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FILED

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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

Attorneys for Respondent/Intervenor Teck Cominco American, Inc.

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CATHERINE E. SATTERLEE, *et al.*,

Petitioners,

-vs-

LUMBERMAN'S MUTUAL CASUALTY
COMPANY, *et al.*,

Respondents/Insurers.

WCC No. 2003-0840

**INTERVENOR TECK COMINCO
AMERICAN, INC.'S RESPONSE TO
PETITIONERS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Respondent Teck Cominco American, Inc. (hereinafter "Teck Cominco"), pursuant to Mont. Admin. R. § 24.5.329 and the Court's Schedule, respectfully submits the following Response to Petitioners' Motion for Partial Summary Judgment.

Argument

Petitioners seek the Court's summary judgment as a matter of law finding Montana Code Annotated § 39-71-710 unconstitutional. By virtue of the Montana Supreme Court's holding in *Reesor v. Montana State Fund*, Petitioners argue that § 710 is unconstitutional because it denies full, permanent total disability ("PTD") benefits to claimants once retired. 2004 MT 370, 325 Mont. 1, 103 P.3d 1019; Pets.' Br. at 2. Petitioners assert retired recipients and recipients of PTD benefits not yet retired are similarly situated and allowing full PTD benefits in the latter and not the former is a violation of the equal protection clause of Article II, § 4, of the Montana Constitution. *Id.* Petitioners misconstrue the Supreme Court's decision in *Reesor*, as well as settled Montana case law.

Constitutional Issue.

As noted by Petitioners in their Brief in Support of Partial Summary Judgment, the proper level of scrutiny applied to equal protection claims pressed by injured workers is the rational basis test. Pets.' Br. at 7; *Reesor*, 2004 MT 370 at ¶ 15. 375 Mont. at ¶ 15, 103 P.3d at ¶ 15. It is blackletter law that "The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the

DOCKET ITEM NO. 246

judgment of the court, beyond a reasonable doubt.” *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, ¶ 13, 15 P.3d 877, ¶ 13. Moreover, every presumption is made in favor of the legislature in an affirmative effort by the reviewing court in order to find the legislation constitutionally firm. *Id.*

As the Respondent Montana State Fund, and the various Respondent/Intervenors have set forth comprehensive and succinct reasons aplenty for denying Petitioners’ Motion and finding § 710 constitutional, Respondent Teck Cominco finds itself unable to make a useful and substantive contribution not already addressed in detail. Accordingly, with the exception of the following, Teck Cominco incorporates by reference the subject arguments advanced by the Respondent and various Respondent/Intervenors and joins therein.

Due Process Issue.

Teck Cominco is not an insurance company and as such occupies an entirely different posture with respect to compensation benefits than the balance of respondents herein. Teck Cominco operated in Montana during the relevant time frame and may have paid out compensation to injured workers. However, on information and belief, Teck Cominco did not participate in any sort of group fund or in the State Fund; rather, Teck Cominco paid compensation benefits, if any, on a completely self-insured basis out of internal operating funds. As such, Teck Cominco’s compensation program may not permissibly be considered a common fund as such is described in Montana law.

The Montana Supreme Court has described a traditional common fund as follows:

Recently, in *Mountain West Farm Bureau v. Hall*, 2001 MT 314, 15-18, 308 Mont. 29, 15-18, 38 P.3d 825, 15-18, we summarized the elements of the common fund doctrine as follows:

- ▶ 1) an active beneficiary must create, reserve, or increase a common fund;
- ▶ 2) the active beneficiary must incur legal fees in establishing the common fund; and
- ▶ 3) the common fund must benefit ascertainable, non-participating beneficiaries. We enforce this doctrine because equity demands that all parties receiving a benefit from the common fund share in the cost of its creation (internal cites omitted).

Flynn v. State Compensation Ins. Fund, 2002 MT 279, ¶ 15, 312 Mont. 410, ¶ 15, 60 P.3d 397, ¶ 15. Consequently, Teck Cominco is likely not an affected party to the instant litigation.

Notwithstanding the likelihood that it is not a proper party to the litigation, Teck Cominco is unable to fully assert and support its position herein because insufficient time for substantive response has been made available. Teck Cominco was initially served on or about June 10, 2005, and has since struggled to find pertinent records addressing the matters set forth in the Petition. Teck Cominco’s records are and have been in storage since sometime in the early 1990s. Moreover, the problem is complicated because Teck Cominco has changed internal corporate structure several times since 1990 and has

changed location several times as well. Further, many of the records pre-date electronic storage, and doubtless, some have been destroyed as a matter of routine file maintenance.

As such, Teck Cominco has been unable to ascertain with any degree of certainty its own position in the instant litigation and has further been unable to conduct discovery necessary to find whether or not Petitioners can even make a cause of action against it. Accordingly, Teck Cominco asserts its due process rights have been and are being impaired to a degree sufficient to deny Petitioners' Motion as a matter of law for being considerably premature.

It is settled law that basic due process awards a litigant sufficient notice and the opportunity to be heard. *Crismore v. Montana Board of Outfitters*, 2005 MT 109, ¶ 15, 327 Mont. 71, ¶ 15, 111 P.3d 681, ¶ 15. The Workers' Compensation Court's rules of procedure plainly recognize parties to litigation must have the opportunity to conduct adequate discovery and fact investigation prior to trial on the merits. Mont. Admin. R. § 24.5.301, *et seq.*

Conclusion

For the reasons set forth above, Petitioners' Motion for Partial Summary Judgment should be denied.

Dated and submitted this 9th day of September, 2005.

GOUGH, SHANAHAN, JOHNSON & WATERMAN


KD Feedback
Attorneys to Teck Cominco American, Inc.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 9th day of September, 2005, a true and correct copy of the foregoing *Response to Petitioners' Motion for Partial Summary Judgment* was hand-delivered, addressed to the attention of the following:

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September 9, 2005

VIA HAND DELIVERY

Ms. Patricia J. Kessner
Clerk of Court
Montana Workers' Compensation Court
1625 11th Avenue, P.O. Box 537
Helena, MT 59624

Re: *Satterlee, et al., v. Lumberman's Mutual Casualty Company, et al.*
WCC No. 2003-0840

Dear Clerk:

Enclosed for filing in the above-identified matter, please find Intervenor Teck Cominco American, Inc.'s Response to Petitioners' Motion for Partial Summary Judgment. Please note that this response was due September 1, 2005, but upon contacting counsel for Petitioners, counsel for Intervenor Teck Cominco was granted a short extension of time within which to file this response.

I have enclosed an extra copy of this Response and ask that you place your filing date stamp thereon and return it to our office courier for our files. Should you have any questions, please do not hesitate to call.

Sincerely,

GOUGH, SHANAHAN, JOHNSON & WATERMAN


Sharon Donnelly

Legal Assistant to KD Feedback

Enclosures