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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DEBRA STAVENJORD, Petitioner, vs. MONTANA STATE FUND Respondent/Insurer	)	WCC No. 2000-0207 STAVENJORD'S OPENING BRIEF ON POST-REMAND ISSUES

Comes now Counsel for Stavenjord to brief certain post-remand issues identified by the Court in its Order dated February 24, 2004.

I. BACKGROUND

On April 1, 2003, the Montana Supreme Court affirmed Stavenjord v. Montana State Fund, 2003 MT 67, 314 Mont. 466, 67 P.3d 229. On April 8, 2003, Stavenjord filed a Notice of Common Fund Attorney Fee Lien, which asserted that a common benefit was created, increased, and/or preserved for partially disabled occupational disease claimants with dates of disease onset from July 1, 1987 to May 22, 2001. On April 24, 2003, this Court entered an Order notifying all Plan I and Plan II insurers to withhold attorney fees claimed by counsel for the Stavenjord Common Fund. Stavenjord 2003 MTWCC 30. In accord with Murer, Stavenjord asked this Court to apply the common fund doctrine pursuant to the Court's inherent power to supervise additional Stavenjord Common Fund benefit payments. The Montana State Fund objected, and this action ensued.

II. PROCEDURAL HISTORY

On February 20, 2004, the parties attended the last of several hearings to discuss the most efficient method to address post-remand Stavenjord common fund issues. In its Order, dated February 24, 2004, the Court asked the parties to brief the following four issues. Stavenjord alerts the Court that she deleted references to the Schmill case, and for clarity switched the order of issue presentation.

A. Issues To Be Briefed:

1) Does the appellate decision in Stavenjord apply retroactively?

2) Did the appellate decision in Stavenjord create a common fund? If so, what claimants are encompassed by the common fund?

3) If the appellate decision in Stavenjord created a common fund, is the common fund limited solely to claimants insured by named respondent - State Fund, or does the common fund encompass all claimants irrespective of their insurers?

4) Does the failure to request common fund fees or class certification in the pre-remand proceedings in Stavenjord bar the petitioner from now requesting common fund fees or class certification?

B. Joint Statement Of Stipulated Facts:

During the first year of the post-remand process, the State Fund argued for the application of an antiquated three-factor test known as the Chevron Oil test. The State Fund also insisted on developing a factual record, so that it could make its Chevron Oil argument. Therefore, the parties were directed to "establish an agreed set of facts by way of affidavit and documentation." This was generous to the State Fund, because in Klimek, Miller, and Flynn, this Court previously held that the Montana Supreme Court had abandoned the Chevron Oil test. Instead, this Court recognized that the Montana Supreme Court adopted a "blanket rule applying all judicial decisions retroactively." After the lengthy stipulation of fact process, which did not include any formal discovery, the parties filed a Joint Statement of Stipulated Facts on February 13, 2004. These stipulated facts are only applicable in the unlikely event that this Court reverses itself and applies the antiquated three-factor Chevron Oil test. As argued below, Chevron Oil does not apply in Montana; consequently, Stavenjord has made few references to the Joint Statement of Stipulated Facts.

III. ARGUMENT

A. ISSUE ONE: DOES STAVENJORD APPLY RETROACTIVELY?

1. Summary of Stavenjord's Retroactively Argument:

The application of the appellate decision in Stavenjord does not involve, in the usual sense, an issue of "retroactive" application of a judicial decision. In Stavenjord, the Montana Supreme Court held that Montana's Occupational Disease Permanent Partial Disability ("PPD") statute, §39-72-405 (2), MCA (enacted 1987), violated the Equal Protection Clause of the Montana Constitution. Stavenjord submits that the Montana Supreme Court considers an unconstitutional statute as void *ab initio*. As such, the unconstitutionality of the statute dates from the statute's enactment, and not from the date that the Stavenjord decision recognized the unconstitutionality.

Fundamentally, the State Fund asks a strange thing. The State Fund asks this Court to enforce an unconstitutional statute, from 1987 to 2001, so that Montana workers' compensation insurers can benefit monetarily. The State Fund's proposal is similar to the efforts of automobile insurance companies resisting the retroactive application of the Montana Supreme Court's decision requiring stacking of insurance coverages in Hardy v. Progressive Speciality Ins. Co., 2003 MT 85, 315 Mont. 107, 67 P.3d 892. In the stacking context, the Court unhesitatingly applied Hardy "retroactively." See, Mitchell v. State Farm Ins. Co., (2003) MT 102, 315 Mont. 281, 68 P.3d 703.

Furthermore, the Supreme Court has implicitly affirmed retroactive application in every appealed workers' compensation common fund case. Therefore, the State Fund has no true authority upon which to rest its novel theory. In Murer, Rausch, and Flynn, the Montana Supreme Court approved the retroactive application of each precedent-setting decision, because each case was decided well after the dates of benefit entitlement at issue.

If this Court determines that Montana's Occupational Disease PPD statute is not void *ab initio*, the claimant discusses the proper standard to apply to answer the question of retroactive application of a judicial decision.

2. An Unconstitutional Statute is Void Ab Initio:

The application of Stavenjord does not involve, in the usual sense, the issue of "retroactive" application of a judicial decision. Rather, it is widely recognized that an unconstitutional statute is void *ab initio*:

> The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but

> is wholly void, and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed, that is, it is void ab initio.

16 Am.Jur.2d Constitutional Law § 203 (footnotes omitted, emphasis added).

On numerous occasions, the Montana Supreme Court has recognized that when a statute is declared unconstitutional, it is void *ab initio*. Ex parte Anderson held that Montana's statute banning the exportation of females for criminal purposes was unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution, since federal law (the Mann Act) preempted the field. Ex parte Anderson (1951), 125 Mt. 331, 238 P.2d 910. Consequently, the Anderson Court ruled:

> "An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." [citing] Ex parte Piebald, 100 U.S. 371, 376, 25 L.Ed. 717. The statute under which the information was drawn being void, the information is wholly insufficient, fails to state a public offense and petitioner's demurrer thereto should have been allowed.

Anderson, 125 Mont. at 336-37, 238 P.2d at 913 (emphasis added).

In Sadler v. Connolly (1978), 175 Mont. 484, 575 P.2d 51, the Montana Supreme Court held that the freeholder requirements of statutes governing qualification for city office are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Sadler Court then stated:

> A legislative enactment declared unconstitutional is void. State ex rel. Schultz-Lindsay Const. Co. v. Bd. of Equalization, (1965), 145 Mont. 380, 403 P.2d 635; Billings Properties, Inc. v. Yellowstone County, (1964), 144 Mont. 25, 394 P.2d 182.

Sadler, 175 Mont. at 490, 575 P.2d at 54. Thereafter, the Sadler Court further expounded:

> As such, the enactment in legal contemplation is as inoperative as if it had never been passed.

Sadler, 175 Mont. at 490, 575 P.2d at 54 (emphasis added).

In McClanathan v. Smith, (1980), 186 Mont. 56, 606 P.2d 507, the Montana Supreme Court declared unconstitutional Montana's statute providing for a 100% Social Security offset against workers' compensation benefits. In Trusty v. Consolidated Freightways, a follow-up case discussing whether McClanathan should be retroactively applied, the Court found that McClanathan applied retroactively:

> In McClanathan, supra, this Court struck down the former statute by ruling it constitutionally unenforceable. This 100% offset provision in the statute became void and unenforceable as a result of the McClanathan decision.
>
> * * *
>
> Appellant [Trusty] suffered his injury during the period the 100% offset statute was in effect. McClanathan left no enforceable offset statute that could be applied to persons injured during the period between July 1, 1973 (effective date of the 100% offset statute) and July 1, 1974 (effective date of the 50% offset statute). Therefore, no offset against appellant's benefits applies.
>
> * * *
>
> This Court cannot come back and change the statute to a 50% offset. Once we found the statute constitutionally unenforceable, then no offset remains in effect.

Trusty v. Consolidated Freightways (1984), 210 Mont. 148, 151-152, 681 P.2d 1085, 1087-1088 (emphasis added).

In Brockie v. Omo Construction, Inc. (1994), 268 Mont. 519, 887 P.2d 167, the Court was asked to retroactively apply its holding in Newville v. Montana Dept. of Family Services (1994), 267 Mont. 337, 883 P.2d 793. Concerning the question of retroactive application, the Brockie Court explained:

> Appellant's notice of subsequent authority pursuant to our decision in Newville asks us to apply Newville retroactively to the wrongful death award. In that case, we concluded that the allocation of percentage of liability to non-parties violates substantive due process. We held that the relevant portion of § 27-1-703(4), MCA, is unconstitutional. When a statute is declared unconstitutional, it is void ab initio.

Brockie, 268 Mont. at 525, 887 P.2d at 171, citing State v. Coleman (1979), 185 Mont. 299, 319, 605 P.2d 1000, 1013.

Although Brockie ruled that Newville should be applied retroactively, the Brockie Court also stated:

> The general rule is that a change of law between the law applied at trial

> and the time of appeal requires this Court to apply the changed law. Haines, 830 P.2d 1230; Lee, 704 P.2d 1060; West-Mont, 703 P.2d 850; Wilson v. State Highway Commission (1962), 140 Mont. 253, 370 P.2d 486. An exception to the general rule is that the new law will not be applied when it is necessary to prevent manifest injustice. Haines, 830 P.2d at 1238.

Brockie, 268 Mont. at 526, 887 P.2d at 171.

Thus, although Brockie properly recognized that an unconstitutional statute is void *ab initio*, it also created confusion by discussing whether to apply the "changed law." This was confusing, because if statute is void *ab initio*, there is no "changed law." The better analysis is simply stated: an "unconstitutional law is void, and is as no law." Ex parte Anderson, 125 Mont. at 336, 238 P.2d at 913; see also, Reynoldsville Casket Co. v. Hyde, (1995) 514 U.S. 749, 761, 115 S.Ct. 1745, 1752 (there is no "changed law" since an unconstitutional statute is in reality "no law").

In the decisive case of Porter v. Galarneau (1996), 275 Mont. 174, 911 P.2d 1143, the Montana Supreme Court explicitly adopted a blanket retroactivity rule in accord with the U.S. Supreme Court's holding in Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 1135 S.Ct. 2510 (1993). In Porter, the Montana Supreme Court established a clear unambiguous mandate requiring the blanket retroactive effect of all judicial decisions. Porter confirmed the rule that all judicial decisions are retroactively applied. Porter, 275 Mont. at 185, 911 P.2d at 1150.

3. The Meaning of Void Ab Initio:

Void *ab initio* means, "null from the beginning." Black's Law Dictionary (5th Ed.). The salient aspect of an unconstitutional statute being void *ab initio*, is that its unconstitutionality dates from the statute's enactment, and not from the date of the decision that recognized the statute's unconstitutionality. 16 Am.Jur.2d Constitutional Law § 203. As a consequence:

> Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.

Id. (emphasis added).

Justice Scalia explained this historic principle of "judicial disregard" in his 1995 concurring opinion in Reynoldsville Casket Co. v. Hyde:

> In fact, what a court does with regard to an unconstitutional law is simply to ignore it. It decides the case "disregarding the [unconstitutional] law," Marbury v. Madison, 1 Cranch 137, 178, 2

> L.Ed. 60 (1803) (emphasis added), because a law repugnant to the Constitution "is void, and is as no law," Ex parte Siebold, 100 U.S. 371, 376, 25 L.Ed. 717 (1880).

Reynoldsville Casket Co., supra., 514 U.S. at 761, 115 S.Ct. at 1752 (italics in original). In Reynoldsville Casket Co., the U.S. Supreme Court also dispelled any doubt that it would continue to apply the Harper blanket retroactivity rule in reaffirming Harper by a 7-2 majority decision. Reynoldsville Casket Co., 514 U.S. at 749, 115 S.Ct. at 1745.

The principle discussed in Reynoldsville Casket Co. is consistent with Montana's general rule that a judicial construction of a statute explains the statute's meaning from its inception. Put bluntly, judicial decisions that construe statutes should always have retroactive application; otherwise, there would be no reason for judicial oversight. This is fundamental. Thus, Justice Scalia cites the historic case of Marbury v. Madison. Indeed, Justice Scalia could have cited Kuhn v. Fairmont Coal Co., wherein Justice Holmes stated: "Judicial decisions have had retrospective operation for near a thousand years." Kuhn, (1910), 215 U.S. 349, 372, 30 S.Ct. 140, 148, 54 L.Ed. 228 (Holmes, J., dissenting).

In Haugen v. Blaine Bank of Montana (1996), 279 Mont. 1, 926 P.2d 1364, the Montana Supreme Court explained this fundamental premise as follows:

> [A] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.

Haugen, 279 Mont. at 8, 926 P.2d at 1368; quoting Rivers v. Roadway Express, Inc. (1994), 511 U.S. 298, 312-13, 114 S.Ct. 1510, 1519.

Similarly, in State v. Goebel, 2001 MT 155, 306 Mont. 83, 31 P.3d 340, the Montana Supreme Court said, "a court's interpretation of a statute is never new law because the decision declares what the statute meant from the day of its enactment, not from the date of the decision." Goebel, ¶ 23.

In sum, a court's declaration that a statute is unconstitutional means that the statute was unconstitutional from the date of its enactment - not merely from the date of the court's decision. As argued below, to hold otherwise would result in a judicially repugnant unequal treatment of similarly situated claimants. Courts do not discriminate. When a claimant presses her case to successful decision, she obtains her benefit just as Debra Stavenjord did in this case. If Stavenjord is not retroactively applied, however, other similarly situated claimants will be unfairly denied.

4. The Retroactive Effect of Stavenjord has Already Been Determined:

In accordance with the principle that an unconstitutional statute is void *ab initio*, the claimant submits that the Montana Supreme Court has already determined that Stavenjord applies "retroactively." This is evidenced by the facts of the case itself. Stavenjord was decided on April 1, 2003, but it adjudicated an Occupational Disease Permanent Partial Disability (hereafter, "OD PPD") entitlement for a condition that arose on April 1, 1998. In this factual respect, Stavenjord was applied retroactively in her own claim. Furthermore, Debra Stavenjord received her additional OD PPD (Stavenjord) benefit for a condition that arose before the foundational case of Henry, which was one of the cases that clearly foreshadowed the Stavenjord appellate decision. See, Henry v. State Fund 1999 MT 126, 294 Mont. 449, 982 P.2d 456.

Similar retroactive applications occurred in the other benefit cases cited above. For instance, Hardy was decided on April 18, 2003, but it adjudicated stacking of insurance policy benefits for an injury that occurred on December 26, 2000. Hardy, at ¶ 7. The Montana Supreme Court decided Mitchell on April 26, 2003, but it adjudicated stacking of insurance policy benefits for an injury that occurred on July 27, 1998. Mitchell, ¶ 5.

In Murer v. State Fund (1994) 267 Mont. 516, 885 P.2d 428 (Murer II), and Murer v. State Fund (1997) 283 Mont. 210, 942 P.2d 69 (Murer III), the Montana Supreme Court adjudicated benefits in 1994 and 1997 that related to temporary benefit caps from 1987 and 1989. In Rausch et al. v. State Fund (2002) 311 Mont. 210, 54 P.3d 25, the Montana Supreme Court adjudicated in 2002 impairment benefits under the 1991 and 1997 Workers' Compensation Acts. In Flynn v. State Fund 2002 MT 203, 311 Mont. 410, 54 P.3d 25, the Montana Supreme Court adjudicated benefits in 2002 that related to prorated attorney fees that were incurred in 1996. In each of these cases, as in every case, the Court reached back to make pronouncements about laws and events that happened in the past. This is not unique, nor is it prohibited, simply because the State Fund now attacks that "retroactive application." In analyzing Hardy, Mitchell, Murer, Rausch, Flynn, Stavenjord, and other cases cited below, it is clear that the Montana Supreme Court does (and should) "retroactively" apply its holdings.

The express language in Stavenjord clearly requires retroactive application:

> "For that reason, we conclude that our holding in *Eastman v. Atlantic Richfield Company* is not applicable to those wage supplement benefits provided for at §39-71-703, MCA, and §39-72-405(2), MCA, **since 1987** and we affirm the decision and judgment of the Workers' Compensation Court.

Stavenjord, ¶ 48 (emphasis added).

Although Stavenjord was decided on April 1, 2003, it was retroactively applied to Debra Stavenjord's condition, which arose on April 1, 1998. As a result, the State Fund paid Debra Stavenjord her full unapportioned "Stavenjord benefit." Not willing to draw an arbitrary retroactive application date starting on April 1, 1998, the Montana Supreme Court stated that its decision was applicable to all PPD benefit entitlements "**since 1987**." This holding was logical, equitable, and in accord with historic legal principles. "[T]he decision declares what the statute meant from the day of its enactment, not from the date of the decision." Goebel, at ¶ 23.

Here, the offending OD PPD statute was enacted in 1987. Stavenjord, ¶ 36. Therefore, the Court's "since 1987" statement has the same effect as if the Montana Supreme Court said, "this statute was unconstitutional from the date of its enactment, and not merely from the date of this Court's decision." Legally, there is no OD PPD "changed law" that this Court could apply from 1987 to 2001, because the previous "unconstitutional statute" was in reality "no law." The previous OD PPD statute was void *ab initio*. Therefore, the direct language of Stavenjord, and other clear legal precedent, commands that §39-72-405(2) MCA must be disregarded from the date of its inception in 1987. The provisions of §39-72-405(2) MCA, "cannot be enforced," and that results in additional benefit entitlement for all similarly situated OD PPD Claimants "since 1987."

5. Montana's Retroactivity Jurisprudence:

Since an unconstitutional statute is void *ab initio*, this Court need not undertake a further analysis of the "retroactive" effect of Stavenjord. However, if this Court decides otherwise, the following section discusses additional Montana retroactivity jurisprudence.

(a) The State Fund's Proposed Three-Factor Test Was Overruled:

In proposing not to apply Stavenjord retroactively, the State Fund has a heavy burden of proof. First, the State Fund may only argue against retroactivity if it convinces this Court to apply the antiquated (and overruled) Chevron Oil test. Second, if applicable, this test requires the State Fund to meet the burden of proof that Stavenjord should not apply retroactively based on the following considerations:

(1) Whether the ruling to be applied establishes a new principle of law by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed;

(2) Whether retroactive application will further or retard the ruling's application; and,

(3) What is the equity of retroactive application.

See, La Roque v. State (1978), 178 Mont. 315, 583 P.2d 1059, citing Chevron Oil v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, ___, 30 L.Ed.2d 296, ___ (1971).

In the 1971 Chevron Oil case, the U.S. Supreme Court found that these three factors should be considered if a party argued against the norm (which is that all judicial decisions should be retroactively applied). As stated above, the U.S. Supreme Court later overruled the Chevron Oil test in Harper (1993), supra.; and see, Reynoldsville Casket, (1995), supra.; or see, e.g., Toms v. Taft, 338 F.3d 519, 529 (6th Cir. 2003).

Montana adopted the Chevron Oil three-factor test in 1978, which was seven years after the U.S. Supreme Court first announced this exception to the general retroactivity rule. See, La Roque, supra. Eighteen years later, Montana overruled the Chevron Oil test in 1996, which was three years after the U.S. Supreme Court overruled the Chevron Oil exception. The Montana Supreme Court overruled the Chevron Oil test in Porter v. Galarneau (1996), 275 Mont. 174, 911 P.2d 1143. This close pairing between adoption and overrule demonstrates how closely the Montana Supreme Court aligns itself with U.S. Supreme Court retroactivity law. The Porter Court held that while statutes may not always be given retroactive effect, judicial decisions construing statutes should always be given retroactive effect. In this respect, Porter explicitly adopted its rule in accord with the U.S. Supreme Court's 1993 holding in Harper, explaining:

> We will continue to give retroactive effect to judicial decisions, which is in accord with the U.S. Supreme Court's holding in Harper v. Virginia Dept. of Taxation (1993), 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74.

Porter, 275 Mont. at 185, 911 P.2d at 1150 (emphasis added).

The Montana Supreme Court thus reconfirmed that all judicial decisions have full retroactive effect, and Porter thereby disregarded the antiquated Chevron Oil exception test. Furthermore, the Montana Supreme Court made two strong points when it accorded its decision with Harper: First, the Montana Supreme Court adopted Harper holding that judicial decisions announcing a rule of law "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." Harper, 509 U.S. at 97, 113 S.Ct. at 2517. Second, the Montana Supreme Court recognized the fundamental reasoning that compels courts to follow the Harper rule: "[A] Court has no more constitutional authority in civil cases than in criminal cases to disregard

current law or to treat similarly situated litigants differently." Harper, 509 U.S. at 97, 113 S.Ct. at 2517.

The fundamental underpinnings of Harper are compellingly demonstrated in the case at bar. Stavenjord pressed her case to decision, and she received a full unapportioned "Stavenjord benefit." However, without retroactive application, other similarly situated claimants, with identical onset dates, would be denied their constitutionally mandated "Stavenjord benefit." Therefore, without retroactive application, there would be an unequal treatment of similarly situated claimants. The Porter/Harper rule prevents such an unjust outcome by confirming that courts in civil cases do not have the constitutional authority to disregard decided law. The reason - courts should treat similarly situated litigants equally.

Porter was immediately followed by two other Montana Supreme Court decisions, which affirmed the Porter/Harper blanket retroactivity rule: Kleinhesselink v. Chevron, U.S.A. (1996), 277 Mont. 158, 920 P.2d 108, and Haugen v. Blaine Bank of Montana (1996), 279 Mont. 1, 926 P.2d 1364.

In Kleinhesselink, the plaintiff sought retroactive application of the Montana Supreme Court's decision in Stratemeyer v. Lincoln County (1996), 276 Mont. 67, 915 P.2d 175, (known as "Stratemeyer II"). In holding for retroactive application, Kleinhesselink stated:

> We give retroactive effect to judicial decisions. Porter v. Galarneau (Mont. 1996), 911 P.2d 1143, 1150, 53 St.Rep. 99, 103. Therefore, Stratemeyer II has application to this case even though it was not available to the District Court in addressing Chevron's motion to dismiss Kleinhesselink's complaint.

Kleinhesselink, 277 Mont. at 162, 920 P.2d at 111.

Likewise, in Haugen v. Blaine Bank of Montana (1996), 279 Mont. 1, 926 P.2d 1364, the Montana Supreme Court explained:

> [T]he United States Supreme Court maintains that "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *Rivers v. Roadway Express, Inc.* (1994), 511 U.S. 298, ____, 114 S.Ct. 1510, 1519, 128 L.Ed.2d 274 (quoting *United States v. Security Industrial Bank* (1982), 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235). "Judicial decisions have had retrospective operation for near a thousand years." *Rivers*, 511 U.S. at ___, 114 S.Ct. at 1519 (quoting *Kuhn v. Fairmont Coal Co.* (1910), 215 U.S. 349, 372, 30 S.Ct. 140, 148, 54 L.Ed. 228 (Holmes, J., dissenting)). Moreover, "[a] judicial construction of a

> statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Rivers, 511 U.S. at ___, 114 S.Ct. at 1519.
>
> Similarly, this Court has often stated that judicial decisions will be given retroactive effect. *Kleinhesselink v. Chevron, U.S.A.* (1996), 277 Mont. 158, ____, 920 P.2d 108, 111; *Porter v. Galarneau* (1996), 275 Mont. 174, 185, 911 P.2d 1143, 1150; *State, City of Bozeman v. Peterson* (1987), 227 Mont. 418, 420, 739 P.2d 958, 960.

Haugen, 279 Mont. at 7-8, 926 P.2d 1367-68 (emphasis added).

The Montana Supreme Court embraced the Harper rule in Porter, Kleinhesselink, and Haugen, and that should have been the end of the present question. Unfortunately, in the subsequent case of Benson v. Heritage Inn, Inc., 1998 MT 330, 292 Mont. 268, 971 P.2d 1227, the Montana Supreme Court mistakenly applied the Chevron Oil test (rejected in Porter/Harper) to determine whether a recent decision on liability law for accumulations of snow and ice applied retroactively.

Similarly, in the case of Ereth v. Cascade County, (12/2/03), 2003 MT 328, P.3d ___, the Montana Supreme Court applied the three-factor test to determine whether to retroactively apply its holding that a criminal defendant must file a legal malpractice complaint within three years of discovery, as opposed to three years from the date of post conviction exoneration. Counsel in Ereth failed to raise the retroactivity issue, so without adequate briefing, the Ereth Court mistakenly cited the three-factor test set forth in Riley (1987), supra. See, Ereth, at ¶ 29.

Despite the anomalous cases of Benson and Ereth, Stavenjord asserts that the Montana Supreme Court adopted a blanket retroactivity rule in Porter. Conversely, the Court did not intend to "re-adopt" the Chevron Oil test in Benson and Ereth. Stavenjord submits that if the Montana Supreme Court truly intended such a monumental shift (backwards), the Court would have made its intention known as clearly as it did when it adopted the Porter/Harper rule.

This Court also succinctly questioned whether the Montana Supreme Court truly intended to reject the Porter/ Harper rule. In Flynn, after remand, this Court reviewed its prior decisions concerning retroactivity. Flynn v. State Fund, on remand, 2003 MT WCC 55, at ¶ 20; see also, Miller v. Liberty Mutual Fire Ins. Co. 2003 MTWCC 6; and Klimek v. State Fund, WCC 9602-7492, Order dated October 11, 1996. In these decisions, this Court clearly recognized that Porter overruled the Chevron Oil test. Flynn, at ¶ 20. The Court then stated: "my sense of the matter is that when squarely confronted with the issue the Supreme Court will adopt a blanket rule of retroactivity with respect to judicial decisions." Flynn, at ¶ 22. Consequently, this Court distinguished Benson (and by implication Ereth), and held that it was probably

counsel's legal neglect that led the Montana Supreme Court to reference Chevron Oil after Porter.

Before deciding that these errant cases were caused by the legal neglect of counsel, this Court thoroughly investigated the issue:

> I have reviewed the appellate briefs in *Benson*. It appears from the briefs that the district court applied the three-prong *Chevron [Oil]* test in its decision (which was affirmed). In addition, on appeal only one party - the plaintiff - cited any law or cases concerning retroactive application of judicial decisions, and the law cited was the *Chevron [Oil]* test as articulated in *Riley v. Warm Springs State Hospital*, 229 Mont. 518, 748 P.2d 455 (1987). *Riley* and the *Chevron [Oil]* test were then cited by the Court in the *Benson* decision. I further note that in another case decided the same year as *Benson*, the Supreme Court reiterated its statement, without discussion, that "[w]e give retroactive effect to judicial decisions." *State v. Steinmetz*, 1998 MT 114, ¶ 10, 288 Mont. 527, 961 P.2d 95. Given these facts, it is not at all clear to this Court that the *Benson* court intended to reject the blanket rule of *Harper* in favor of the *Chevron [Oil]* test or even considered the issue.

Flynn, ¶ 22 (emphasis added).

Flynn, Miller, and Klimek recognized that there was no true judicial consideration of retroactivity by the Montana Supreme Court in Benson (or Ereth). Stavenjord believes that if the Montana Supreme Court had truly intended to take such a monumental leap backwards, the Court would have discussed its numerous cases, after Riley, which established Montana's blanket retroactivity rule. Thus, it is submitted that Benson and Ereth do not control the issue at bar. Rather, in those anomalous cases, it appears that counsel failed to apprise the Montana Supreme Court about the applicable retroactivity standard.

(b) Analysis of The State Fund's Authority:

After losing at the Montana Supreme Court once, the State Fund now wants to re-argue the Stavenjord case by questioning (again) whether the offending OD PPD statute was unconstitutional between 1987 and 2001. Essentially, in order to make its prospective application argument, the State Fund has no other choice but to pretend that Montana's OD PPD statute was "constitutional" between 1987 and 2001. However, the State Fund offers no authority that would allow this Court to disregard the Montana Supreme Court's explicit finding that this statute has been unconstitutional "since 1987."

Given the nature of the simultaneous briefing, Stavenjord must employ conjecture about how the State Fund will argue against full (retroactive and prospective) application of Stavenjord. In doing so, Stavenjord anticipates that the State Fund may cite the case of Sheehy v. State of Montana (1991), 250 Mont. 437, 820 P.2d 1257.

In Sheehy, plaintiffs filed a class action lawsuit against the State for a refund of state taxes paid between 1983 and 1988 on federal retirement benefits. Sheehy, 250 Mont. at 438, 820 P.2d at 1257. Specifically, plaintiffs challenged the constitutionality of Section 15-30-111(2)(c)(i) MCA (1989), which allowed the State to collect income taxes on federal retirement benefits that exceeded $3,600.00. The plaintiffs premised their claim on the United States Supreme Court's decision in Davis v. Michigan Department of the Treasury (1989), 489 U.S. 803, 109 S.Ct. 1500. In Davis, the United States Supreme Court held a similar Michigan statute unconstitutional. In Sheehy, the Montana Supreme Court did not apply Davis retroactively; therefore, the plaintiffs did not receive a tax refund from the State.

If the State Fund does cite Sheehy, this Court should review the full history of the case. Specifically, this Court should note that the U.S. Supreme Court subsequently issued a writ of certiorari remanding Sheehy back to the Montana Supreme Court for further consideration in light of Harper, supra. See, Sheehy v. Montana Dept. of Revenue, 509 U.S. 916, 113 S.Ct. 3025 (1993). The U.S. Supreme Court remand of Sheehy was necessary, because in Harper, the Court addressed Virginia's refusal to give retroactive effect to the Davis holding:

> When this Court applies a 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. This rule extends *Griffith's* ban against "selective application of new rules." 479 U.S., at 323, 107 S.Ct., at 713. Mindful of the "basic norms of constitutional adjudication" that animated our view of retroactivity in the criminal context, id., at 322, 107 S.Ct., at 712, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we 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. Beam, supra, 501 U.S., at 543, 111 S.Ct., at 2447 (opinion of SOUTER, J.). Our approach to retroactivity heeds the admonition that "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently."

Harper, 509 U.S. at 97, 113 S.Ct. at 2517-18 (emphasis added).

Finally, this Court should note that Harper explicitly abrogated the Montana Supreme Court's Sheehy decision. See, Harper, 509 U.S. at 94 fn. 6, 113 S.Ct. at 2515 fn. 6.

The claimant acknowledges the additional case of Seubert v. Seubert (2000), 301 Mont. 399, 13 P.3d 365, wherein the three-factor retroactivity test was also discussed. In Seubert, the district court entered an order approving the divorcing father's child support obligation. Two years later, the Child Support Enforcement Division (CSED) attempted to modify that order. The district court held that CSED's endeavor to modify the order was a usurpation of judicial authority and a violation of the separation of powers under Article III, Montana Constitution. Seubert, ¶ 10. The Montana Supreme Court agreed. Id., ¶ 48.

The issue of retroactive versus prospective application did not arise in Seubert until the CSED later petitioned the Court for clarification. Id., ¶ 56. In that request, the CSED's petition was the only document filed on the issue of retroactivity. The claimant submits that CSED mistakenly cited the older Chevron Oil test, which included Sheehy, Benson, and Riley, supra. The Montana Supreme Court relied exclusively on the authority cited by CSED, and the Court simply quoted CSED's language applying the three-factor test. As with Benson, and Ereth, there was no consideration in Seubert about whether the Montana Supreme Court should step backwards and re-adopt the older retroactivity rule.

(c) Criminal Cases of Significance:

A compelling line of recent criminal cases decided by the Montana Supreme Court confirm that the Porter rule of retroactive application is the current rule. See, State v. Steinmetz, 1998 MT 114, 288 Mont. 527, 961 P.2d 95; State v. Waters, 1999 MT 229, 296 Mont. 101, 987 P.2d 1142; State v. Goebel, 2001 MT 155, 306 Mont. 83, 31 P.3d 340; and Robbins v. State, 2002 MT 116, 310 Mont. 10, 50 P.3d 134.

In Steinmetz, the defendant sought retroactive application to his case of a recent judicial decision. In ruling in his favor, Steinmetz stated:

> After this appeal was submitted on briefs, we decided the case of Hulse v. State, 1998 MT 108, 289 Mont. 1, 961 P.2d 75. Because we give retroactive effect to judicial decisions, Hulse is applicable in the case sub judice although it was not available to the District Court at the time it ruled on Steinmetz's motion to suppress. Kleinhesselink v. Chevron, U.S.A. (1996), 277 Mont. 158, 162, 920 P.2d 180, 111 (citing Porter v. Galarneau (1996), 275 Mont. 174, 186, 911 P.2d 1143, 1150).

Steinmetz, 288 Mont. at 531, 960 P.2d at 98. Obviously, Steinmetz relied on the Porter rule set forth by the Montana Supreme Court in Kleinhesselink and Porter.

In the 1999 case of State v. Waters, the issue was whether a new judicial rule (that oral pronouncement of sentence is a legally effective judgment) should apply retroactively to Waters' appeal. In holding for retroactivity, the Waters' Court explicitly overruled prior Montana cases applying the Chevron Oil test to determine if a new judicial rule of criminal procedure should be applied retroactively. Waters at ¶ 20. In doing so, the Waters' Court relied on Steinmetz, supra, and the U.S. Supreme Court decision in Griffith v. Kentucky (1987), 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649. In Griffith, the U.S. Supreme Court held that, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith, 479 U.S. at 328, 107 S.Ct. at 716, 93 L.Ed. at 661. Furthermore, the U.S. Supreme Court held in Harper that the Griffith ban against the selective application of new judicial rules applied equally to criminal and civil cases. Harper, 509 U.S. at 97, 113 S.Ct. at 2517-18. In this regard, as discussed above, Harper was explicitly adopted by the Montana Supreme Court in Porter, 275 Mont. at 185, 911 P.2d at 1150.

Finally, in the 2001 case of State v. Goebel, the Montana Supreme Court discussed the historical development of the rule governing retroactive application of judicial decisions in the criminal law context. Specifically, the Court described the demise of the Chevron Oil test. Goebel, 2001 MT at ¶¶ 7-23. Additionally, Goebel discussed the rule governing retroactive application of a judicial decision construing a statute. In doing so, Goebel synthesized the rationale of the U.S. Supreme Court and the Montana Supreme Court's decision in Haugen - A civil case:

> Furthermore, in *Rivers v. Roadway Express* (1994), 511 U.S. 298, 312-13, 114 S.Ct. 1510, 1519, 128 L.Ed.2d 274, the Supreme Court determined that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Accord *Haugen v. Blaine Bank* (1996), 279 Mont. 1, 8, 926 P.2d 1364, 1368. Thus, a court's interpretation of a statute is never new law because the decision declares what the statute meant from the day of its enactment, not from the date of the decision.

Goebel, ¶ 23 (emphasis added).

In summary, when the Montana Supreme Court truly considers whether to apply the old Chevron Oil test, the Court clearly decides in favor of the Harper/Porter blanket retroactive application rule for all judicial decisions. Conversely, when

counsel neglect to brief the retroactivity issue, the Montana Supreme Court has, on a few occasions, mistakenly relied on the old Chevron Oil test.

Fundamentally, with regard to the retroactive application of a judicial decision construing a statute, the Montana Supreme Court recognizes that "a court's interpretation of a statute is never new law because the decision declares what the statute meant from the day of its enactment, not from the date of the decision." Goebel, ¶ 23; Haugen, 297 Mont. at 8, 926 P.2d at 1368. Here, the appellate decision in Stavenjord affirmed this Court's determination that the OD PPD statute, §39-72-405 (2) MCA, was unconstitutional. As such, this holding controls from the date of the statute's enactment in 1987, and not from any other arbitrary date. This Court should not apply the Chevron Oil test. Instead, the Court should follow Montana Supreme Court mandate to find that the provisions of §39-72-405(2) MCA, "cannot be enforced." That holding will result in additional PPD entitlement for all Occupational Disease Claimants "since 1987."

6. Stavenjord Applies Retroactively Under the Chevron Oil Test:

Unfortunately, Stavenjord must brief the Chevron Oil issue, assuming arguendo, that this Court chooses to apply the three-factor test. However, even if the Court applies Chevron Oil, the Court should nevertheless determine that Stavenjord has retroactive application. Stavenjord addresses the three-factor analysis below.

(a) The State Fund Has The Burden Of Proof

The State Fund must overcome a heavy burden to proof when it asks the Court to disregard the favored rule that judicial decisions apply retroactively. As noted by this Court

> [E]ven under Chevron [Oil] retroactive application of judicial decisions is favored. The factors considered under Chevron [Oil] are, after all, "factors to be considered before adopting a rule of *nonretroactive* application." LaRoque, 178 at 319, 583 at 1061. Thus, the burden is on the State Fund to persuade the Court that the decision in this case should *not* be applied retroactively.

Flynn 2003 MTWCC ¶ 24 (italics in the original).

(b) The First Chevron Oil Factor

As to the First Chevron Oil factor, the Montana Supreme Court's decision in Stavenjord was "clearly foreshadowed." Well before 1987, Montana courts encountered multiple Occupational Disease versus Workers' Compensation "injuries." With the advance of medical science making the similarity of these "injuries" evident,

questions were raised about the obvious inequity of treating one class of claimant differently from another. In a last ditch effort, the 1987 Legislature enacted a "bright line" test to divide the claims. However, as stated in Stavenjord, when the Legislature enacted that offending statute, it abandoned any remaining justification for disparate PPD entitlement. Stavenjord at ¶ 37. From the 1987 enactment forward, most attorneys seriously questioned the unequal application ("protection") of the two disparate PPD laws. These developments clearly foreshadowed the inevitable Stavenjord holding.

Furthermore, before Stavenjord was decided, the Montana Supreme Court had already prohibited the denial of equal protection to Occupational Disease Claimants. Henry v. State Fund, supra, 294 Mont. at 456, 982 P.2d at 461. In Henry, the Court said that workers who suffer work-related injury on one shift, versus those injured over more than one shift, are similarly situated, and entitled to equal protection. Henry specifically held that the denial of equal benefits (rehabilitation) to Occupational Disease Claimants was unconstitutional. As analyzed by the Henry Court, both classes suffered work-related injury, and as here, both classes incurred permanent partial disability. Furthermore, injured workers in both classes were unable to return to their time of injury jobs, both classes incurred wage loss, both classes lost future earning capability, and both classes had as their exclusive remedy the Workers' Compensation Act or the Occupational Disease Act. The Henry case clearly foreshadowed Stavenjord.

(c) The Second Chevron Oil Factor

As to the Second Chevron Oil factor, whether retroactive application will further or retard the ruling, Stavenjord submits the answer is obvious. Failure to enforce Stavenjord retroactively would nullify the decision. What could be said to similarly situated OD PPD claimants? There is no defensible argument to deny similarly situated OD PPD claimants full Stavenjord benefits. Even if the State Fund devises such an argument, it clearly would "retard" the Stavenjord ruling. No court should have to explain that Debra Stavenjord should receive her additional PPD (which she did), but tell another similarly situated claimant that she is not equally entitled. As argued above, courts demand blanket retroactive application of judicial decisions, because anything less results in unequal treatment of equally deserving claimants. If Stavenjord is not applied retroactively that would "retard the ruling." The workers' compensation insurance companies obviously want to keep this money, but the Montana Supreme Court found that the failure to pay this benefit was unconstitutional. The only way to give Stavenjord ruling effect is for this Court to require Montana's workers' compensation insurers to pay Stavenjord benefits.

In this regard, this Court's statement in Miller v. Liberty Mutual is applicable by analogy:

> To deny retroactive application would reward those insurers for their misinterpretation. Indeed, denying retrospective application would allow insurers to postpone the effect of a valid statute [or ruling] simply by misinterpreting it.

Miller, 2003 MTWCC 6, at ¶ 27.

(d) The Third Chevron Oil Factor

Finally, as to the Third Chevron Oil factor, the equity of retroactive application is manifest. Potentially, thousands of claimants are now entitled to a relatively small increase in their Occupational Disease PPD benefit. These claimants need this benefit; because they suffered work-related "disease," incurred permanent partial impairment, were unable to return to their time of injury jobs, incurred wage loss, and lost future earning capability. The $10,000.00 PPD benefit that these claimants may have received probably did not cover their debts that they incurred during medical recuperation. In essence, these claimants deserve this money more than the insurance companies deserve to keep it.

Equity demands that OD PPD claimants receive the same "reasonable wage loss benefit" that injured workers receive under the Workers' Compensation Act. This was the basis of the Stavenjord holding. Stavenjord pressed her case to decision, and she has now received a full unapportioned "Stavenjord benefit." Without retroactive application, other similarly situated claimants would be denied the benefit. Therefore, without retroactive application, there would be an inequity. Therefore, equity runs toward retroactive application.

The State Fund geared up its self-satisfying stipulation of facts (compiled without discovery) in order to argue that it does not have the method or the money to pay Stavenjord benefits. As to the method and the money, the State Fund does not disclose the entire story.

(i) The Method

The State Fund has extensive experience with common fund identification and payment method. For instance, the State Fund concedes that there were approximately 3,200 Murer claimants (Stip. Fact # 65 (a)). In addition, Stavenjord submits that the State Fund also handled large numbers of claimants in Broeker and other common fund cases. Therefore, the State Fund has the method, but it usually requires a small push by the courts. For instance, after some "encouragement" by this Court, the State Fund developed a method to find and pay benefits to Murer claimants. The State Fund began that process based on the Supreme Court rulings in Murer II (1994) and Murer III (1997). Therefore, the State Fund has been working on its method to identify and pay common fund claimants for approximately ten years. Now, the State Fund

submits to this Court several excuses (essentially the entire stipulation of facts) why those methods will not work. When this Court reviews all of those excuses, this Court should seriously question why anything is any different than it was in Murer. The State Fund undoubtedly expressed the same excuses then, and with the Court's oversight, those excuses were proven unnecessary. Surely, those excuses are no better now. The State Fund has had ten years to familiarize itself with common fund methods, so this Court should hold the State Fund responsible to use them to pay OD PPD to constitutionally deserving claimants.

In comparison to the 3,200 claimants in Murer, the State Fund estimates that there are 3,543 Stavenjord claimants (Stip. Facts # 26, 27, 28). In this regard, the State Fund's estimated number of claimants is disputed. Notably, NCCI, a non-profit rating and data management service (Stip. Fact #71), said that the State Fund had overestimated the number of Stavenjord claimants by approximately 46%. Specifically, NCCI estimated that only 54.1% of the State Fund estimate would be entitled to Stavenjord benefits (Stip. Fact, Exhibit C, at internal exhibit "VB"). Therefore, the State Fund was caught "crying wolf." This Court should disregard the excuse that the State Fund does not have the method to pay Stavenjord benefits.

(ii) The Money

Since the equity is clear that the State Fund should pay these deserving claimants the additional OD PPD benefit, as opposed to allowing the State Fund to keep this "unconstitutional" gain, this Court should examine what the State Fund did with its extra "unconstitutional" money. In the Joint Statement of Stipulated Facts, the State Fund confirmed that it gave the money away. Despite the fact that the Court entered its Stavenjord ruling in 2001, the State Fund nevertheless refunded $4,995,259.00 to policyholders in 2001. In 2002, the State Fund refunded $4,001,224.00 to policyholders. In 2003, the State Fund refunded $2,949,597.00 to policyholders. (Stip. Fact #77). Therefore, after this Court "gave notice" of this claim to the State Fund by its decision in 2001, the State Fund nevertheless gave away/refunded $11,946,080.00. The Court should note that this amount is very close to the State Fund's lower estimate of the total potential Stavenjord exposure (See, Stip. Fact #73).

The State Fund's disregard of deserving claimants is even more revealing when this Court reviews how immense sums were relinquished by the State Fund to the State's General Fund during the last two years. Despite the fact that this Court entered its Stavenjord ruling in 2001, the Legislature received $26,300,000.00 from the State Fund in 2002 and 2003. In fact, most of this money, $22,300,000.00, was given to the Legislature after the Supreme Court decided Stavenjord. (See, Stip. Fact Exhibit "F," and House Bill 363). As to the question of equity and retroactive application, this Court should question the equity of whether a small portion of this refunded/extra insurance money (which totaled $37,246,080.00) should go to

deserving claimants or whether it is more equitable to spend it all on refunds and general funds. Obviously, the refunded/extra insurance money, totaling $37,246,080.00, would easily cover all potential Stavenjord and Schmill benefits - with millions to spare. (Stip. Facts # 73 & 74; however, please note that both NCCI and the Employment Relations Division contend that the State Fund estimates are much too high. See, Exhibit "C" internal exhibit "V-A, and "Exhibit "H")

Furthermore, The State Fund did not substantially raise its premiums to prepare to pay these benefits. For instance, in 2001, the year of this Court's Stavenjord ruling, the State Fund did not increase premiums (0%) (Stip. Fact #78). In 2002, the State Fund only increased premiums by 2.7%, and in 2003, the State Fund only increased premiums by 2.8% (Stip. Fact #78). There will be no argument that the State Fund was unable to raise premiums, because the State Fund stipulates that Montana's workers' compensation costs are currently 33% lower than they were in 1995" (Stip. Fact #88).

Finally, this Court should note that at the end of 2003, after the refunded/extra insurance money ($37,246,080.00) was spent, the State Fund still had a surplus of $121,600,000.00 (Stip. Fact #79). This is clearly enough money to pay Stavenjord and Schmill benefits, and it will leave adequate reserves for the State Fund to pay other obligations.

In the study commissioned by the Employment Relations Division, alluded to above, an independent auditing firm concluded that the Stavenjord decision would increase premium rates by 4/10ths of 1 percent (Stip. Fact Ex. "H"). In addition, NCCI estimated that the effect of Stavenjord decision would only be "moderate" (Stip. Fact, Ex. "C," internal exhibit "V-A").

Therefore, even if this Court does apply the Chevron Oil three-factor test, this Court should follow the general well-principled rule that Stavenjord must be retroactively applied.

B. ISSUE TWO: DID STAVENJORD CREATE A COMMON FUND? IF SO, WHAT CLAIMANTS ARE INCLUDED?

1. The Stavenjord Claimants - "Generally."

As a result of the Montana Supreme Court's decision, Stavenjord submits that a common benefit was created, increased, and/or preserved for all OD PPD Claimants with dates of disease onset between July 1, 1987 and the date of this Court's decision on May 22, 2001. This class of common fund claimants includes all workers that suffered work-related disease that sustained either wage loss or impairment. In other words, all similarly situated claimants.

As with PPD under the Workers' Compensation Act, claimants entitled to additional Stavenjord OD PPD have a vested right that accrued at maximum medical improvement, despite subsequent injury or death. Stavenjord submits that this "accrued entitlement" is assured by Breen v. Industrial Accident Board, (1968) 150 Mont. 463, 436 P.2d 701. In Breen, the Montana Supreme Court held:

> "If an employee is receiving compensation as a result of an industrial injury and subsequently dies from causes other than this injury, liability for further compensation by way of death benefits or continuing disability benefits is cut off . . . but we do not construe this statute as terminating liability for compensation accrued prior to death but unpaid at the time of death."

Breen, 150 Mont. at 475, 463, 436 P.2d at 707. The Breen Court further stated:

> "Compensation is payable even after death because the benefits have accrued prior to death but were unpaid."

Breen, 150 Mont. at 475, 463, 436 P.2d at 707.

Stavenjord submits that Breen is still controlling law, which is evidenced by the fact that Breen was referenced favorably in Monroy v. Cenex, (1990) 246 Mont. 365, 805 P.2d 1343. In Monroy, benefits were terminated for a claimant who died of excessive alcohol consumption, but the Court nevertheless confirmed the Breen exception for "compensation accrued prior to the death, but unpaid at the time of the death." Monroy, 246 Mont. at 371, 805 P.2d at 1346.

Finally, Stavenjord contends that any settled OD PPD case should be examined for the potential that it may be reopened under the recognized legal principles of misrepresentation, ambiguity, or mutual mistake.

2. Stavenjord Did Create A Common Fund.

In accord with Murer v. State Compensation Mutual Ins. Fund, 238 Mont. 210, 942 P.2d 69 (1997) (Murer III), Stavenjord asks this Court to apply the common fund doctrine. Stavenjord submits that the application of the common fund doctrine is the most expeditious and equitable method available to deliver additional OD PPD benefits to all similarly situated claimants.

In Murer, several claimants initiated litigation seeking a higher workers' compensation benefit rate. Instead of allowing a class action proceeding, the Court held that a common fund theory was more appropriate. In this regard, the Court employed a doctrine that had been used in "several cases" in Montana "since 1933."

See, Means v. Montana Power Co. (1981) 191 Mont. 395, 625 P.2d 32. Therefore, the Murer Court denied class certification and applied the common fund doctrine. The common fund theory was obviously affirmed on appeal. Murer III, 942 P.2d at 72. It is important to note that in this respect the Murer case was applied retroactively from July 1, 1987 through June 30, 1991 (Indeed, the State Fund stipulates that Murer was given retroactive effect at Stip. Fact # 65).

The ruling in Murer forced the State Fund to increase benefit payments to approximately 3,200 claimants who were not parties in the earlier litigation. Murer III, 942 P.2d at 72, (Stip. Fact # 65 (a)). In comparison, the State Fund estimates that there are 3,543 Stavenjord claimants (Stip. Facts # 26, 27, 28). However, the State Fund's estimated number of claimants is disputed, because NCCI estimated that only 54.1% of the State Fund estimate would be entitled to Stavenjord benefits (Stip. Fact, Exhibit C, at internal exhibit "VB").

After remand, the Murer claimants again moved for class certification, but that procedure was unnecessary, because this Court already had the inherent power to supervise the plan to contact and pay absent claimants. Thereafter, the State Fund paid $2,180,955.00 in Murer benefits and fees (Stip. Fact # 65 (b)). In the Murer common fund, the State Fund stipulates that it paid common fund attorney fees.

Generally, the common fund doctrine "authorizes the spread of fees among those individuals benefiting from the litigation which created the common fund." Mountain West Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, 308 Mont. 29, 38 P.3d 825. The common fund doctrine provides:

> 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.

Murer III, 283 Mont. at 222, 942 P.2d at 76.

To receive attorney fees under the common fund doctrine, a party must satisfy three elements: "First, a party (or multiple parties in the case of a consolidated case) must create, reserve, increase, or preserve a common fund. This party is typically referred to as the active beneficiary. Second, the active beneficiary must incur legal fees in establishing the common fund. Third, the common fund must benefit ascertainable, non-participating beneficiaries." Mountain West Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, 308 Mont. 29, 38 P.3d 825.

As reiterated by this Court in Ruhd, at ¶6, "[T]hree criteria must be met for an award of common fund attorney fees. Those criteria were most recently summarized in Flynn v. State Compensation Ins. Fund, ¶ 15, 2002 MT 279, 312 Mont. 410, 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."

Stavenjord easily meets the three elements of the common fund test. First, Stavenjord "created, increased, and/or preserved" a common benefit for other OD PPD Claimants. Stavenjord satisfies the first criteria, because she litigated and created the precedent that created the common fund; therefore, she was the active beneficiary. Second, Stavenjord incurred legal fees in establishing this common fund; thus, she satisfies the second requirement. Third, as in Murer, these common fund beneficiaries are readily ascertainable. Therefore, the workers' compensation insurers in the state of Montana can offer no substantive argument why the Murer common fund doctrine should not apply.

During its discussion about the attorney fee issue, the Murer III Court noted that as a result of its decision the insurer became obligated to increase benefits to a substantial number of otherwise uninvolved claimants. Murer III, 942 P.2d at 75. The Court said that those benefits would not have been created, increased, and/or preserved absent the Court's decision; or put another way, no such obligation by the insurer would have existed without the Murer decisions. Therefore, the Montana Supreme Court recognized that attorney fees were properly awarded based upon the common fund doctrine. In arriving at this result, the Montana Supreme Court again confirmed that the common fund doctrine was "deeply rooted in American jurisprudence." Murer III, 942 P.2d at 76.

After discussing the common fund doctrine, the Court recognized:

> Application of the common fund doctrine is especially appropriate in a case like this where the individual damage from an institutional wrong may not be sufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong. The alternative to the doctrine's application is simply for the wrong to go uncorrected.

Murer III, 942 P.2d at 76.

The Murer III Court continued:

> Based on these legal principles and authorities, we conclude that when a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bear a portion of the litigation costs, including reasonable attorney's fees. Accordingly, the party who creates the common fund is entitled, pursuant to the common fund doctrine, to reimbursement of his or her reasonable attorney's fees from that fund.

Murer III, 942 P.2d at 76.

The Montana Supreme Court held that absent claimants were required to contribute, in proportion to the benefits they actually received, to the costs of litigation, including reasonable attorney's fees. Murer III, 942 P.2d at 77. As stated above, the Montana Supreme Court subsequently followed Murer II & III in Rausch, Fisch & Frost v. State Fund, 311 Mont. 210, 54 P.3d 25 (2002); and, Flynn v. State Fund, supra.

As in Murer, Rausch, and Flynn, Stavenjord should be entitled to common fund attorney fees. Stavenjord engaged in complex and lengthy litigation that resulted in the development of a legal precedent. Her action directly benefited a substantial number of occupational disease claimants who neither were parties to, nor directly involved in, the Stavenjord litigation. See, Murer III, 283 Mont. at 223, 942 P.2d at 76. In addition, Stavenjord "established a vested right on behalf of the absent claimants to directly receive monetary payments of past due benefit underpayments." See, Murer III, 283 Mont. at 223, 942 P.2d at 76-77. These absent claimants will receive the benefit "even though they were not required to intervene, file suit, risk expense, or hire an attorney." Murer III, 283 Mont. at 223, 942 P.2d at 77. Since Stavenjord's active litigation created a common fund that directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries should be required to bear a portion of the litigation costs, including reimbursement of reasonable attorney fees from the fund. See, Murer III, 283 Mont. at 223, 942 P.2d at 76. This Court should find that the appellate decision in Stavenjord created a common fund and find that the Stavenjord attorneys are entitled to reasonable attorney fees.

C. ISSUE #3: IS THE STAVENJORD COMMON FUND LIMITED SOLELY TO STATE FUND CLAIMANTS, OR DOES IT EXTEND TO OTHER INSURANCE COMPANY CLAIMANTS?

The Stavenjord common fund should extend to all OD PPD Claimants, regardless of insurer, because the Stavenjord decision created a common benefit for those claimants. Policy reasons underlying the common fund doctrine strongly suggest that all claimants entitled to receive a common benefit should share in the cost of its creation. Conversely, it is inequitable to require one set of claimants (those of one named insurer) to pay the entire expense of creating the common fund.

Counsel for Stavenjord respectfully acknowledges that this Court addressed the issue of "global application" in the case of Ruhd v. Liberty Northwest Insurance, Corp., 2003 MTWCC 38, at ¶5. In Ruhd, the Court joined as Intervenors the attorneys for Rausch, after the Supreme Court remanded the Rausch issues of class status and common fund fees. See, Rausch et al., v. State Compensation Insurance Fund, 2002

MT 203, 311 Mont. 210, 54 P.3d 25. In Ruhd, this Court decided that similarly situated claimants, other than those insured by the State Fund, were not part of the Rausch common fund. Thus, the Court decided against "global application."

The appellate decision in Rausch involved the issue of whether insurers should immediately pay impairment awards to PTD claimants under the 1991 and 1997 versions of the Montana Workers' Compensation Act. This Court originally determined that no impairment award existed for any PTD claimant. Rausch appealed, and on September 5, 2002, the Montana Supreme Court reversed. The Supreme Court held that PTD claimants are entitled to the immediate payment of impairment awards upon receipt of an undisputed medical rating. Counsel for Rausch sought global common fund fees from all claimants benefited by the appellate decision in Rausch. To protect this potential global attorney fee lien, this Court notified all Montana workers' compensation insurers and self-insurers of the Rausch attorney fee lien. See, Notice of Claim of Attorney Lien (dated January 23, 2003).

Counsel for Rausch argued that the Rausch appellate holding applied to all claimants regardless of the name of the insurer. However, this Court expressed concern about its jurisdiction over nonparticipating insurers:

> There is no way to identify which other insurers and self-insureds owe impairment awards to PTD claimants short of their volunteering the information, being made parties to pending or new litigation, or the Court issuing subpoenas to compel the information.

Ruhd, 2003 MTWCC ¶7.

In response, counsel for Rausch argued that the common fund was akin to "property," over which this Court would have in rem jurisdiction regardless of whether the insurer was a party.

There was no debate that Rausch was the controlling precedent that created the common benefit at issue. Nevertheless, this Court determined that the Rausch attorneys were only entitled to common fund fees from State Fund claimants. See, Ruhd, Order dated May 30, 2003. This Court also determined that the attorney representing Ruhd was entitled to common fund fees from Liberty Northwest claimants. Unfortunately, in so holding, this Court created three separate classes of claimants, and each class had a different common fund fee obligation. From the decision limiting the common fund to only one insurer, it is notable that the State Fund appealed. Oral argument in Rausch and Ruhd will be held at the Montana Supreme Court on March 24, 2004.

The State Fund appealed this Court's holding, because State Fund claimants would be required to pay all of the Rausch common fund fees. In this respect, the

decision penalized State Fund claimants with a disproportionate fee. The State Fund was also concerned that, as the largest insurer in Montana, it would become a target for common fund/class action litigation. The rationale behind this concern is that attorneys will attack the state's largest insurer if they will only be entitled to recover common fund fees from the named insurer. Thus, the State Fund was concerned that the Ruhd ruling favored smaller insurers, which would affect the State Fund's ability to compete for business. These concerns are well founded if this Court does not revise its "named party only" holding.

This Court's "named party only" holding is problematic in other fundamental ways. Rausch created the common benefit, and there was no dispute that the Montana Supreme Court awarded common fund attorney fees. Rausch 2002 MT ¶ 48. Therefore, the Rausch precedent benefited all claimants in Montana regardless of the name of the insurance carrier. In fact, the record in Ruhd demonstrates that counsel for Liberty Northwest conceded Rausch benefits to Mr. Ruhd solely because of the Rausch decision. Therefore, counsel for Rausch justifiably maintained that those claimants should share in the cost of the litigation that created their benefit. Rausch counsel argued that basic fairness dictated that all claimants benefited by Rausch should, regardless of insurer, pay an equal share. Echoing the concerns of the State Fund, counsel for Rausch argued that it was inequitable to require only State Fund claimants to pay for the creation of the common benefit. Such a holding allows claimants covered by other insurers to receive benefits without paying a fair share.

Rausch counsel argued that the common fund was created from a statutory construction of law; therefore, it was by nature more akin to a property right. As such, counsel argued that this Court had in rem jurisdiction regardless of the name of the insurance company that held the common fund property. In this regard, it is not the insurers that pay Rausch attorney fees; rather, fees are paid from common fund property.

The central question presented was whether payments made to ascertainable beneficiaries, other than those insured by the State Fund, were part of the Rausch common fund. In this regard, Stavenjord submits that the appellate decision in Rausch did not limit its application to only those injured workers insured by the State Fund. In fact, to limit the global application would be inequitable, and as argued by counsel, it may create a temptation for other attorneys to "piggy-back." Counsel for Rausch justifiably asked, "What common fund did any other attorney create?"

This Court concluded that Rausch and the common fund it created, only applied to claimants entitled to benefits payable by the State Fund. The Court relied on that portion of the Rausch appellate opinion, which indicated that a common fund was created by an ascertainable class of workers denied payment by the State Fund. Ruhd, 2003 MTWCC ¶7. However, this Court did not address the global breadth of the issues as framed by the Montana Supreme Court. In Rausch, the appellate

decision broadly addressed the rights of all claimants - not just those within the State Fund. The four issues before the Supreme Court in Rausch are paraphrased below:

> 1. Did the Workers' Compensation Court err when it concluded that permanently totally disabled workers are not entitled to receive impairment awards?
> 2. Is an impairment award due to a permanently totally disabled claimant upon the receipt of his or her undisputed impairment rating or upon retirement?
> 3. Should an impairment to a permanently totally disabled claimant be characterized as a total or partial disability benefit?
> 4. Are claimants' attorneys entitled to attorney fees pursuant to the common fund doctrine?

Rausch, 2002 MT ¶¶ 3 - 6. As written, there is no indication in this list of issues that the Montana Supreme Court intended to limit the Rausch decision to State Fund claimants only. Obviously, this legal interpretation affected all potential claimants, insurers, and employers. Therefore, this Court already bound (and has asserted jurisdiction over) the nonparticipating insurers in Montana. The construction of a statute applies equally to all claimants affected. There could not be one set of judicial rulings that apply to the State Fund, and another set that apply to other insurers.

Irrespective of the name of the insurer, all applicable claimants throughout Montana benefited from the Rausch case. The central holding in the appellate decision was the conclusion that all PTD claimants (not just those insured by the State Fund) are entitled to immediate impairment awards. The express language in the Rausch holding verifies this point:

> [W]e conclude, therefore, that permanently totally disabled claimants are legally entitled to an impairment award for the loss of physical function to their body occasioned by a work-related injury pursuant to the recognition of such awards in Montana Code Annotated sections 39-71-710 and 39-71-737.

Rausch, 2002 MT ¶ 30.

Moreover, the Supreme Court made several other statements that made it clear that its Rausch ruling applied to all PTD claimants. For instance, the Court stated, "[A]n impairment award is due to a permanently totally disabled claimant upon receipt of his or her undisputed impairment rating." Rausch, 2002 MT ¶ 34. Additionally, as to how the impairment award should be characterized, the Supreme Court applied its holding to all PTD claimants: "The most logical approach is to characterize the impairment award consistently with the claimant's disability status . . ." Rausch, 2002 MT ¶ 41. Finally, in relation to the requested common fund fees, the Supreme Court recognized: "[T]he attorneys representing [Rausch] all

engaged in active litigation which preserved the benefit of immediate impairment awards to permanently totally disabled claimants." Rausch, 2002 MT ¶ 48. In none of these express statements did the Supreme Court confine its Rausch holding merely to State Fund claimants. Rather, the holding expressly applied to all similarly situated claimants. In the Court's review of the question about whether Rausch applied to all claimants, regardless of insurer, this Court stated:

> My decision concerning common fund fees should not be read as relieving other insurers or self-insureds from their obligation to pay impairment awards to PTD workers. The Rausch decision is a binding precedent on all insurers. It holds unequivocally that all insurers are required by law to pay the impairment awards as issue in that case. Failure to do so may potentially subject non-complying insurers to penalties and additional attorney fees.

Ruhd, 2003 MTWCC 38 ¶ 23 (5/30/03).

A review of common fund doctrine principles compels the conclusion that the common fund extends beyond the State Fund. First, the Rausch decision created a precedent inuring to the benefit of all Montana PTD claimants irrespective of whether they were insured by the State Fund. This is important, because the common fund doctrine applies at its essence to those funds created which are "common" between the active beneficiary (Rausch and Stavenjord) and the non-participating beneficiaries (other PTD claimants and OD PPD claimants). The doctrine requires attorney fees to be assessed equally against all beneficiaries (active and nonparticipating).

Nonparticipating beneficiaries, by definition, do not create a new precedent. Rather, nonparticipating beneficiaries merely request the same benefit. Under common fund principles recognized by the Montana Supreme Court in Murer, Mountain West, and Flynn, one of the essential elements of the common fund is that it inures to the attorneys who successfully created the benefit for a larger group than just the named plaintiff:

> Generally, the common fund doctrine authorizes assigning responsibility for fees among those individuals who benefit from the litigation which created the common fund. (Citations omitted). The doctrine entitles the party who created the fund to reimbursement of his or her reasonable attorney fees from the common fund."

Flynn, 2002 MT ¶ 15, (citing Murer, 283 Mont. at 223, 942 P.2d at 76); Mountain West Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, ¶ ¶ 15-18, 308 Mont. 29, 38 P.3d 825.

The fundamental concept in common fund jurisprudence is that attorneys' fees should be collected from the fund as a whole. In this way, courts prevent inequity "by assessing attorney's fees against the entire fund, thus spreading fees proportionally among those benefited by the suit." Boeing Co. v. Van Gemert, et al., 444 U.S. 472, 479, 100 S.Ct. 745, 749 (1980) (citing Mills v. Electric Auto-Lite Co., 396 U.S. 375, 394, 90 S.Ct. 616, 626 (1970)). Unfortunately, in Rausch, this Court stopped short of full equity by only assessing fees against one segment of the common fund.

Admittedly, this Court determined that the Rausch attorneys did not satisfy all three criteria under the common fund doctrine. These three requirements require:

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;
3) The common fund must benefit ascertainable, non-participating beneficiaries.

See, Flynn, 2002 MT ¶ 15. In analyzing these elements in Ruhd, this Court found that counsel for Rausch only met the three criteria as to the State Fund. The court noted that claimants covered by other insurers and self-insureds were "different." Ruhd 2003 MTWCC ¶ 7. As argued above, however, Stavenjord submits that claimants covered by other insurers are no different from State Fund claimants.

Stavenjord understands this Court's jurisdictional concern that other insurers and self-insureds are nonparties. The Court was apparently troubled because of what it perceived as a lack of jurisdiction. Obviously, if there is a lack of jurisdiction, that would be a substantial hurdle to overcome on the way to identify applicable common fund claims administered by non-party insurers and self-insureds. All practitioners in Montana hope that this problem does not suggest that this Court must have hundreds of joined defendant/insurers in order to grant common fund relief.

Stavenjord submits that it is not the named insurer that makes the difference. Rather, it is the claim, not the defendant, that creates the common fund. Stavenjord proposes that this Court has jurisdiction over these defendants, because of the property in their possession. This is the essence of in rem jurisdiction. Under this principle, access to the property is assured by the Notice and Lien sent to each insurer and self-insured.

The foundation for jurisdiction in a common fund case is not the party defendant; rather, it is the combined benefits of all claims that create the fund. As such, this Court has jurisdiction that allows it to equitably order all claims to share in the common cost of the fund. As further evidence that the Stavenjord common fund is created by a combination of claim benefits, Stavenjord reminds the Court that insurers do not pay common fund fees. Instead, fee payments come from the fund created. In Flynn, this Court recognized that fact: "I further note that the attorney fees requested in this case are not against the insurer but rather against benefitted claimants." Flynn

2003 MT WCC ¶ 9. The common fund is therefore property that belongs to each affected claimant regardless of the name of the insurer that administers that benefit.

As it did in Rausch, this Court posted an order in Stavenjord that notified all Plan II Workers' compensation insurers and Plan I self-insurers of the Stavenjord common fund attorney fee lien. By such Notice, this Court exerted jurisdiction over the common fund property pursuant to this Court's inherent power under the common fund doctrine. By this same power, this Court had the authority to authorize all insurers to withhold Stavenjord attorney fees. The purpose of the lien notice is to preserve the right to attorney fees should other claimants become entitled to additional benefits. See, Broeker v. State Fund, 2002 MTWCC 25 (May 3, 2003).

Although the Stavenjord notice of lien was not as comprehensive as the notice provided in Rausch, the Rausch notice procedure could easily be followed in the instant case. Such notice would, in effect, join all insurers and self-insureds for the minimal purpose of identifying and distributing common fund property. As argued above, those benefits are more akin to property, and by such notice, this Court would acquire quasi in rem jurisdiction over the property no matter where the property is found. See, First v. State of Montana Dept. of Social and Rehabilitation Svcs., (1991) 247 Mont. 465, 468, 808 P.2d 467, 474 (unemployment insurance benefits subject to seizure notwithstanding presence of defendant out of state); see also, Consumers United Ins. Co. v. Syverson, (1987) 227 Mont. 188, 190, 738 P.2d 110, 112.

It is not necessary to join all Montana insurers as named defendants, because in rem proceedings do not bind parties. Rather, in rem proceedings adjudicate the property in question. The court has jurisdiction over the enforcement and administration of that property much like a constructive trust. Gassert v. Strong, (1908) 38 Mont. 18, ___, 98 P. 497, 501. In such cases "all the world is charged with notice." In re Baxter's Estate, Clifford v. Davis, (1934) 98 Mont. 291, 39 P.2d 186, 191. The central point is that jurisdiction over the property is not asserted against the parties holding the property. In this respect, it is immaterial that Stavenjord did not formally join every known Montana insurer. Each insurer is bound to respect the jurisdiction of the Court after this Court provides notice. With notice, this Court resolves its jurisdictional concern about nonparticipating insurers.

With notice, the Court could easily allow the named insurer, as well as other insurers, to receive "due process right now by defending against the common fund claim. It has been given both notice of the claim and an opportunity to be heard, the very things it claims it is being denied." Flynn 2003 MTWCC ¶ 19. This procedure would not, as feared, result in a flood of 600 insurance companies clamoring to offer new defenses (How can there be many more?); therefore, the concern that this Court expressed in Ruhd, should be reconsidered. See, Ruhd 2003 MTWCC ¶ 19. Jurisdiction is over the property, so those insurers that contend that they are entitled to keep that property must, after notice, come to the Court to prove their case.

Stavenjord interpreted a statute that affected Montana's occupational disease PPD benefit scheme. This legal interpretation affected all potential claimants, insurers, and employers. Therefore, this Court already bound (and has asserted jurisdiction over) all nonparticipating insurers in Montana. The judicial construction of this statute applies equally to all claimants and insurers affected. Obviously, there is not one set of laws that apply to the State Fund, and another set of laws that apply to other insurers. This ruling binds all workers' compensation insurers, and to hold otherwise would probably be unconstitutional. This Court should not hold one sub-set of claimants responsible for all of the costs of the common fund.

If this Court's holding in Ruhd/Rausch is applied to Stavenjord, it would create two disparate classes of Stavenjord claimants: (1) Those claimants who obtain benefits from the State Fund (after paying a common fund fee); and (2) Those claimants who obtain benefits based on Stavenjord from other insurers (without paying a fair share of the common fund fee). The first class of claimants receives a lower benefit, because it must pay fees. The second class of claimants receives a higher benefit, because it does not pay fees. Inequity between these classes defies the underlying principle of the common fund doctrine. Furthermore, such disparate benefit entitlement would invoke equal protection questions, because like people under like circumstances should be treated equally. To require the State Fund claimants to pay the entire Stavenjord common fund fee, while allowing other similarly situated claimants to receive benefit without fee, does not amount to equal treatment.

Stavenjord requests a uniform application of the common fund to all eligible claimants, irrespective of the name of their insurance carrier. This result promotes equity, allows the Court to administer payment within one case, and it lessens the temptation for endless "piggy-back" litigation. To hold otherwise is inconsistent with controlling law. Stavenjord asks this Court to find that common fund attorneys' fees should be paid by all applicable claimants benefited.

D. ISSUE #4: DOES THE FAILURE TO REQUEST COMMON FUND FEES IN PRE-REMAND PROCEEDINGS BAR STAVENJORD FROM REQUESTING COMMON FUND FEES?

This Court previously ruled that the failure to request common fund fees in pre-remand proceedings does not bar a request for common fund fees after the successful appellate decision. In Flynn v. State Fund, 2003 MTWCC 55, this Court addressed this exact issue, and stated:

> [C]laimant's request for common fund fees with respect to benefitted claimants is not barred by his failure to make the request at an earlier stage of these proceedings."

Flynn 2003 MTWCC ¶ 14.

In Flynn, as here, there is "no question that prior to remand from the Supreme Court the claimant did not plead" common fund fees. Flynn 2003 MTWCC ¶ 9. Nevertheless, this Court found, "the Supreme Court has held that attorney fees do not always need to be asserted in the pleadings or the pretrial order and may be raised after the merits of the case have been determined." Flynn 2003 MTWCC ¶ 9. More importantly, this Court recognized that it is essentially impossible to request common fund fees at the inception of a case like Flynn or Stavenjord, because the claimant must first establish the legal precedent:

> Entitlement to fees from the benefitted claimants arose only after the claimant in this case successfully litigated his claim and established a precedent.

Flynn 2003 MTWCC ¶ 9.

This Court noted that its "[normal] rule regarding the pleading of attorney fees is aimed at providing notice where the claimant seeks imposition of attorney fees against an insurer pursuant to section 39-71-611 or -612, MCA." Flynn 2003 MTWCC ¶ 9. However, this Court quickly noted, "The rule was not calculated to cover common fund fees." Flynn 2003 MTWCC ¶ 9.

This Court explained that its rule for regular cases differs from its rule for common fund fee cases:

> Unlike fees awarded under section 39-71-611 or 39-71-612, MCA the fees requested in this case do not require proof of unreasonableness on the part of the insurer or any other factual basis for the fee. Like a statutory entitlement, common fund fees are a legal consequence of claimant prevailing in the original action and thereby benefitting other claimants. As in Estate of Lande, inclusion of the request for attorney fees in the petition would not have simplified trial issues or enhanced trial preparation.

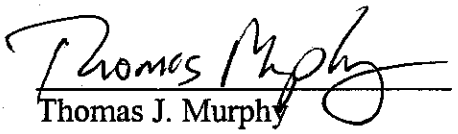
Flynn 2003 MTWCC ¶ 13; citing, In re Estate of Lande, 1999 MT 179, 295 Mont. 277, 983 P.2d 316.

Based on this Court's reasoning in Flynn, and other relevant cases, Stavenjord submits that her failure to request common fund fees in pre-remand proceedings does not bar a request for common fund fees after her case was affirmed by the Supreme Court.

IV. CONCLUSION

For the reasons stated above, Stavenjord asks this Court to apply the appellate decision in Stavenjord retroactively; to find that Stavenjord did create a common fund, which, irrespective of insurer, includes all eligible Occupational Disease PPD Claimants; and finally, to allow counsel to recover common fund fees for this litigation.

DATED this 5th day of March 2004.



Thomas J. Murphy
Attorney for Stavenjord

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of March 2004, a true and correct copy of the foregoing STAVENJORD'S OPENING BRIEF ON POST-REMAND ISSUES was served upon the attorneys for the Respondent via first class mail to the addresses listed below:

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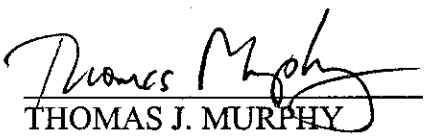

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