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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL,	)	WCC No. 2001-0300
	)	
Petitioner,	)	
	)	
vs.	)	**LIBERTY'S BRIEF REGARDING**
	)	**COMMON FUND AND**
LIBERTY NORTHWEST INSURANCE CORP.,	)	**RETROACTIVE APPLICATION**
	)	
Respondent/Insurer for	)	

The Court in its minute entry of February 24, 2004, has framed the following issues for briefing:

1. Does the failure to request common fund fees or class certification in the pre-remand proceedings in both Stavenjord and Schmill bar the petitioners in those cases from now requesting common fund fees or class certification?

2. Do the appellate decisions in Stavenjord and Schmill, 2003 MT 67 and 2003 MT 80, apply retroactively?

3. Did the appellate decisions in Stavenjord and Schmill, 2003 MT 67 and 2003 MT 80, create common funds in the respective cases? If so, as a general matter, what claimants are encompassed by the common funds?

4. If common funds are created as a result of the appellate decisions in Stavenjord and Schmill, 2003 MT 67 and 2003 MT 80, are the common funds limited solely to claimants insured by the named respondents in those cases, or do the funds encompass all claimants irrespective of their insurers?

The parties have stipulated the following facts:

1. Liberty Northwest ("LNW"), wrote its first Montana workers' compensation policy in July of 1988.

2. As of August 25, 2003, LNW had a total of 31,794 claims in Montana.

3. As of October 16, 2003, LNW identified 909 occupational disease claims from the 31,794 total claims filed in Montana.

4. LNW's computer system is not able to identify whether apportionment was taken in any of the 909 occupational disease claims.

COMMON FUND

Jurisdiction-Statutory

The Court's framing of the first issue assumes it has jurisdiction to award common fund fees; it does not.

In making the following arguments, LNW is mindful of this Court's decision in Flynn v. State Compensation Ins. Fund, WCC No. 2000-0222, Decision and Order Regarding Retroactivity and Attorney Fees, but as noted in the Court's minute entry, the parties must raise the issues they want to preserve for appeal.

> "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. (PER 5-4-04 ERRATA LTR. CW)

The statute cited above by the Court provides ~~impertinent~~ 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 Courts 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. Its holding is straight forward: "The judgment of the Workers' Compensation Court is affirmed." Schmill v. Liberty Northwest Ins. Corp., 2003 MT 80 at ¶23.

To award Schmill 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.

Jurisdiction-Pleadings

The issue as frame acknowledges common fund attorney fees were not plead initially.

> "A district court does not have jurisdiction to grant relief outside of the issues presented by the pleadings unless the parties stipulate that other questions be considered or the pleadings are amended to conform to the proof." *Ryan v. City of Bozeman* (1996), 279 Mont. 507, 511, 928 P.2d 228, 230 (citing *Old Fashion Baptist Church v. Montana Dep't of Revenue* (1983), 206 Mont. 451, 457, 671 P.2d 625, 628).

H-D Irrigating, Inc. v. Kimble Properties, Inc., 301 Mont. 34, 8 P.3d 95, 2000 MT 212, at ¶22.

Because Schmill did not plead common fund in her original petition, her claim for common fund attorney fees is now barred.

Due process

Schmill's failure to plead to common fund attorney fees in her petition and the Pretrial Order denied LNW due process.

> Article II, Section 17 of the Montana Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law." Due process requires both notice of a proposed action and the opportunity to be heard. *Pickens v. Shelton-Thomas*, 2000 MT 131, ¶ 13, 300 Mont. 16, ¶ 13, 3 P.3d 603, ¶ 13. Montana Media is required to demonstrate that it: (1) has a property interest; and (2) the procedures in place provide an inadequate protection of that property interest.

Montana Media, Inc. v. Flathead Co., 314 Mont. 121, 63 P.3d 1129, 2003 MT 23, at ¶65.

Notice and the opportunity to be heard is not just an academic exercise in this case. Had LNW been aware claimant was seeking common fund attorney fees, LNW would have had the option of trying to settle this case, presumably on a disputed liability basis, and thereby avoid the legal and administrative entanglements that are inherent in common fund claims. Also it would have had the opportunity to raise the defense of this Court's lack of jurisdiction to award common fund attorney fees and, all other things being equal, have had it ruled on initially rather than having to have yet another judicial proceeding and the administrative entanglements necessitated in common fund cases.

RES JUDICATA

Liberty is mindful that the Court has not been receptive to LNW's res judicata arguments in the past. But LNW must preserve its record for appeal. This Court's discussion of res judicata in Cheetham v. Liberty Northwest, 2001 MTWCC 65, Decision and Judgment, at ¶27-28 succinctly sets forth the law of res judicata.

No one seriously can contend Schmill could not have raised the common fund attorney fee issue, assuming the Court rejects LNW's initial jurisdictional argument, given the Montana Supreme Court decision in Murer v. State Compensation Mut. Ins. Fund, 283 Mont. 210, 942 P.2d 69 (1997) establishing the common fund doctrine.

This Court's discussion at ¶29 of Cheetham concisely explains the unique nature of Workers' Compensation Court proceedings: "The difficulty in applying the 'opportunity to litigate' doctrine to the present case arises from the practice of this Court. In cases where an insurer has denied liability, the Court typically considers only the issue of liability. In denied liability cases, the amount of benefits due is typically an arithmetical computation not requiring judicial intervention. . . ."

This was not a denial of initial liability case. Instead it was a dispute over the interpretation of the apportionment statute in the Occupational Disease Act. As the undersigned understands the Court's rational at ¶29, with which LNW agrees, it would not be fair in all cases to ask a litigant to raise each and every issue that could be raised in a disputed initial liability case.

But, in the instant case, it was a simple dispute over statutory interpretation that would either result in an increase in benefits or the apportionment contemplated by the statute. It is not as though Schmill was unfairly caught unaware of the possibility of claiming common fund attorney fees. If she prevailed, she had to know that she would get more money, and, if the case were applied retroactively, there would be a common fund created just as occurred in Murer. Therefore the rational in Cheetham does not apply in the instant case. Liberty respectfully requests the Court

to follow its rationale in Cheetham while at the same time recognizing the implied exception to the general non-application of the rule of res judicata in the Montana Workers' Compensation Court, i.e., a benefit dispute based on statutory interpretation which could result in increased benefits to a claimant and, and if retroactively applied, to all those similarly situated.

Equitable estoppel

The doctrine of equitable estoppel is concisely set forth in Selley v. Liberty Northwest Ins. Corp.:

> ¶9. As a general matter, estoppel arises when a party through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse. Smith v. Krutar (1969), 153 Mont. 325, 332, 457 P.2d 459, 463. The doctrine of equitable estoppel is grounded in both statute and case law. By statute, the following presumption is deemed conclusive:
>
> the truth of a declaration, act, or omission of a party, as against that party in any litigation arising out of such declaration, act, or omission, whenever he [or she] has, by such declaration, act, or omission, intentionally led another to believe a particular thing true and to act upon such belief . . . .
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> Section 26-1-601(1), MCA.
>
> ¶10. Furthermore, we have held that six elements are necessary in order to establish an equitable estoppel claim: (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse. See Dagel v. City of Great Falls (1991), 250 Mont. 224, 234-35, 819 P.2d 186, 192-93; Elk Park Ranch, Inc. v. Park County (1997), 282 Mont. 154, 165, 935 P.2d 1131, 1137-38. A party must establish all six elements before the doctrine can be invoked. Billings Post No. 1634 v. Montana Dep't of

Revenue (1997), 284 Mont. 84, 90, 943 P.2d 517, 520. Equitable estoppel must be established by clear and convincing evidence. Beery v. Grace Drilling (1993), 260 Mont. 157, 163, 859 P.2d 429, 433.

¶11. The doctrine of equitable estoppel is designed to prevent one party from unconscionably taking advantage of a wrong while asserting a strict legal right, and will be invoked where "justice, honesty, and fair dealing" are promoted. In re Marriage of K.E.V. (1994), 267 Mont. 323, 331, 883 P.2d 1246, 1251. At this point, it is necessary to address Liberty's view that the doctrine of equitable estoppel has no application to the facts of this case because it engaged in no "wrongful conduct." The WCC took a similar position:

The doctrine of equitable estoppel precludes a party from profiting from its wrong . . . . Even without consideration of the specific elements of the doctrine, [Selley] has failed to demonstrate any wrong by Liberty. At best she has demonstrated that Liberty belatedly learned that Dr. Nelson did not have admitting privileges and therefor [sic] did not satisfy the definition of a treating physician.

¶12. Classically, the function of the doctrine of equitable estoppel is the prevention of fraud, actual or constructive. See 28 Am.Jur.2d Estoppel and Waiver § 28, at 630 (1966); 2 Joseph Story, Commentaries on Equity Jurisprudence § 1543, at 780 (Jairus W. Perry ed., rev.12th ed. 1984). However, this does not imply that the party sought to be estopped must have possessed an actual intent to deceive, defraud or mislead the other party at the inception of the transaction. Indeed, "[t]he fraud may, and frequently does, consist in the subsequent attempt to controvert the representation and to get rid of its effects, and thus to injure the one who has relied on it." 28 Am.Jur.2d Estoppel and Waiver § 43, at 651 (1966).

¶13. Under modern usage, the meaning of "fraud" upon which an equitable estoppel action is premised is that it would be unconscionable or inequitable to allow the party sought to be estopped to repudiate or set up claims inconsistent with its prior conduct and, thus, to commit "a fraud upon the rights of the person benefited by the estoppel." 3 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 803, at 185-86 (Spencer W. Symons ed., 5th ed. 1941). To do so would permit a fraudulent "purpose" or "result" to occur which would be repugnant to equity. See 28 Am.Jur.2d Estoppel and Waiver § 43, at 651 (1966). Therefore, when comparing the many permutations of equitable estoppel, it has been said that the doctrine rests upon the following general principle: When one of

> two innocent persons--that is, persons each guiltless of an intentional, moral wrong--must suffer a loss, it must be borne by that one of them who by his [or her] conduct--acts or omissions--has rendered the injury possible.
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> 3 Pomeroy, Equity Jurisprudence § 803, at 187.
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> ¶14. Today, we apply the doctrine of equitable estoppel to prevent an inequitable result. We conclude, as analyzed below, that Selley has established an equitable estoppel claim and, therefore, that Liberty is estopped from asserting § 39-71-116(30), MCA (1993), as a defense to reimbursing Dr. Nelson. We address each of the six elements in turn.

Selley v. Liberty Northwest Ins. Corp., 2000 MT 76, ¶9-14.

Liberty relied to its detriment on Schmill's representation in her pleadings that she was proceeding only on her own behalf. The detriment is that had she plead common fund attorney fees, LNW could have made the decision to settle, presumably on a disputed liability basis, for possibly less than the full amount and certainly without the current legal and administrative entanglements associated with common fund claims.

The remaining five elements of the doctrine are established as follows:

(1) Schmill was silent about her intent to claim common fund attorney fees.

(2) This fact must necessarily be imputed to her.

(3) Liberty can rely only on the pleadings, such as the Pretrial Order, which supercede all other pleadings and framed the issues for the Court.

(4) It was both natural and probable that Liberty would act on the representation that she was seeking only fees for herself, as the issue was framed.

(5) Liberty relied on Schmill's representation that she was seeking only attorney fees for herself.

(6) This element is discussed immediately above.

Also see Rasmussen v. Heebs Food Center, 270 Mont. 492, 893 P.2d 337, 339-340 (1995)(a party may not benefit from asserting one position during pre-trial discovery and later assert a contrary position to the detriment of its opponent at trial or on appeal.)

In its original decision, Schmill v. Liberty Northwest, Decision and Judgment, 2001 MTWCC 36, in its judgment the Court denied Schmill's request for attorney fees. That issue was not raised on appeal. Schmill v. Liberty Northwest, 2003 MT 80. Therefore, Schmill's request for common fund attorney fees properly falls under Heisler v. State Fund, 198 MTWCC 25, ¶31 (Petitioner had fair and full opportunity to pursue claim for attorney fees and chose not to do so and on appeal did not raise the issue resulting in the law of the case.)

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

Any discussion of this topic has to begin with recognition that the Montana Supreme Court in Eastman v. Atlantic Richfield, 237 Mont. 332, 77 P.2d 862 (1989) held the different benefit levels between the OD Act and the Workers' Compensation Act did not make the OD Act unconstitutional. In fact to this date, the Montana Supreme Court has not held the OD Act to be unconstitutional.

In fact as recently as March 19, 2004, in Fellenberg v. Transportation Ins. Co., 2004 MTWCC 29, Findings of Fact Conclusions, of Law and Judgment, the Court at ¶57 made the following holding:

> ¶57 I therefore consider only the challenges to sections 39-72-703 and 39-72-706, MCA. Those challenges are based on equal protection. However, the pre-1987 ODA has been held not to violate equal protection guarantees. *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 777 P.2d

862 (1989). While the rationale of *Eastman* may have been seriously undermined in *Henry v. State Compensation Ins. Fund,* 1999 MT 126, 294 Mont. 449, 982 P.2d 456, the Supreme Court has not overruled *Eastman* and this Court does not have the authority to do so. I therefore decline the claimant's invitation to declare the sections unconstitutional.

To this date the most this Court has been able to say about the constitutionality of the OD Act after Eastman is that the rationale of Eastman **"may have been seriously underminded."** If this Court is constrained by the Montana Supreme Court decision in Eastman as it states in the above passage, how are insurers suppose to predict that the Montana Supreme Court would hold a specific statutory provision of the OD Act unconstitutional? What the undersigned believes we have all lost sight of in discussing the foreshadowing issue is that it should be examined based not on the personalities of the Supreme Court, but instead on the rules of law that govern a person's right to rely on the then existing law.

Statutes passed by our legislature are presumed to be constitutional as a matter of law. Davis v. Union Pacific, 282 Mont. 233, 239, 937 P.2d 27 (1997). A party challenging the constitutionality of a statute bares the heavy burden of proving it to be unconstitutional beyond a reasonable doubt. *Id.*, 282 Mont. at 239, 937 P.2d at 30.

In addition to these basic rules that weigh heavily against finding whether the Supreme Court's decision in this case was foreshadowed is the respective roles of the courts and the legislature. The legislature is charged with declaring public policy in this state with the enactment of statutes: "[The public policy of the State of Montana is set by the Legislature through its enactments of statutes, and this] Montana Supreme] Court may not concern itself with the wisdom of such statutes." Duck Inn, Inc. v. Montana State University, 285 Mont. 519, 523-524, 949 P.2d 1179, 1182 (19).

Prospective application of judicial decisions has been utilized by the Montana Supreme Court, even to the point of denying plaintiffs any recovery for damages suffered under unconstitutional statutes. For example, in Sheehy v. State of Montana, 250 Mont. 437, 820 P.2d 1257 (Mont. 1991), the plaintiffs filed a class action lawsuit against the state for a refund of state taxes they paid from 1983 to 1988 on their retirement benefits received under the Federal Employees' Retirement Act ("FERA"). *Id.* at 1257. The plaintiffs challenged the constitutionality of MCA § 15-30-111(2)(c)(I) (1989), which allowed the state to collect income taxes on benefits received under FERA that exceeded $3,600. The plaintiffs' claim was premised upon the United States Supreme Court's decision in Davis v. Michigan Dept. of the Treasury, 489 U.S. 803 (1989), in which the Court held that a similar Michigan statute, which exempted from taxation all retirement benefits paid by the state to retired state employees while taxing the retirement benefits of all other employers, was unconstitutional. *Id.*, 820 P.2d at 1258. The parties in Sheehy

stipulated that the U.S. Supreme Court's holding in Davis invalidated MCA § 15-30-111(2)(c)(I) on constitutional grounds. *Id.* Therefore, the issue before the Montana Supreme Court was whether Davis applied retroactively to the plaintiffs, entitling them to refunds on the taxes assessed under the statute. *Id.*

The court concluded that Davis did not apply retroactively to the plaintiffs and, therefore, they were entitled to no refund from the state for their taxes previously paid under the statute. The court concluded that because "the Davis opinion required at least three extensions of previous law . . . we hold that the result was not clearly foreshadowed." *Id.* at 1262.

Based on its conclusion that the decision in Davis was not foreshadowed, the court explained why equity would not be served by applying Davis retroactively to the plaintiffs:

> Because we have concluded that the decision in *Davis* was not foreshadowed, the plaintiffs' assertion that the tax imposed was illegal is an overstatement. The taxation scheme was not "illegal" until the *Davis* decision was issued, and the tax has not been imposed since that time. We conclude that refunds as a result of retroactive application of *Davis* would not promote the concept of intergovernmental tax immunity.
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> * * *
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> Plaintiffs argue that equity favors making refunds because it is Montana's public policy to provide refunds of illegally collected taxes. But as we have discussed above, **taxes collected before the opinion in *Davis* were not illegally collected taxes**.

Id. at 1262 (emphasis added).

The Montana Supreme Court also applied a new rule of law prospectively only in Chapel v. Allison, 241. Mont. 83, 785 P.2d 204 (Mont. 1990). In Chapel, the Montana Supreme Court abolished the "locality rule," which limited the standard of care for general practitioners to that standard "established by similar communities in Montana." *Id.* at 209. The Court adopted a new national standard to which general practitioners in Montana would be held regarding medical malpractice cases: "we hold that a non-board-certified general practitioner is held to the standard of care of a "reasonably competent general practitioner acting in the same or similar community in the United States in the same or similar circumstances." *Id.* at 210.

However, despite Chapel's alleged injuries due to Dr. Allison's treatment of his broken leg, the court refused to apply the newly adopted standard to Dr. Allison, and instead applied the new standard prospectively only:

> [a] change of judicial attitude of this nature should be prospective only. We, therefore, order on remand of this case to the District Court that any further proceedings relating to the applicable standard of care of Dr. Allison shall be that standard of care enunciated in the Tallbull case, since that was the standard of care applicable when Dr. Allison treated Chapel.

Id.

Therefore, the Court refused to apply the newly adopted standard of care retroactively despite Chapel's injury and damages due to the alleged malpractice of Dr. Allison. Retroactive application of a new standard of care would have clearly opened up Dr. Allison, as well as countless other doctors, to liability to which they had not been previously exposed. The same considerations apply to the present case

Similar to the Montana Supreme Court in Sheehy, *supra*, the United States Supreme Court has also declined to apply new judicial rules retroactively because it refused to promote the "fiction" that newly announced rules were always the law. For example, in Chevron Oil Co. v Huson, 404 U.S. 97 (1971), the appellant, Huson, injured his back while working on an oil platform owned by Chevron. *Id.* at 98. Huson sued Chevron approximately two years after the date of his injury. *Id.* However, there was a dispute over whether the claim was time barred under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et. seq* ("Lands Act"). *Id.* At the time Huson filed his claim, there was a line of federal court decisions applying the time limitations of federal admiralty law to claims arising under the Lands Act. *Id.* at 99. However, while Huson's claim was pending, the Supreme Court issued its decision in Rodgrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, in which the Court held that the time limitations for claims under the Lands Act were dictated by the law of the state in which the claim was filed, not admiralty law. Chevron, at 99. Under Rodgrigue, Huson's claim against Chevron was time-barred under Louisiana's one-year statute of limitation for personal injury actions. *Id.*

However, the U.S. Supreme Court declined to retroactively apply its decision in Rodgrigue to bar Huson's claim. The Court emphasized that its holding in Rodgrigue would not apply retroactively because Rodgrigue was a case of first impression in the Supreme Court and overruled decisions by the Fifth Circuit applying admiralty law, including the doctrine of laches, to Lands Act cases. *Id.* at 107. Therefore, the change in the law effected in Rodgrigue could not have been "clearly foreshadowed" by Huson. In

this regard, the Court emphasized that new rules should not be retroactively applied under the "fiction" that the newly stated rule was always the law:

> It cannot be assumed that [the respondent] did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was. **"We should not indulge in the fiction that the law now announced has always been the law** and, therefore, that those who did not avail themselves of it waived their rights."

Id. at 107 (quoting Griffin v. Illinois, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring in judgment) (emphasis added). The Court concluded that to apply Rodgrigue retroactively to bar Huson's claim would produce the most "substantial inequitable results." *Id.* (citing Cipriano v. City of Houma, 395 U.S. 701, 706 (declining to retroactively apply its decision overturning an unconstitutional statute in order to protect property interests of cities, bondholders and others connected with municipal utilities).

The discussion of this issue has revolved around the Eastman and Henry v. State Compensation Ins. Fund, 294 Mont. 449, 982 P.2d 456, 1999 MT 126, decisions. But there is a decision between the two on the basis of which the two cases now before the Court could not have been foreshadowed. In Lueck v. United Parcel Service, 258 Mont. 2, 851 P.2d 1041 (1993), the plaintiff argued he had an occupational disease and was entitled to the return to work preference at MCA 39-71-317(2); the Supreme Court affirmed the District Court which held the term "injury" in the preference statute did not include an occupational disease.

The Schmill Court decided an issue or first impression in the interpretation of a statute that is presumed to be constitutional and which presumption created a heavy burden of proving the statute unconstitutional beyond a reasonable doubt. Furthermore, LNW was correct in deferring to the statute because the legislature and not the courts determine the public policy of this state. The Occupational Disease Act has still not been held to be unconstitutional. Prior to the decision in this case, the Lueck Court held a provision of the Workers' Compensation Act (return to work preference) was a benefit not available to those with an occupational disease claim.

In McMahon v. Anaconda Co., 208 Mont. 482, 486, 488, 678 P.2d 661 (1984), the Montana Supreme Court appears to have approved apportionment. In Nelson v. Semi Tool, Inc., 252 Mont. 286, 289-290, 829 P.2d 1 (1992), in the Montana Supreme Court interpreted MCA 39-72-706 in a way that can only be understood as endorsing it's application in occupational disease cases.

In making this argument, LNW is requesting the Court not to base what is foreshadowed on the personalities of the members of the Supreme Court, but instead on the rules of law that govern a person's right to rely on the then existing law.

Furthering rule's operation

In Nelson v. Semi Tool, Inc., 252 Mont. 286, 289-290, 829 P.2d 1 (1992), in the Montana Supreme Court interpreted MCA 39-72-706 in a way that can only be understood as endorsing it's application in occupational disease cases. Retroactive application of Schmill will not further the rule's application. The Supreme Court in Schmill created a new insurer liability which was contrary to the language of the statute and the decision in McMahon v. Anaconda Co., 208 Mont. 482, 486, 488, 678 P.2d 661 (1984). Insurers are now on notice that they can not apportion occupational disease claims. Therefore, prospective application for all claims on or after June 22, 2001, will not weaken the rule or retard its operation.

Substantial inequity

Liberty has identified 909 occupational disease claims. Whether apportionment was taken in each one is not known and can not be known unless each file were hand audited. If LNW were required to perform the hand audit, it would require either current personnel to take time away from their duties related to claims adjustment and/or hiring of additional personnel.

Although LNW has identified 909 occupational disease 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.

This additional cost would be inequitable because, as this Court learned in Murer, the disruption and cost associated with even this limited file review is disruptive and can be costly.

The benefits to which a claimant is entitled are determined by the statutes in effect on the date of the injury or occupational disease. Buckman v. Montana Deaconess Hosp., 224 Mont. 318, 730 P.2d 380 (1986). The apportionment statute as of the date of Schmill's OD claim had not been ruled to be unconstitutional. Therefore, under the

(CORRECTIONS MADE PER ERRATA LETTER OF 5-4-04)
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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 Schmill.

Additionally, retroactive application of the Schmill holding, when common fund attorney fees were not plead in the original proceeding, presents the Court with the following questions: Does the Court want to issue an open invitation to all those attorneys who in the past two or three decades have expanded insurer liability in a case of statutory interpretation to file common fund claims? What would be the prohibition?

APPELLATE DECISIONS

Nowhere in the text of the Schmill Supreme Court decision is there a reference to an award of common fund attorney fees. This issue as framed by the Court regarding creation of common funds is only accurate if the decision is applied retroactively. Therefore if the decision is applied retroactively, the first part of the third issue must be answered yes, a common fund was created, even though the decision did not award common fund attorney fees.

The second part of the third issue is a different way of asking should the decision be applied retroactively and if so, how far back?

The Henry decision was the first successful constitutional challenge to an Occupational Disease Act provision after Eastman. Given the cases cited above, even Henry can not be taken to foreshadow future successful constitutional challenges to Occupational Disease Act statutes because Henry did not overrule Eastman. As regard the apportionment statute, earlier Supreme Court case law had discussed it, and the cases cited above, with approval.

NAMED INSURED

As LNW understands the fourth issue, it could be restated as whether the common fund attorney fees will be paid by the named insured or all other insurers? If that is the question, the Court has already answered it in Ruhd v. Liberty Northwest, 2003 MTWCC 38, Decision and Orders Granting Motion to Amend, in which it held the attorneys in Rausch, Fisch, and Frost v. State Fund were not entitled to common fund attorney fees

based on the impairment award payable to Ruhd by LNW or with respect to impairment awards payable by LNW to other PTD claimants.

Oral argument on the appeal of that decision was heard by the Montana Supreme Court on March 24, 2004.

Another way the issued could be understood is whether other insurers must pay benefits under the Schmill holding to claimants that fall under that holding. Again, this looks like a restatement of whether the Schmill decision should be applied retrospectively.

DATED this 29 day of March, 2004.

Larry W. Jones
Senior Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of March, 2004, I served the original of the foregoing LIBERTY'S BRIEF REGARDING COMMON FUND AND RETROACTIVE APPLICATION, by FAX (406) 444-7798 and first-class mail, postage prepaid, on the following:

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

and a copy of the same to the following:

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