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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

JEREMY RUHD, Petitioner, vs. LIBERTY NORTHWEST INSURANCE CORP., Respondent/Insurer.	)	WCC No. 2002-0500 **LIBERTY'S BRIEF REGARDING COMMON FUND ATTORNEY FEES AND RETROACTIVE APPLICATION**

Procedural History

This case is on remand from the Montana Supreme Court pursuant to Ruhd v. Liberty Northwest Insurance Corporation, 2002 MT 290N. Previously this Court in Ruhd v. Liberty Northwest, 2003 MT WCC 38, ruled on Ruhd's request for class certification and common fund attorney fees. Id at ¶4.

At ¶18, the Court found "Ruhd established Liberty's liability for benefits it had denied him and other PTD Liberty claimants, thus creating a common fund with respect to Liberty claimants." Then the Court in the same paragraph held "Ruhd's attorney is entitled to common fund attorney fees with respect to those benefits."

In ruling on the class action, the Court at ¶20 of its decision denied Ruhd's motion to amend and for class certification.

Liberty's understanding is that Ruhd has not objected to Liberty's proposed statement of facts served April 12, 2004, but Liberty requests this point be clarified in Ruhd's reply brief. In that pleading, Liberty proposed the following facts:

> COMES NOW Liberty pursuant to the Court's minute entry of March 29, 2004, and files its proposed statement of facts: Liberty Northwest identified the following PTD cases by computer search and consultation with various adjusters:

Claim No.	I/OD Date	Status	Attorney
687-008785	OD 8-1-90	Settled 4-29-98	
687-009149	? 12-28-90	Settled 12-11-93	
687-012393	? 10-8-93	Dead	
687-013374	? 6-10-94	Open	
687-014224	? 4-1-94	Open	
687-016009	? 5-24-95	Settled 1-27-98	
687-017203	? 9-25-95	Settled 7-1-98	
687-020089	I 8-7-96	Open	Lauridsen
687-023985	I 10-29-97	Open	Melcher
687-025087	? 1-27-98	Open	Wallace
687-025165	? 1-30-98	Open	
687-036525	I 11-22-99	Open	G. Angel
687-031857	? 7-28-00	Open	
687-043474	? 10-9-01	Open	Skjelset

Of these 14 cases, the 4 settled cases should be excluded. Murer v. State Compensation Mutual Insurance Fund, 283 Mont. 210, 119-220, 942 P.2d 69, 74-75 (1997).

The claim in which the claimant is dead should also be excluded.

Because Liberty Northwest is the named insured, only Liberty Northwest cases were screened.

Liberty is aware of this Court's rulings in the Flynn v. State Fund as well as Miller v. Liberty Mutual, 2003 MT WCC 6, but as the Court has noted in Stavenjord and Schmill, Liberty is making the following arguments to preserve issues for appeal, if necessary.

Liberty will address the issued of whether this Court can award common fund attorney fees, already having noted above the Court has so indicated, and the issue of retroactive application of Rausch v. State Fund, 2002 MT 203, (hereinafter FFR) through the Supreme Court's holding through this case.

COMMON FUND

Jurisdiction-Statutory

The Court does not have jurisdiction to award common fund attorney fees.

> "The jurisdictional parameters of the Workers' Compensation Court are defined by statute as interpreted, from time to time, by the decisions of this Court. Section 39-71-2905, MCA, restricts the jurisdiction of the Workers' Compensation Court to disputes concerning 'any benefits under Chapter 71' of Title 39."

Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund, 1998 MT 169, ¶11.

The statute cited above by the Court provides in pertinent part "The penalties and assessments allowed against an insurer under Chapter 71 are the exclusive penalties and assessments that can be assessed by the workers' compensation Judge against an insurer for disputes arising under Chapter 71."

The Court's statutory grant of jurisdiction to award attorney fees is set forth at MCA §§39-71-611, 612. Those statutes do not authorize this Court to assess attorney fees or penalize an insurer by awarding attorney fees under a common fund attorney fee theory.

While it might be said that the Montana Supreme Court has this jurisdiction to award common fund attorney fees, it did not do so in this case.

To award Ruhd common fund attorney fees, the Court would have to violate the most fundamental rule of statutory construction: "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will effect to all." MCA 1-2-101.

RETROACTIVE APPLICATION

The leading case on retroactive application of a Supreme Court decision is Ereth v. Cascade County, 2003 MT 328, ¶29.

> In *Riley v. Warm Springs State Hosp.* (1987), 229 Mont. 518, 748 P.2d 455, we set forth the three factors to be considered in determining whether or not to apply a judicial decision retroactively. If nonretroactive application is sought, "[f]irst, the ruling to be applied nonretroactively must establish a new principle of law either by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed. Next, the new rule must be examined to determine whether retroactive application will further or retard its operation. Third, the equity of retroactive application must be considered." *Riley*, 229 Mont. at 521, 748 P.2d at 457. All three of these factors weigh in favor of nonretroactive application of this new rule in our jurisprudence.

Clearly Foreshadowed

The issue in the instant case was a matter of first impression in Rausch v. State Fund, 2000 MT WCC 56, which held a PTD claimant was not entitled to an impairment award. In the face of that clear precedent Ruhd raised the same issue and this Court in its summary judgment, Ruhd v. Liberty Northwest, WCC No. 2002-0500, filed August 7, 2002, denied his claim for an impairment award. The Supreme Court in FFR at ¶20 stated "No section of the Workers' Compensation Act explicitly authorizes impairment awards per se." How can the decision in FFR have been clearly foreshadow when there was no statute authorizing the impairment award Ruhd claimed?

Furthering rule's operation

Retroactive application of FFR will not further the rules application. The Supreme Court in FFR created a new insurer liability which had no express statutory basis. Insurer's are now on notice that they can not deny impairment awards to PTD claimants. Prospective application of the rule will not weaken the rule or retard its operation.

Substantial inequity

Although LNW has identified PTD claims by computer query, the Court is aware that common fund claimant's attorneys are not always satisfied with insurer representations as to the number of claims. There can be additional costs, as occurred in Murer, when the Court became actively involved in monitoring identification of applicable cases to the point where there were numerous hearings and the State Fund had to work with the common fund attorneys and their

expert in the complicated and drawn out procedure of trying to understand different computer systems, how they were coded, and how they could be interrogated.

The benefits to which a claimant is entitled are determined by the statutes in effect on the date of injury. Buckman v. Montana Deaconess Hosp., 224 Mont. 318, 730 P.2d 380 (1986). Therefore, the Buckman rule, which has not been overruled, would have to be abandoned in all statutory interpretation cases which increase insurer liability. The Montana Supreme Court has never so held.

The Buckman rule is intended to provide stability and certainty in the Montana Workers' Compensation system and it would be unfair to disrupt both by increasing insurer liability retroactively when LNW had every right to rely on the Buckman rule in this case and all cases that predate FFR.

CONTRACT

"The basis for workers' compensation is a contract of hire either express or implied." Buckman v. Montana Deaconess Hospital, 224 Mont. 318, 325-326 (1996). Contracts for hire may be oral or written. The retro-application of FFR raises the question of how far back in time it could be applied. That is, Liberty's contractual obligations to a claimant, under which work comp benefits are paid, could not exceed the contract period of the obligation.

Liberty's contractual obligations under an oral contract for hire is three years and for a written contract of hire is eight years. MCA 27-2-202.

Therefore, if FFR is applied retroactively, every claimant and the time of injury employer would have to be located to determine if the claimant was working under an oral or written contract of hire. If the contract of hire is oral, then only those claimants with dates of injury three years prior to this Court's decision may benefit from it. There is an eight year period for those with a written contract of hire.

If the Court were simply to ignore this contract principal and apply FFR retroactively uniformly and irrespective of the type of contract of hire, the Court's ruling would impermissibly impair Liberty's contract rights. Synek v. State Compensation Insurance Fund, 272 Mont. 246, 252-253 (1995).

If the Court were to require Liberty to undertake this identification of claimant's employers, it would be both inequitable and unduly burdensome because of the resources it would take to locate the parties, if they could be located.

If the Court were to apply the FFR decision retroactively there are additional issues relating to the types of cases that would fall under the retroactive application and how far back the FFR decision could be applied retroactively.

The categories of cases that theoretically could be involved in this proceeding would require payment of PTD benefits. Under this general category there are two major categories of claims (a.) settled and (b.) not settled. Under the second category there are two sub-categories (a) claims in which PTD are being paid and (b) claims in which PTD was paid but has been stopped for some reason, e.g., retirement, death, change of disability statute, loss of eligibility, etc.

SETTLED CASES.

This category is the easiest one to deal with because of the abundance of case law. In the leading case, Kienas v. Peterson, (1981), 191 Mont. 325, 328, 624 P.2d 1, the Montana Supreme Court held: "The full and final compromise settlement entered into by the parties is a contract. The law of contracts applies in construing and determining the validity and **enforceability** of the settlement agreement." (Emphasis added.)

In determining whether a workers' compensation settlement can be reopened, the Court, without hesitation, looked to contract law. Citing § 28-2-401, MCA, the Court in Kienas held that a mutual mistake of material fact can be the basis. Id. at 329. Citing § 28-2-410, MCA, the Court in Brown v. Richard A. Murphy, Inc., (1993), 261 Mont. 275, 280-281, 862 P.2d held that a mutual mistake of law can be the basis for re-opening a workers' compensation settlement.

In the same way that it looked to contract law to determine the grounds for reopening work comp settlements, the Court applied the two year statute of limitation for setting aside work comp settlements. Rath v. St. Labre Indian School, (1991), 249 Mont. 433, 439-440, 816 P.2d 1061. Specifically, the Court in Rath held that "the statute of limitations begins to run when the facts are such that the party bringing the action would have discovered the mistake had he or she exercised ordinary diligence." *Id.*

UNSETTLED CASES.

In this category of cases the Court has given clear guidance regarding the body of law to look to in evaluating the instant case. In the seminal decision Buckman v. Montana Deaconess Hosp., (1996), 224 Mont. 318, 321, the Court held: "Workers' compensation benefits are determined by the statutes in effect as of the date of injury."

The dispute in Buckman was over a lump sum conversion under an amended statute and whether the amended statute could be applied retroactively. Buckman, 224 Mont. at 320. In resolving the constitutional challenge, the Court characterized the issue before it as follows:

We now turn our attention to the contract clause challenge before us. In the past we have generally interpreted the contract clauses found in Art. II, § 31, 1972 Mont. Const. and Art. I, § 10(1), United States Constitution as interchangeable guarantees against legislation impairing the obligation of contracts. *Neel v. Federal Savings and Loan Assoc.* (Mont.1984), 675 P.2d 96, 103. Consistent with our intention to initially examine state grounds in an effort to resolve the issue, **we turn to prior Montana contract clause case law for independent interpretation of our own prohibition of impairment of contract**. Federal cases cited are relied on for their analytical persuasiveness but in no way mandate
our decision.

The Montana Constitution states, "No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature." Art. II, § 31, 1972 Mont. Const. We have construed the two contract clauses interchangeably, and have cited United States Supreme Court opinions to test the validity of Montana legislation under both contract clauses. *Neel,*
675 P.2d at 103.

The basis for Workers' Compensation is a contract of hire either express or implied. Section 39-71-117, MCA; § 39-71-118, MCA; 1C Larson Workmen's Compensation Law § 47.10 (1986). **This Court, as well as courts of other states have held that Workers' Compensation is based on contract theory.** *Estate of Baker* (1977), 222 Kan. 127, 563 P.2d 431; *Harris v. National Truck Service* (1975), 56 Ala.App. 350, 321 So.2d 690; *Spengler v. Employers Commercial Union and Insurance Co.* (1974), 131 Ga.App. 443, 206 S.E.2d 693; *Gaston v. San Ore Construction Co.* (1970), 206 Kan. 254, 477 P.2d 956; *Nadeau v. Power Plant Engineering Co.* (1959), 216 Or. 12, 337 P.2d 313; *Morgan v. Industrial Accident Board* (1956), 130 Mont. 272, 300 P.2d 954.

This Court has assumed for a number of years that the Workers' Compensation statutes in effect on the date of injury **set the contractual rights between the parties**. *Trusty,* 681 P.2d at 1085. This is consistent with the provisions of the Workers' Compensation Act that the term employee or worker means "each person in this state ... who is in the service of an employer ... under an appointment or contract of hire, express or implied, oral or

written." Section 39-71-118, MCA.

. . . .

The question becomes whether the statute at issue in this case constitutes an impairment of the obligation of contract.

Buckman, 224 at 325-326 (emphasis added).

As in Buckman, the Court has consistently held that rights between the parties in the workers' compensation arena are contractual rights.

> This Court has assumed for a number of years that the Workers' Compensation statutes in effect on the date of injury set the **contractual rights between the parties.**" *Buckman v. Montana Deaconess Hosp.* (Mont.1986), 730 P.2d 380, 384, 43 St.Rep. 2216, 2222 (citing *Trusty v. Consolidated Freightways* (1984), 210 Mont. 148, 681 P.2d 1085, 1087, 41 St.Rep. 973, 975). Both the United States and Montana Constitutions prohibit state laws impairing the obligation of a contract. Art. I, Sec. 10, U.S. Const; and Art. II, Sec. 31, Mont. Const.

Carmichael v. Workers' Compensation Court, (1988), 234. Mont. 410, 413, 763 P.2d 1122 (emphasis added). The dispute in *Carmichael* involved the retroactive application of the newly enacted statutes governing workers' compensation mediation.

> On appeal, Carmichael argued that retroactive application of the mediation requirement unconstitutionally impaired his contractual rights by significantly delaying his right to petition the Workers' Compensation Court. We observed that Carmichael's contractual workers' compensation rights vested on the date of his injury and entitled him, as of that date, to directly petition the Workers' Compensation Court. *Carmichael,* 763 P.2d at 1124. The mediation statute subsequently enacted by the legislature required exhaustion of the mediation procedure prior to filing a petition in the Workers' Compensation Court, a delay of up to 100 days. Accordingly, **we held that retroactive application of the mediation statute to Carmichael's work- related injury substantially and impermissibly impaired his vested contractual rights.** *Carmichael,* 763 P.2d at 1126.

Synek v. State Compensation Ins. Fund, (1995), 272 Mont. 246, 252-253 (emphasis added).

Both sub-classes of unsettled claims invoke the contract provisions of the Montana Code Annotated, which include statutes of limitations, under the above case law.

STATUTES OF LIMITATION.

The following statutes govern the commencement of actions based on contract and for relief on the grounds of mistake. Section 27-2-102(2), MCA, provides:

> Unless otherwise provided by statute, the period of limitation begins when the claim or cause of action accrues. Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation.

Section 27-2-202, MCA, further provides in relevant part:

> (1) The period prescribed for the commencement of an action upon any contract, obligation, or liability founded upon an instrument in writing is within 8 years.
>
> . . . .
>
> (3) The period prescribed for the commencement of an action upon an obligation or liability, other than a contract, account, or promise, not founded upon an instrument in writing is within 3 years.

With regard to actions for relief on the ground of mistake, § 27-2-203, MCA, provides:

> The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within 2 years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Section 27-2-211, MCA, further provides:

> (1) Within 2 years is the period prescribed for the commencement of an action upon:
>
> . . .
>
> (c) **a liability created by statute** other than:
> (i) a penalty or forfeiture; or
> (ii) a statutory debt created by the payment of public assistance.

(Emphasis added.)

The statute of limitation set forth at § 27-2-203, MCA, was addressed by the Court in D'Agostino v. Swanson, (1990), 240 Mont. 435, 443:

> . . . [T]he statute of limitations for actions based on mutual mistake does not depend on actual discovery of the alleged mistake before it begins to run. Rather, the limitations period begins to run when the facts are such that the party bringing the action would have discovered the mistake had he exercised ordinary diligence. *Gregory v. City of Forsyth* (1980), 187 Mont. 132, 136, 609 P.2d 248, 251. Therefore, when it ruled upon the statute of limitations issue, the District Court was **not required to determine at what point the D'Agostinos obtained actual knowledge of the encroachment**.

(Emphasis added.)

The Montana Supreme Court and this Court have given additional guidance regarding when a statute of limitations begins to run and what role ignorance of the facts and/or the law plays. In Bennett v. Dow Chemical Company, (1986), 220 Mont. 117, 120-121, the Supreme Court stated:

> This Court follows the general rule that the fact that a party with a cause of action has no knowledge of his rights, or even the facts out of which the cause arises, does not delay the running of the statute of limitations until he discovers the facts **or learns of his rights under those facts**.

(Emphasis added.) In Wiard v. Liberty Northwest Ins. Corp., 2001 MTWCC 31, ¶ 13, this Court concluded as follows:

> Whether or not the claimant was "intimately familiar with the laws and regulations which comprise Montana's Workers' Compensation Act" (Brief in Opposition to Respondent's Motion for Partial Summary Judgment and in Support of Petitioner's Motion for Partial Summary Judgment at 4), **his ignorance of the law was no excuse**. *Donovan v. Graff,* 248 Mont. 21, 25, 808 P.2d 491, 494 (1991); *Rieckhoff v. Woodhull*, 106 Mont. 22, 30, 75 P.2d 56, 58 (1937). **If ignorance of the law were an excuse, laws would be applied willy-nilly depending upon the individual's legal knowledge; the result would be legal chaos and there would be no rule of law at all.**

(Emphasis added.)

If the award of common fund attorney fees are allowed retroactively and not barred by the doctrine of laches, as set forth below, then these statute of limitations should limit the retroactive application of this Court's holding. Specifically, under MCA § 27-2-211, the holding should not be applied more than two years retroactively. Alternatively if a settled case would have to be re-opened to award common fund attorney fees, then this Court's holding should not be applied more than two years retroactively under MCA § 27-2-203.

Alternatively, if the contract for hire was oral, which requires a factual determination, it should not be applied more than three years retroactively and if it were a written contract for hire then this Court's holding should not be applied more than eight years retroactively under MCA § 27-2-202.

THE DOCTRINE OF LACHES.

The doctrine of laches was summarized in Marriage of Hahn and Cladouhos (1994), 263 Mont. 315, 318, as follows:

> Section 1-3-218, MCA, provides that "[t]he law protects the vigilant before those who sleep on their rights." Laches is a concept of equity that can apply when a person is negligent in asserting a right, and can apply where there has been an unexplained delay of such duration or character as to render the enforcement of the asserted rights inequitable. *Fillner v. Richland* (1991), 247 Mont. 285, 290, 806 P.2d 537, 540. Each case must be determined on its own unique facts. *Fillne*r, 806 P.2d at 540.

Claimants other than Ruhd could have made the argument that he made, but chose to sleep on their rights. Under the governing case law, any claimant that would benefit by the retroactive application of the holding in Ruhd needs to explain why he or she did not make the same claim Ruhd did.

SUMMARY

For the reasons stated above, the decision should not be applied retroactively.

Alternatively, if it is applied retroactively, then the decision should not apply to those claims that are barred by the applicable statutes of limitation.

Alternatively, those claimants could have made the same challenge that Ruhd did but declined to do so. They slept on their rights and are barred by laches.

For the reasons stated above, LNW requests that the holding in this case held to be enforceable only from the date of the Workers' Compensation Court decision in this case.

DATED this 4 day of May, 2004.

Larry W. Jones
Attorney for Respondent/Insurer

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2004, I served the original of the foregoing LIBERTY'S BRIEF REGARDING COMMON FUND ATTORNEY FEES AND RETROACTIVE APPLICATION, first-class mail, postage prepaid, on the following: Ms. Patricia J. Kessner
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