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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

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9 **IN THE WORKERS' COMPENSATION COURT**
10 **OF THE STATE OF MONTANA**

11 WCC No. 2003-0840

12 CATHERINE E. SATTERLEE,

13 Petitioner,

14 vs.

15 LUMBERMAN'S MUTUAL CASUALTY
16 COMPANY, et al.,

17 Respondent/Insurer,

18 MONTANA STATE FUND,

19 Intervenor.

**RESPONSE TO MOTION FOR PARTIAL
SUMMARY JUDGMENT OF RESPONDENTS
J.H. KELLY, LLC AND LOUISIANA
PACIFIC CORPORATION**

20 STATEMENT OF THE CASE

21 Pursuant to the Court's June 20, 2005 "Notice of Briefing
22 Schedule," Respondent J.H. Kelly, LLC and Louisiana Pacific
23 Corporation file their Response to Petitioners' Motion for
24 Partial Summary Judgment.

25 To put this response in its proper context, Respondents
26 refer to the following section of the Court's "Notice of
Opportunity to Appear and Intervene" dated April 18, 2005:

"3. At present, the Court does not intend to
address the class action and common fund requests.
However, a decision in favor of the petitioners may
lead to class or common fund certification, thereby

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DOCKET ITEM NO. 214

1 affecting insurers not presently parties in this case.
2 The Court is therefore providing an opportunity to all
3 insurers who have provided workers' compensation
4 insurance coverage since July 1, 1989, to appear and
5 intervene in this case so that they can participate in
6 the briefing and argument of the petitioners'
7 constitutional challenges and, if the constitutional
8 issues are decided in the petitioners' favor, in the
9 briefing and argument of the petitioners' request for
10 class action or common fund certification."

11 ISSUES FOR DECISION

- 12 1. Is Section 39-71-710, MCA, unconstitutional in allowing
13 permanent total disability and rehabilitation
14 compensation benefits to be terminated based upon a
15 claimant's retirement?
- 16 2. If so, is common fund certification appropriate?

17 STATUTE AT ISSUE

18 Section 39-71-710, MCA, provides:

19 **"Termination of benefits upon retirement.** (1) If a
20 claimant is receiving disability or rehabilitation
21 compensation benefits and the claimant receives social
22 security retirement benefits or is eligible to receive
23 or is receiving full social security retirement
24 benefits or retirement benefits from a system that is
25 an alternative to social security retirement, the
26 claimant is considered to be retired. When the
claimant is retired, the liability of the insurer is
ended for payment of permanent partial disability
benefits other than the impairment award, payment of
permanent total disability benefits, and payment of
rehabilitation compensation benefits. However, the
insurer remains liable for temporary total disability
benefits, any impairment award, and medical benefits.

"(2) If a claimant who is eligible under subsection
(1) to receive retirement benefits and while gainfully
employed suffers a work-related injury, the insurer
retains liability for temporary total disability
benefits, any impairment award, and medical benefits."
(our emphasis).

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1 I. FIRST ISSUE: CONSTITUTIONAL CHALLENGE TO SECTION
2 39-71-710 MCA

3 In *Reesor v. Montana State Fund*, 2004 Mont. 370, 325 Mont.
4 1, _____ P.3d _____ (December 22, 2004), the Montana Supreme
5 Court held that Section 39-71-710, MCA, was unconstitutional for
6 allowing permanent partial disability benefits to be terminated
7 upon a claimant's retirement, because it denied equal protection
8 to older claimants.

9 Not surprisingly, Petitioners here assert that *Reesor's*
10 holding with respect to PPD benefits is dispositive in that it:

11 " * * * applies equally to PTD and rehabilitation
12 benefits. There is no legal or factual basis for a
13 constitutional distinction between how those benefits
14 should be administered. * * * " (Mot., pg. 5).

15 Does *Reesor* compel a conclusion of unconstitutionality in
16 the instant case, where PTD/rehabilitation benefits were
17 terminated to the retired Petitioners?

18 Respondents' response is yes. This Court is bound to apply
19 the decisions of higher courts under the doctrine of stare
20 decisis, and there is no valid basis for distinguishing the
21 issue in *Reesor* from the issue here.

22 The main factual difference is that *Reesor* involved
23 termination of PPD benefits, whereas this case involves
24 termination of PTD/rehabilitation benefits. That, however, is a
25 distinction without a difference, especially since the three
26 benefits that ostensibly may be terminated upon a claimant's
retirement are contained within the same statute, a statute
already found to violate equal protection guarantees.

Thus, Respondents would concede that Petitioners' motion
for partial summary judgment should be granted on the issue of
the unconstitutionality of Section 39-71-710, MCA.

That brings us to the issue of common fund, an issue where
Respondents are not inclined to be so generous.

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II. SECOND ISSUE: COMMON FUND CERTIFICATION

A. Applying the "Common Fund Doctrine" to a Workers' Compensation Context Is an Unnatural Extension of the Doctrine Beyond its Proper Boundaries.

Respondents make this argument with the knowledge that stare decisis prevents this Court from adopting their argument at this level, given the Montana Supreme Court's embrace of the Common Fund Doctrine in earlier workers' compensation cases, discussed infra.

Respondents believe, however, that the issue should be revisited by the Montana Supreme Court and since this case may provide a vehicle for doing so, the argument is being made.

The decision responsible for applying the Common Fund Doctrine in a workers' compensation context is *Murer v. State Compensation Mutual Insurance Fund*, 283 Mont. 210, 942 P.2d 69 (1997) (*Murer III*).

In an earlier phase of that case (*Murer II*), claimants were successful in obtaining a ruling which held that caps on maximum benefits were only temporary and that the State Fund could not continue to apply those caps after the dates on which they had expired. This led to an increase in maximum benefits to many claimants who were not parties to the litigation.

One of the issues in *Murer III* was whether the Workers' Compensation Court erred in denying claimant's motion for attorney fees pursuant to the common fund doctrine. The Court held that it did, and reversed that part of the WCC's judgment.

Citing early U.S. Supreme Court cases, the *Murer III* Court wrote that

"[t]he common fund doctrine is deeply rooted in American jurisprudence and provides a well-recognized exception to the traditional American rule regarding attorney fees. * * * These common fund doctrine cases provide that when a party has an interest in a fund in common with others and incurs legal fees in order to establish, preserve, increase, or collect that fund, then that party is entitled to reimbursement of his or her reasonable attorney fees from the proceeds of the fund itself."

1 Citing *Means v. Montana Power Co.*, 191 Mont. 395, 625 P.2d
2 32 (1981), the Court added that the common fund doctrine "is
3 rooted in the equitable concepts of quasi-contract, restitution
4 and recapture of unjust enrichment," in order to

5 " * * * spread the cost of litigation among all
6 beneficiaries so that the active beneficiary is not
7 forced to bear the burden alone and the 'stranger'
8 (i.e., passive) beneficiaries do not receive their
9 benefits at no cost to themselves."

10 The *Murer III* Court concluded:

11 "Application of the common fund doctrine is
12 especially appropriate in a case like this where the
13 individual damage from an institutional wrong may not
14 be sufficient from an economic viewpoint to justify
15 the legal expense necessary to challenge that wrong.

16 "Based on these legal principles and authorities,
17 we conclude that when a party, through active
18 litigation, creates a common fund which directly
19 benefits an ascertainable class of non-participating
20 beneficiaries, those non-participating beneficiaries
21 can be required to bear a portion of the litigation
22 costs, including reasonable attorney fees.
23 Accordingly, the party who creates the common fund is
24 entitled, pursuant to the common fund doctrine, to
25 reimbursement of his or her reasonable attorney fees
26 from that fund." (our emphasis).

Justices Gray and Turnage dissented from this portion of
the Court's opinion. Their dissenting opinion will be discussed
below.

**1. The original "common fund" decisions involved a true
"common fund," not an unidentified class of claimants.**

When the U.S. Supreme Court decisions relied upon by the
Murer III majority are analyzed, it quickly becomes apparent
that those types of cases truly involved plaintiffs whose
interests were joined through a true "common fund," which the
"lead" plaintiff successfully prosecuted.

These must be contrasted with cases such as *Murer III*, in
which there was no fund at all until the ex post facto

1 determination of a "common fund," derived only after the Court
had decided the case.

2 For example, the leading case of *Trustees v. Greenough*, 105
3 U.S. 527, 26 L.Ed. 1157 (1881), involved a trust fund under
court control. Plaintiff sued on behalf of himself and other
4 bondholders against trustees of the Internal Improvement Fund of
Florida to prevent wasting and destroying the 10-11 million
5 acres comprising the fund through the sale of huge blocks of the
land at nominal prices and refusal to provide for the payment of
6 interest or sinking fund on the bonds.

7 The Supreme Court allowed the complainant, who advanced
8 most of the expenses for the successful litigation to the
benefit of the other bondholders having an equal interest in the
9 fund, to be reimbursed his reasonable costs and attorney fees
out of the fund.

10 As another example, *The Boeing Company v. Van Gemert*, 444
11 U.S. 472, 100 S.Ct. 745 (1980), concerned a class action for
alleged inadequate notice of the redemption of convertible
12 debentures. The Supreme Court affirmed the U.S. District Court's
award of attorney fees and costs from the total amount of the
13 class action judgment fund, included the unclaimed portion of
the judgment. The Court reasoned, through Justice Powell:
14

15 "In this case, the named respondents have
16 recovered a determinate fund for the benefit of every
member of the class whom they represent. Boeing did
17 not appeal the judgment awarding the class a sum
certain. Nor does Boeing contend that any class member
18 was uninjured by the company's failure adequately to
inform him of his conversion rights. Thus, the damage
19 to each class member is simply the difference between
the redemption price of his debentures and the value
20 of the common stock into which they could have been
converted. To claim their logically ascertainable
21 shares of the judgment fund, absentee class members
need prove only their membership in the injured class.
22 Their right to share the harvest of the lawsuit upon
proof of their identity, whether or not they exercise
23 it, is a benefit in the fund created by the efforts of
the class representatives and their counsel. Unless
24 absentees contribute to the payment of attorney's fees
incurred on their behalves, they will pay nothing for
25 the creation of the fund and their representatives may
26 bear additional costs. The judgment entered by the

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1 District Court and affirmed by the Court of Appeals
2 rectifies this inequity by requiring every member of
3 the class to share attorney's fees to the same extent
4 that he can share the recovery. * * *

5 A third example, *Fleischmann Distilling Corp. v. Maier*
6 *Brewing Co.*, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967),
7 will be discussed in the context of the dissenting opinion in
8 *Murer III*. Suffice to say here that *Fleishmann* is strong
9 contrary authority against applying the Common Fund Doctrine in
10 this or any other Montana worker's compensation case.

11 **2. *Murer III* erroneously extended the equitable Common Fund**
12 **Doctrine to statutorily covered workers' compensation**
13 **cases.**

14 As indicated above, the Court in *Murer III* relied on an
15 earlier Montana Supreme Court decision, *Means v. Montana Power*
16 *Company*, supra.

17 While *Means* is a good illustration of the proper
18 application of the Common Fund Doctrine, *Murer III* is a better
19 illustration of an improper application of the doctrine.

20 In *Means*, a fire in the Pattee Canyon area of Missoula
21 County caused extensive damage to homes and land. The Montana
22 Department of Natural Resources and Conservation (DNRC)
23 conducted an investigation that revealed that the possible cause
24 was the Montana Power Company's power lines.

25 Massive litigation ensued. By stipulation of the parties
26 (except DNRC), the Williams Law Firm was designated as lead
27 counsel, representing 30 of 31 parties in claims totaling over
28 \$2,242,000.

29 Prior to trial, various homeowners settled their claims for
30 \$1,215,000, of which \$425,000 was for DNRC. Other landowners
31 ("raw landowners") proceeded to trial (the trial result is not
32 found in the opinion).

33 After the settlement, Williams moved for a determination of
34 compensation and was awarded \$47,222.22, to be paid by DNRC.
35 DNRC appealed. The Supreme Court affirmed.

36 DNRC contended attorney fees were not recoverable in the
37 absence of a contractual agreement between the parties or any

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1 statutory authority. However, the Court agreed with Williams
2 that the Common Fund Doctrine provided an exception to this
3 general rule. The doctrine "* * *" provides that when a party
4 through active litigation creates, reserves or increases a fund,
5 others sharing in the fund must bear a portion of the litigation
6 costs including reasonable attorney fees. * * *"

7 The *Means* Court noted that the Common Fund Doctrine "* * *"
8 is founded upon the principles of equity. In enforcing this
9 doctrine, equity demands that all parties receiving a benefit
10 from the common fund be included in its application."

11 In *Means*, a common fund of \$1,215,000 dollars was created
12 through the efforts of the lead counsel, of which DNRC received
13 \$425,000. In the absence of a fee agreement or statutory
14 authority, the Court properly applied the Common Fund Doctrine
15 to make sure counsel was reasonably compensated for his efforts,
16 and that the other beneficiaries did not get a "free ride."

17 *Murer III* presents an entirely different picture, however.
18 It applied the Common Fund Doctrine to award attorney fees, even
19 though the Montana Workers' Compensation Act's statutory scheme
20 already provided for payment of fees to claimant's counsel.

21 The dissent, written by Justices Gray and concurred in by
22 Justice Turnage, got it right. We would urge that, should the
23 Montana Supreme Court decide to again review this issue, it
24 give greater weight to the dissent's logic than the majority did
25 in *Murer III*.

26 While recognizing and agreeing with the application of the
Common Fund Doctrine "under appropriate circumstances," Justice
Gray focused on the fact that the Workers' Compensation Act

"* * * expressly regulates attorney fees and goes so
far as to require an attorney representing a worker's
compensation claimant to submit his or her employment
contract, setting forth the terms of the fee
arrangement, to the Department of Labor and Industry *
* *."

She thus concluded that the Workers' Compensation Court
"correctly concluded that it was without authority to create a
separate equitable remedy under the Act regarding attorney
fees."

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1 Justice Gray then turned her attention to one of the U.S.
2 Supreme Court cases cited by the majority, *Fleischmann*. That
3 case involved a claim for trademark violation under the federal
4 Lanham Act. The Supreme Court held that "[w]hen a cause of
5 action has been created by a statute which expressly provides
6 the remedies for vindication of the cause, other remedies should
7 not readily be implied." The Court thus rejected application of
8 the Common Fund Doctrine to award attorney fees as a separate
9 element of recovery, writing that "* * * [a] a judicially
10 created compensatory remedy in addition to the express statutory
11 remedies is inappropriate in this context."

12 Justice Gray argued for the same result in *Murer III*:

13 "* * * The Workers' Compensation Act is a statutory
14 system providing for a statutory cause of action and
15 statutorily-prescribed remedies, including attorney
16 fees. No portion of the Act authorizes the attorney
17 fees sought here pursuant to the common fund doctrine
18 and we are not free to judicially engraft equitable
19 remedies such as this one onto the Act. * * * (our
20 emphasis).

21 She also felt that even if the equitable remedy were
22 not precluded by the Act, "* * * it is unavailable here"
23 because the requirements for a common fund were not met.
24 Her first step echoes our comments made above about the
25 nature of "true" common fund cases:

26 "In the first place, it is my view that there is
no common fund here. While *Murer II* undoubtedly
created an entitlement in numerous individual nonparty
claimants to additional benefits, no 'fund' was set
aside for the payment of such benefits, either in the
course of this litigation or otherwise. The common
fund cases, while not defining precisely what is
required to constitute a 'common fund,' each involve a
settlement fund, a judgment fund, or a trust fund of
some sort. This case does not." (our emphasis).

Justice Gray went on to state that (1) "* * * the Court
cites to no case under which nonparty beneficiaries have been
required to pay a portion of attorney fees under common fund
doctrine"; and (2) "* * * the party claimants here are not
required by their fee arrangements with counsel to bear the
burden of fees in excess of those relating to their own claims;

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1 the fee contracts generally provide that the client claimants
are responsible only for the standard 20/25%. * * *

2 The only fees counsel are entitled to, she stressed, are
3 those pursuant to their fee agreements. Her concluding remarks
bear repeating¹:

4 "While I sympathize with counsel's substantial
5 investment of time in this litigation, and applaud
6 their success on behalf of their clients and the
benefits their work is providing to numerous
7 nonparties, I am unpersuaded that we should 'bend' the
common fund doctrine to award them fees under a
8 doctrine intended to protect the parties to a suit
where, as here, the parties require no protection.
9 Many legal actions involve risk to counsel of fee
awards which are not commensurate with the amount of
10 work performed. Indeed, it is fair to say that many
counsel 'give it their all' to the same extent these
11 counsel have done and are altogether unsuccessful,
both as to their clients' recovery and their own. We
12 do not have a system, however, under which counsel are
then remunerated based on their 'expectations.' We
13 should not create one here.

14 "I would affirm the Workers' Compensation Court's
15 denial of attorney fees under the common fund
doctrine."

16 In short, the common fund doctrine has been corrupted by
17 its engraftment upon the Montana Workers' Compensation Act. The
18 end result is like a three-humped camel - it is an unnatural
extension of the beast.

19
20 **3. Even if the Common Fund Doctrine applies, it will apply**
21 **only to "open" claims as of the date the Reesor decision**
issued, i.e., December 22, 2004.

22 To the extent the Common Fund Doctrine applies and a valid
23 common fund class may be shown to exist, the lien applies only
to claims that were in an open status as of the date the Reesor
24 Court issued its decision, that is, as of December 22, 2004.

25 ¹ We apologize for the block quotes, however, paraphrasing would
26 not do justice to Justice Gray's logical and persuasive dissent.

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