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OFFICE OF
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HELENA, MONTANA

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

JEREMY RUHD,

Petitioner,

v.

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Respondent/Insurer.

WCC No. 2002-0500

**STATE FUND'S REPLY BRIEF
REGARDING RETROACTIVITY**

COMES NOW the Montana State Fund ("State Fund") and hereby files its Reply Brief Regarding Retroactivity. For the reasons stated herein, the State Fund requests this Court deny Ruhd's attempt to retroactively apply *Ruhd v. Liberty Nw. Ins. Corp.*, 2002 MT 290N, 313 Mont. 422, 63 P.3d 513 (unpublished).

INTRODUCTION

Pursuant to the Court's directive of March 29, 2004, the State Fund filed its Opening Brief in this matter on May 3, 2004. As the Court is aware, to avoid repetitiveness, for the sake of brevity and in the interests of judicial economy, the State

Fund incorporated by reference the prior briefs it had filed in related cases¹ on the same issue. See State Fund's Opening Brief Re: Retroactivity and Common Fund Entitlement 1 (May 3, 2004). Ruhd objected to that approach and unnecessarily requested sanctions, a matter which is the subject of separate briefing.² On June 1, 2004, Ruhd filed his Brief in Support of Retroactive Application. To meet the deadline originally set forth by the Court, the State Fund files this Reply Brief and asserts that Ruhd's motion for retroactive application should be denied.

ARGUMENT

Ruhd's attorney has apparently not specified the time frame in which he asserts his attorney lien applies on a retroactive basis. However, Ruhd's injury was governed by the 1999 version of the WCA. See *Ruhd*, ¶ 7. Therefore, like the attorneys in *Rausch*, the State Fund assumes that Ruhd's attorney is attempting to assert his lien back to July 1, 1987.

The retroactivity analysis, including a discussion of the viability of *Chevron Oil* and the inapplicability of *Rausch* to the 1987 and 1989 versions of the WCA, was fully developed in the State Fund's prior briefing in related common fund cases. Pursuant to those pleadings and arguments, *Ruhd* should not be applied retroactively. Notably, Ruhd's attempt to retroactively apply *Ruhd*, a direct descendant of *Rausch*, to claims occurring under the 1987 and 1989 versions of the WCA is prohibited by this Court's decision on that issue in *Rausch*. See *Rausch v. State Fund*, WCC Nos. 9907-8274R1, 2000-0023R1, 2000-0030R1, Decision and Judgment Respecting Remaining Issues (July 11, 2003) (holding that permanently totally disabled claimants injured between July 1, 1987 and June 30, 1991, are not entitled to impairment awards).

Like the 1987 and 1989 versions of the WCA, pre-1987 law prohibits PTD

¹ *Flynn v. State Fund*, WCC No. 2000-022, *Stavenjord v. State Fund*, WCC No. 2000-0207, *Schmill v. State Fund*, WCC No. 2001-0300, and *Rausch v. State Fund*, WCC No. 9907-8274R1, WCC No. 2000-0023R1, WCC No. 2000-0030R1.

² Although this Court may sua sponte take judicial notice of documents and court records from other judicial proceedings, the State Fund requests this Court take judicial notice of the court records from the other common fund cases, which includes the briefs the State Fund filed in *Flynn*, *Stavenjord*, *Schmill* and *Rausch*. See Mont. R. Evid. 202(b)(6) (2004).

claimants from receiving impairment awards.³ If Ruhd's attorney is attempting to assert his lien to pre-1987 claims, the State Fund reserves the right to counter that argument.

CONCLUSION

Previous decisions from this Court and the State Fund's prior briefs in related common fund litigation which address the retroactivity issue establish that *Ruhd* should not be applied retroactively. If this Court applies *Ruhd* retroactively, the State Fund asserts that the retroactive application must be limited to claims occurring on or after July 1, 1991, because prior to the 1991 version of the WCA, PTD claimants were prohibited from receiving payment of their impairment awards.

RESPECTFULLY SUBMITTED this 7 day of June, 2004.

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CERTIFICATE OF MAILING

The undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Montana State Fund, hereby certifies that on this 7th day of June, 2004, she mailed a copy of the foregoing *State Fund's Reply Brief Regarding Retroactivity*, postage prepaid, to the following persons:

³ In *Rausch*, the parties acknowledged the inability of PTD claimants injured prior to 1987 to receive payment of impairment awards. See Revised Settlement Stipulation § 2. By approving the settlement agreement, the Court validated that acknowledgment. See Order Approving Revised Settlement Stipulation (Mar. 31, 2003).

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