. The Insurers know that it will be difficult for a claimant's estate to prosecute her claim, so the Insurers delay.

The Insurers argue against disclosure of potential Reesor claimants, because it is "premature" or "too expensive" to find these claimants. However, the State Fund arguments in Stavenjord II before the Supreme Court demonstrate how important this information is to the question of retroactivity. At the hearing, State Fund attorney Brad Luck introduced a document called the "Estimated Common Fund Retroactive Costs." This document purported to demonstrate the projected costs of Stavenjord, Satterlee, Schmill, and Reesor. (See Exhibit B attached). Interestingly, none of the State Fund's estimates were verified through discovery, but in the case at bar this Court should order the Insurers to verify their exposure estimates.

For the Reesor case, the State Fund estimated a cost of Three Million Dollars. Reesor asks how the State Fund got that number? More importantly, Reesor asks why the State Fund does not want to ascertain a more certain number. The answer to both questions is that the Insurers want to cry, "the sky is falling," rather than speak to the Court about the truth. In truth, the Insurers do not want to identify the exact number of Reesor claimants, because the Insurers want to return to the Montana Supreme Court (in Reesor II) with huge exposure estimates. This Court should not allow that tactic to work again.

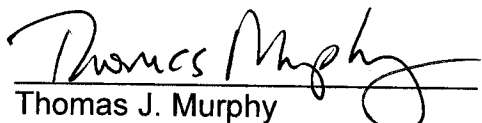
In Stavenjord, the Workers' Compensation Court found that the State Fund exposure estimate was overblown. Specifically, the Workers' Compensation Court called that State Fund estimate a "worst case scenario," and "not a realistic estimate." Stavenjord 2004 MTWCC 62, ¶ 30. In the case at bar, this Court should require the Insurers to identify the truth instead of allowing them to make unrealistic estimates.

As Exhibit B demonstrates, the Insurers argued "cost to the system," as the primary reason for their challenge to retroactive application of Stavenjord. Undoubtedly, the Insurers will argue "cost to the system," as the basis for their challenge to retroactive application of Reesor. The Insurers contend that cost is the primary concern in the retroactive application analysis; therefore, Reesor asks this Court to compel the Insurers to identify the claimants and the costs.

**Conclusion**

This Court should not allow the State Fund to argue based on a "worst case scenario," that is unrealistic. The Insurers have made cost the issue, so Reesor asks this Court to order the Insurers to itemize the cost. The Court should compel the Insurers to answer Reesor's discovery requests.

**DATED** this 27<sup>th</sup> day of January, 2006.

  
Thomas J. Murphy  
Attorney for Petitioner

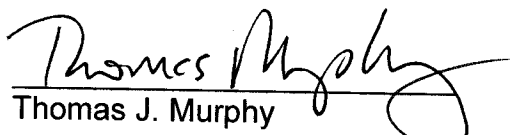
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 27<sup>th</sup> day of January, 2006, a copy of the foregoing was served by mailing a true and correct copy of said document via first class mail to the attorneys at the address listed below:

Bradley J. Luck  
Garlington, Lohn & Robinson  
PO Box 7909  
Missoula, MT 59807

Tom Martello  
State Fund  
PO Box 4759  
Helena, MT 59604-4759

Attorney for Insurer/Respondent

  
Thomas J. Murphy

Larry W. Jones  
Law Office of Jones & Garber  
An Insurance Company Law Division  
700 SW Higgins Avenue, Suite 108  
Missoula, MT 59803-1489  
(406) 543-2420  
(406) 829-3436 (FAX)  
Attorney for Respondent/Insurer

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR,

Petitioner,

vs.

Liberty Ins. Underwriters Inc.  
Liberty Insurance Corp.  
Liberty Mutual Fire Insurance Co.  
Liberty Mutual Insurance Co.  
Liberty Northwest Ins. Corp.  
LM General Insurance Company  
LM Insurance Corporation  
LM Personal Insurance Company  
LM Property & Casualty Ins. Co.  
Wausau Business Ins. Co.  
Wausau Underwriters Ins. Co.  
One Beacon American Ins. Co.  
One Beacon Ins. Co.

Respondents.

WCC No. 2002-0676

**LIBERTY OBJECTION TO  
PETITIONER'S DISCOVERY  
REQUEST TO LIBERTY  
NORTHWEST AND  
ASSOCIATED INSURERS  
AND  
MOTION FOR  
PROTECTIVE ORDER  
AND SUPPORTING BRIEF**

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On December 12, 2005 Petitioner served on Respondent his discovery requests, a copy of which is attached.

In reviewing the Workers' Compensation Court's website on this Common Fund case, Liberty was unable to find any authorization from the Court to initiate discovery. The procedure that has been followed in other Common Fund cases

is that the Court would work through what have now been termed "implementation issues", such as whether a Common Fund exists, the scope of the Common Fund (retroactive application), the procedure to identify relevant Common Fund cases, etc.

The effect of Petitioner's discovery is to preempt the Court's working through the implementation issues by asking for a global evaluation of an insurer's caseload, under criteria not reviewed and authorized by the Court, to identify claims that may fall under the holding in Reesor.

For the reasons set forth below, Liberty objects to this discovery request and moves for protective order.

#### MOTION FOR PROTECTIVE ORDER AND SUPPORTING BRIEF

COMES NOW the above-named Respondent, pursuant to ARM 24.5.325 and moves the Court for an order directing that a discovery petition request not be had unless and until the Court, through the procedure previously followed, expressly to declare the existence of a Common Fund and then declare how it is to be implemented.

#### BRIEF

Under ARM 24.5.325 the Court has broad discretion in limiting discovery, including a protective order to the effect that certain types of discovery not be had.

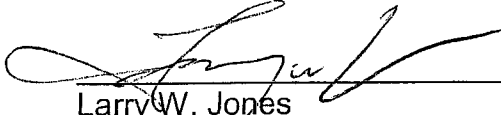
In the instant case, Petitioner filed his Notice of Common Fund attorney lien on January 20, 2005.

The Court in its SUMMONS AND NOTICE OF ATTORNEY FEE LIEN filed April 22, 2005 at ¶4 states "Further, each of you is made a Respondent to the Petitioner's Common Fund claims and summoned to answer the Petitioner's Request for Certification of a Common Fund and enforcement of his attorney's lien." At ¶5 the Court goes on to order "Following the deadline for filing of your answer, the Court will conduct further proceedings to determine whether a Common Fund exists, the extent of any Common Fund, and the Petitioner's entitlement to attorney fees pursuant to the Common Fund doctrine. If the Court finds there is a Common Fund, then proceedings to enforce Common Fund entitlement and the Petitioner's attorney fee lien will follow."

It is against this background that Petitioner's discovery request is premature because the Court, and only this Court, has the authority under the summons to direct that discovery be had, the scope of that discovery and what files would be relevant within the scope of discovery. Stated differently, Petitioner has jumped the gun on the procedure generally followed by this Court in Common Fund cases as well as the specific directives in its SUMMONS AND NOTICE OF ATTORNEY FEE LIEN.

For the reason stated above, Liberty requests the Court to enter an order directing that the discovery requested by Reesor against the named insurers in the attached discovery request not be had at this time. Liberty further requests that an order be issued directing Reesor not to direct any further discovery requests at the insurers in the attached pleading unless and until authorized by the Court to do so.

DATED this 30 day of December, 2005.

  
Larry W. Jones  
Attorney for Respondent  
Liberty Northwest Ins. Corp.

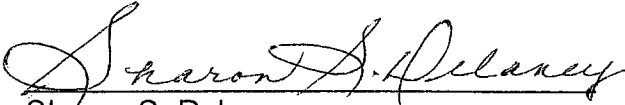
CERTIFICATE OF SERVICE

I hereby certify that on the 30th day December, 2005, I served the original of the foregoing LIBERTY NORTHWEST'S RESPONSE TO PETITION FOR HEARING, by first-class mail, postage prepaid, on the following:

Ms. Patricia J. Kessner  
Clerk of Court  
Workers' Compensation Court  
PO Box 537  
Helena, MT 59624-0537

and a copy of the same to the following:

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

  
Sharon S. Delaney



JAN - 3 2006

Bradley J. Luck  
GARLINGTON, LOHN & ROBINSON, PLLP  
199 West Pine • P. O. Box 7909  
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Thomas E. Martello  
Montana State Fund  
P. O. Box 4759  
Helena MT 59604-4759

Attorneys for Respondent/Insurer

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  
RESPONSES/OBJECTIONS TO  
PETITIONER'S DISCOVERY  
REQUESTS AND MOTION TO STAY**

COMES NOW the Montana State Fund ("State Fund") and responds to the Discovery Requests to Montana State Fund dated December 12, 2005, as follows:

**INTERROGATORY NO. 1:**

Please identify all workers compensation claimants that may be entitled to additional PPD benefits pursuant to Reesor v. State Fund. Please consider this a request for the identities of potential Reesor claimants from 7/1/1987 through 12/22/2004. For each claimant identified, please state\*:

A. The name and address of the claimant;

**COPY**

Ex "A"

- B. State the date of injury:
- C. State the date of birth of the claimant.
- D. State the total amount of any payment made to that claimant;
- E. State the total amount of any additional Reesor benefit entitlement that is due to that claimant (if known);
- F. If you do not know the amount of the additional Reesor benefit entitlement due to the claimant, please state the PPD element(s) that is/are known and those that are not known;
- G. State the claim number;
- H. State whether you contend that the claimant's case is closed or final; and if the answer is yes, please state the rationale supporting your contention.
- I. Please describe the procedure(s) that Montana State Fund used to identify each of the listed claimants in response to this interrogatory. (For instance, if computer searches were used, please identify the database and query(ies); or if manual searches were used, please identify the location of the files and the search criteria).

\*Note: Petitioner's counsel agrees to abide by the terms of the State Fund's privacy agreement, which the parties signed in the Stavenjord case.

**RESPONSE:** Objection. The Request is premature and unduly burdensome. Pursuant to Administrative Rules of Montana 24.5.325 the State Fund moves the Court for a Protective Order directing that the discovery be stayed until (and if) such time as a common fund has been found and a review and remediation process has been established by the Court. In support of the objection and motion, the State Fund states as follows:

This Court issued a Summons to workers' compensation insurers potentially affected by the Supreme Court ruling in this case on April 22, 2005. At paragraph 5 of the Summons the Court indicated that, following the appearances of respondent parties it "will conduct further proceedings to determine whether a common fund exists . . . . If the Court finds there is a common fund, then proceedings to enforce common fund entitlements . . . will follow." The Court's Minute Entry from the July 14, 2005, in-person conference indicates that it will identify issues and set a briefing schedule. Several parties have appeared and raised substantive issues regarding the common fund and

implementation of the Supreme Court ruling. The Court has not yet determined the issues to be briefed or set a schedule for such filings, although other issues that may be involved are being briefed in other common fund cases. A determination of any of several issues raised, predominately the common fund and retroactivity questions, are necessary before any remediation process or procedure may be considered.

As a result of the above, the extensive efforts required to respond to the noted discovery are premature. No finding of a common fund has been made. No remediation efforts have been directed. Most importantly, even if a common fund is established, there is no guarantee that the extensive efforts required to respond to the discovery will later be found to be sufficient by the Court and Petitioner and the entire process may have to be repeated.

In light of the above, the Requests are overly burdensome. As the Court and counsel are well aware, the State Fund is engaged in remediation and discovery efforts in other common funds and class actions. The administrative cost and burden of such efforts is significant, severely stressing available resources. To divert such efforts to a premature and presently unnecessary project would not only be unreasonably costly in terms of labor hours and expense it would limit or preclude efforts on other projects that have been directed by the Courts or are incident to necessary litigation or claim activities.

DATED this 30 day of December, 2005.

Attorneys for Respondent/Insurer

GARLINGTON, LOHN & ROBINSON, PLLP  
199 W. Pine • P. O. Box 7909  
Missoula, MT 59807-7909  
Telephone (406) 523-2500  
Telefax (406) 523-2595

By Bradley J. Luck  
Bradley J. Luck

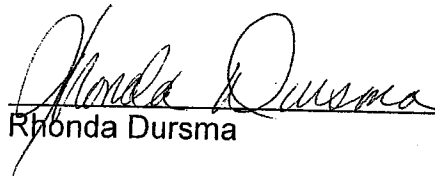
**CERTIFICATE OF MAILING**

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent/Insurer, hereby certify that on this 30<sup>th</sup> day of December, 2005, I mailed a copy of the foregoing **STATE FUND'S RESPONSES/OBJECTIONS TO PETITIONER'S DISCOVERY REQUESTS AND MOTION TO STAY**, postage prepaid, to the following persons:

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

Mr. Larry Jones  
Jones and Garber  
700 SW Higgins #108  
Missoula, MT 59803

Mr. James G. Hunt  
Hunt & Molloy Law Firm  
P.O. Box 1711  
Helena, MT 59624

  
Rhonda Dursma

# ESTIMATED COMMON FUND RETROACTIVE COSTS

	New Fund	Old Fund
Stavenjord *	\$14 - 19M	\$5 - 7M
Satterlee	\$134 - 186M	\$93 - 116M
Schmill	\$1.4 - 1.9M	\$800,000
Reesor	\$2M	\$1M
Totals	\$151.4 - 206.9M	\$99.8 - 123M
Murer (actual)		\$2,180,955.16
Present Deficit		\$7,442,792
* NCCI Total	\$17.9 - 20.6M	

***Murphy Law Firm***

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Telephone (406) 452-2345  
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*Thomas J. Murphy, Attorney*  
*Charla K. Tadlock, Attorney*

*Lou Joi Poelman, Paralegal*  
*Sandra Gilbert, Paralegal*  
*Peggy Thelen, Paralegal*

January 27, 2006


Workers Compensation Court  
Attn. Pat Kessner  
P O Box 537  
Helena, Mt 59624-0357

Re: Reesor v. Montana State Fund  
Cause #: WCC No. 2002-0676

Dear Ms. Kessner:

Enclosed for filing in the above-captioned case, please find Petitioner's Motion to Compel Discovery Responses From The Montana State Fund And The Liberty Companies. Please accept this as Reesor's motion to compel and Reesor's response to the Insurers' motions for protective order. Please contact me if you have any questions about this document. Thank you.

Sincerely yours,

  
Thomas J. Murphy

TJM/ljp

cc: Bradley J. Luck w/enc.  
Larry W. Jones w/enc