LAURIE WALLACE
Bothe & Lauridsen, P.C.
P.O. Box 2020
Columbia Falls, MT 59912
Telephone: (406) 892-2193

"Attorneys for Petitioner"

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL, Petitioner, vs. LIBERTY NW INS. CORP., Respondent. and MONTANA STATE FUND, Intervenor,	WCC NO. 2001-0300 PETITIONER'S REPLY BRIEF

COMES NOW the Petitioner, CASSANDRA SCHMILL, by and through her attorney of record, and submits the following brief in reply to the opening briefs of both Liberty Northwest Ins. Corp. and the Montana State Fund. For the reasons stated herein, the Respondents' arguments should be rejected and the Court should rule as requested by the Petitioner.

I. FAILURE TO PLEAD COMMON FUND FEES

Liberty Northwest Ins. Corp. (LNW) and Montana State Fund (MSF) do not raise any arguments which this Court has not previously addressed and rejected in *Flynn v. State Compensation Ins. Fund*, 2003 MTWCC 55. The Court's reasoning in *Flynn* was sound and should be followed again in this case.

Both Respondents again reargue the issue of res judicata. As to the MSF's res judicata argument, it is without merit since the MSF was not a party to the original *Schmill* petition. Likewise, LNW's argument that res judicata applies because Petitioner had the "opportunity to litigate" the common fund attorney fee in the original pleading but failed to do

so if factually flawed. The Petitioner fails to see how she had the opportunity to litigate her entitlement to common fund attorney fees when as yet no common fund has been found by the Court. Furthermore, once a common fund is recognized, the attorney fee is automatic. It requires no litigation and the only consideration is the reasonableness of the fees. Neither LNW nor MSF has alleged that the asserted 25% attorney fee is unreasonable.

LNW's equitable estoppel argument claims that LNW "could have made the decision to settle, but presumably on a disputed liability basis . . ." had it been notified in the pleadings that the Petitioner would assert a common fund attorney fee if successful on appeal. (LNW Brief, p. 7.) This "woulda, coulda, shoulda" argument is completely without merit. It assumes that the Petitioner would have accepted a disputed liability settlement. It also assumes that LNW is worse off if a common fund attorney fee is ordered than if one is not. In fact, since it is the common fund claimants who will be paying the attorney fees from their benefits not LNW, LNW has suffered no harm.

Similarly, any exposure to additional costs and expenses by LNW will not arise as a result of a common fund attorney fee, but will arise only if *Schmill* is applied retroactively. Was the Petitioner required to plead retroactivity in order to avoid an equitable estoppel defense to her request for common fund attorney fees? Obviously not. Like retroactivity, entitlement to common fund attorney fees is not a claim to be plead. Common fund attorney fees are reimbursement which arises by operation of law once a party with an interest in a common fund incurs legal fees in order to establish the fund. *Murer v. State Compensation Mutual Ins. Fund,* 283 Mont. 210, 223, 942 P.2d 69, 76 (1997).

As a final argument, LNW asserts that the Court does not have jurisdiction to award common fund attorney fees because the fee statutes in the Workers' Compensation Act do not expressly authorize the Court to award such fees. The Respondent's argument is misdirected.

Common fund attorney fees will be paid, if at all, from the benefits of claimants. As such, the language of sections 39-71-611 and -612, MCA, is not controlling since those provisions refer to attorney fees being paid by the insurer. Instead, the statutory provision giving the Workers' Compensation Court its generally jurisdictional grant should be referenced. That provision states, in pertinent part, as follows:

> "A claimant or an insurer who has a dispute concerning any benefits under chapter 71 of this title may petition the workers' compensation judge for a determination of the dispute after satisfying dispute resolution requirements otherwise provided in this chapter . . . If the dispute relates to benefits due to a claimant under chapter 71, the judge shall fix and determine any benefits to be paid and specify the manner of payment . . ." §39-71-2905, MCA.

The Montana Supreme Court has found that pursuant to this statute, the Workers' Compensation Court has "broad jurisdictional powers over disputes [concerning benefits]

under the Act . . ." *Liberty NW Ins. Corp. v. State Compensation Ins. Fund*, 1998 MT 169, 289 Mont. 475, ¶10, 962 P.2d 1167. By virtue of this jurisdictional grant, the Workers' Compensation Court has been found to have jurisdiction "to determine which of several parties is liable to pay the workers' compensation benefits, or if subrogation is allowable, what apportionment of liability may be made between insurers, [to make declaratory rulings,] and other matters that go beyond the minimum determination of the benefits payable to an employee." *State ex rel Uninsured Employer's Fund v. Hunt*, 191 Mont. 514, 519, 625 P.2d 539, 542 (1981).

Since common fund attorney fees only arise if additional benefits are paid to claimants as a result of the *Schmill* decision, the award of common fund attorney fees is a dispute concerning benefits and thus within the jurisdiction of the Workers' Compensation Court.

The Respondents' arguments in defense of the Petitioner's request for common fund attorney fees fail for lack of legal and factual support. The Petitioner plead an entitlement to attorney fees in her petition for hearing. Pursuant to *In re Estate of Lande,* 295 Mont. 277, 983 P.2d 316 (1999) and *Mountain West Farm Bureau Mutual Ins. Co. v. Brewer*, 2003 MT 98, 315 Mont. 231, 69 P.3d 652 (2003), this is sufficient to overcome the defenses raised by the MSF and LNW. As such, the Petitioner's general claim for attorney fees in the petition for hearing is sufficient to allow an award of common fund attorney fees should a common fund be found.

II. RETROACTIVITY

Both Respondents assert that the *Chevron Oil* retroactivity test is still alive and well in Montana. Both this Court and the Supreme Court have concluded otherwise and the Respondents' have raised no new arguments which seriously challenge either court's reasoning. Even the cases the Respondents cite to for the proposition that judicial decisions declaring statutes unconstitutional are not always applied retroactively do not merit reconsideration of this Court's prior retroactivity ruling.

For example, the Respondents both cite to *Sheehy v. State of Montana*, 250 Mont. 437, 820 P.2d 1257 (1991), wherein the Montana Supreme Court refused to apply a United States Supreme Court decision retroactively after finding a state tax statute unconstitutional (§15-30-111(2)(c)(i)). What the Respondents fail to present is the subsequent history of the case after the Montana Supreme Court decision. In *Sheehy v. Montana Dept. of Revenue,* 509 US 916, 113 S.Ct. 3025 (1993), the United States Supreme Court issued a writ of certiorari remanding the case back to the Montana Supreme Court with the directive to apply its decision in *Davis v. Michigan Dept. of the Treasury,* 489 US 803, 109 S.Ct. 1500 (1989) retroactively. So that there was no confusion regarding the retroactivity of federal civil judicial decisions, the United States Supreme Court referred the Montana Supreme Court to the decision in *Harper v. Virginia Dept. of Taxation,* 509 US 86, 97, 1113 S.Ct. 2510, 2517-18 (1993), wherein the Court stated:

When this Court applies the rule of federal law to the parties

> before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule . . . [W]e can scarcely permit ' the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. [Citations omitted.]

Thus, *Sheehy* is not good law and an invalid basis upon which to reject the vast case law from the Montana Supreme Court finding unconstitutional statutes void ab initio.

In *Seubert v. Seubert*, 301 Mont. 399, 13 P.3d 365 (2000), the retroactivity issue was not briefed in the initial appeal, but arose after the decision was issued by way of a petition for clarification from the losing party. *Id.*, ¶56. Only the petitioner briefed the issue and the Supreme Court simply quoted directly from the petitioner's brief in its order finding only prospective application of the decision. Not only does the decision fail to mention the longstanding rule of law that in Montana statutes declared unconstitutional are void ab initio, but it also fails to explain why *Chevron Oil* is being followed when it was expressly rejected four years earlier.

This is shaky legal ground upon which the MSF is asking this Court to base a decision rejecting the rule of law that unconstitutional statutes are void ab initio. Certainly, constitutional considerations of equal protection would arise if this Court were to agree with the Respondents. As the United States Supreme Court noted in *Harper,* 509 US at 97, 113 S.Ct. at 2517-18:

> "The Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently."

Chevron Factors

The Respondents have failed to carry their burden of proving that *Schmill* should not be applied retroactively. *LaRoque v. State,* 178 Mont. 315, 319, 583 P.2d 1059, 1061 (1978). As this Court noted in *Flynn*, "even under Chevron [Oil] retroactive application of judicial decisions is favored." *Flynn*, ¶24.

Both LNW and MSF allege that the decision in *Schmill* was not foreshadowed. Both arguments rely heavily on *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 777 P.2d 862 (1989). These arguments would have some merit but for the *Henry v. State Fund,* 294 Mont. 449, 982 P.2d 456 (1999) decision. MSF concedes the relevance of *Henry* to this factor when it argues that if *Schmill* is applied retroactively it should only go as far back as the decision in *Henry*. (MSF Brief, p. 22.)

However, it was not just the *Henry* decision which foreshadowed *Schmill*, but the 1987 change in the definition of injury. As the *Henry* Court noted:

> "[A]fter the 1987 amendments to the WCA and ODA, the definitions of "injury" and "occupational disease" no longer focus on the nature of the medical condition, but rather focus on the number of work shifts over which the worker incurs an injury. Thus the historical justification for treating workers differently under the WCA and ODA no longer exists."

Thus, the Court's decision in *Henry* was not, as alleged by Respondents, premised on a complete denial of benefits to occupational disease claimants versus a partial denial of benefits, but upon any denial of benefits based solely on which classification the claimant belonged to, injury or occupational disease. It was the disparate payment of benefits to similarly situated claimants which was found unconstitutional in both *Henry* and *Schmill*. The MSF's assertion that the degree of the disparity dictates whether the decision in *Schmill* was foreshadowed is, thus, legally inaccurate.

As with the first factor, the Respondents have failed to present a compelling legal argument that the retroactive application of *Schmill* would not further the rules application. The rule announced in *Schmill* is that both occupational disease and industrial injury claimants should receive the same benefit rate without regard to apportionment for pre-existing conditions. If this rule were only applied prospectively, it would leave a whole class of similarly situated claimants still unconstitutionally subject to apportionment. This result would clearly retard the application of the rule, while retroactive application back to July 1, 1987, would result in the equal treatment of all similarly situated claimants. The Respondents' arguments fail to address this point and thus must be rejected.

The third factor requires the weighing of inequities. LNW argues that the decision in *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 730 P.2d 380 (1986), weighs against applying *Schmill* retroactively. However, to read *Buckman* in that way would allow the legislature to enact unconstitutional laws and the insurers to benefit from those enactments until a case could work its way to the Supreme Court. The insurers would then further benefit by being assured that they would never have to go back and pay the benefits due to those who were wrongly denied them in the first place. There is no equity in this scheme, only greater profit to insurance companies. The Court correctly found in *Flynn* that there must be proof of "substantial inequitable results" in order for this factor to weigh against retroactivity. The Respondents have failed to present proof of such inequities. Moreover, when any inequity to the claimants is weighed against that to the insurers, there can be no doubt that occupational disease claimants have suffered more under the apportionment rule than the insurers will suffer in paying the benefits now due.

MSF further argues that applying *Schmill* retroactively would constitute an unconstitutional impairment of contracts between the MSF and its policyholders. There are several problems with this argument. First, the prohibition against retroactive changes in the

law is limited to legislative changes, not judicial decisions. The MSF's citation to case law from 1932 and 1933 for the proposition that the prohibition against impairment of contracts applies to judicial decisions is without merit. Pursuant to the 1972 State Constitution, Montana's Contract Clause reads as follows:

> "No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchise, or immunities, shall be passed by the legislature." [Emphasis added.] Article II, §31.

Second, even if a contract clause argument could be made against a judicial decision, the MSF must prove that the decision "constitutes an impairment of the obligation of contract." *Buckman* 224 Mont. 318, ____ 730 P.2d 380, ____ (1986). The Montana Supreme Court subscribes to the principle that not all laws impairing contracts are unconstitutional:

> 'The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.' *Buckman* at ____, citing, *United States Trust Co. of New York v. New Jersey*, 431 US 1, 25-26, 97 S.Ct. 1505, 1519, 52 L. Ed. 2d 92, 111-12 (1977).

The MSF argues that the impairment consists of workers' compensation insurers having to pay more in benefits than what the premiums were originally based on. The Montana Supreme Court has rejected a similar argument in the past. In *Hardy v. Progressive Specialty Ins. Co.*, 315 Mont. 107, 67 P.3d 892 (2003), the Court held that anti-stacking provisions of an automobile insurance policy were void as against public policy despite the defendant's argument that allowing stacking of coverages would require the insurer to pay benefits for which it did not charge a premium. In rejecting this argument, the Court noted that there was no evidence that the premium charges did not reflect "the actual risk willingly assumed." *Hardy*, ¶43.

Likewise, in this case, there is no evidence that the premiums charged by the MSF since July 1, 1987, were not sufficient to pay unapportioned benefits to all occupational disease claimants. Since apportionment affected a small minority of occupational disease claims, it is unlikely that premium rates were adjusted based on that potential alone. The MSF has presented no facts to support such a contention. To the contrary, the dividend refunds over the years would support a contrary finding.

Public policy clearly supports the retroactive application of a judicial decision finding a statute unconstitutional even when such application might impair a contractual obligation. The

MSF has failed to present facts to support its contention that "substantial harm" would occur to the contractual obligations of the parties if the decision is applied retroactively. As such, no unconstitutional impairment of contracts would occur if *Schmill* were applied retroactively.

The MSF's last argument is that if *Schmill* is applied retroactively, it should only go back to the date of the *Henry* decision as that is when it became foreshadowed. The argument lacks any legal basis. Using the date of the *Henry* decision is simply an arbitrary date to save the insurers money. The definitions of injury and occupational disease were the same the day before the *Henry* decision as the day after. It was the legislature's definitional changes to these terms made effective July 1, 1987, which was the basis for finding the suspect statutes in *Henry* and *Schmill* unconstitutional. There is simply no legal basis for using any date other than July 1, 1987, as the retroactivity date.

III. DID *SCHMILL* CREATE A COMMON FUND?

LNW agrees that if *Schmill* is applied retroactively it would create a common fund. MSF, asserts that even if *Schmill* satisfies the technical requirements for establishing a common fund, Petitioner had an insufficient economic stake in the litigation to warrant the creation of a common fund. According to MSF, the fact that Petitioner recovered $1,438.42 out of which she paid $359.61 in attorney fees, "justified the legal expense necessary to challenge the disparate treatment." (MSF Brief, p. 24.) The numbers speak for themselves. The economic benefit to the Petitioner was no greater than that to Mr. Murer, Mr. Broeker, or Mr. Flynn.

IV. DOES A *SCHMILL* COMMON FUND APPLY TO NONPARTY INSURERS?

The MSF agrees with Petitioner that if a common fund is found it should apply to all insurers and self-insurers whether they were parties to the original litigation or not. LNW disagrees, but does nothing more than to refer to this Court's decision in *Ruhd v. Liberty NW Ins., Corp.*, 2003 MT WCC 38. Petitioner has already presented arguments in opposition to the Court's ruling in *Ruhd* and, therefore, will not repeat those arguments here, but refer the Court to her original pleadings.

CONCLUSION

For the reasons stated herein, and those presented in the Petitioner's opening brief, the Petitioner asks this Court to find that there was no waiver of common fund attorney fees; to apply the Montana Supreme Court's decision in *Schmill* retroactively; to find that a common fund was created by the decision in *Schmill*; and to find that common fund attorney fees are due from all nonparticipating beneficiaries, not just those of the named insurer.

RESPECTFULLY submitted this 13 day of April, 2004.

ATTORNEYS FOR PETITIONER

BOTHE & LAURIDSEN, P.C.
P.O. Box 2020
Columbia Falls, MT 59912
Telephone: (406) 892-2193

By: Laurie Wallace
LAURIE WALLACE

Certificate of Mailing

I, Robin Stephens, do hereby certify that on the 13 day of April, 2004, I served a true and accurate copy of the PETITIONER'S REPLY BRIEF by U.S. mail, first class, postage prepaid to the following:

Mr. Larry Jones
Liberty NW Ins. Corp.
700 SW Higgins, Ste. 108
Missoula, Montana 59803-1489

Mr. Bradley Luck
Garlington, Lohn & Robinson
P.O. Box 7909
Missoula, MT 59807-7909

Robin Stephens
Robin Stephens