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

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF KALISPELL
BEFORE THE WORKERS' COMPENSATION JUDGE

ROBERT FLYNN, Petitioner, vs. STATE COMPENSATION INS. FUND, Respondent.	WCC NO. 2000-0222 AMICUS CURIAE BRIEF OF LAURIE WALLACE

COMES NOW the undersigned, Laurie Wallace, and pursuant to the Court's invitation to file Amicus Briefs in the above-entitlement matter, hereby submits the following brief for the Court's consideration.

ARGUMENT

In its Order dated June 10, 2003, the Court states two issues for consideration:

(1) Does the failure to request common fund attorney fees or class certification in the pre-remand proceedings bar post-remand request for common fund or class certification?

(2) Is the Supreme Court decision in *Flynn* retroactive?

The undersigned is not familiar with the facts of the *Flynn* case and thus will not attempt to answer the foregoing questions in light of those facts. It is the understanding of the undersigned, however, that the Court hopes to employ whatever legal analysis is used to resolve the *Flynn* issues in the other common fund cases. As such, the following brief attempts to provide the Court with pertinent legal arguments, but applies those legal arguments to the facts in *Schmill*.

1. Common Fund Attorney Fees

The State Fund has argued in this case that there should be no entitlement to common fund fees because (1) common fund fees were not requested in the Petition for Hearing or at any time prior to the Supreme Court decision, therefore, the defendant did not have notice of the potential creation of a common fund; (2) the claimant's failure to plead an entitlement to common fund fees creates an estoppel, barring all post-remand requests for common fund fees; and (3) the claim is barred by res judicata. The State Fund's arguments are without merit for the following reasons.

In the case of *Mountain West Farm Bureau Mutual Ins. Co. v. Brewer,* 315 Mont. 231, _____ P.3d _____ (2003), the plaintiff filed a declaratory judgment action seeking to establish insurance coverage under a Mountain West policy. The plaintiffs filed a motion for summary judgment on the coverage issue and the lower court entered summary judgment in favor of the insurer. The plaintiffs appealed. The summary judgment was reversed on appeal and thereafter the plaintiffs filed a motion seeking attorney fees. The insurer rejected the demand for fees stating that since the plaintiffs had not specifically asked for fees as part of their motion for summary judgment, they had waived their right to seek them. The insurer based its waiver defense on the argument that it did not have notice of the attorney fee claim and, therefore, did not have an opportunity to defend against the claim. The lower court agreed with the defendant and denied the plaintiffs' motion for fees and the case was appealed a second time.

The Supreme Court rejected the insurer's waiver defense finding both notice and an opportunity to defend. The Court reasoned as follows:

> Here, Mountain West had notice of the Christensens' desire to seek attorney fees as they specifically prayed for such relief in their initial Petition for Declaratory Relief. Like the defendant in *Kunst* (opportunity to

> defend against claim at oral argument on attorney fee motion), Mountain West had an opportunity to defend against the request for attorney fees, which it successfully did in the District Court. Finally, the Christensens have not prevailed until we remanded the matter to the District Court. Thus, waiting to file a motion for attorney fees until prevailing on appeal was proper. For these reasons, we conclude that the Christensens did not waive their entitlement to attorney fees. *Mountain West Farm Bureau,* 315 Mont. at 235.

In the *Schmill* case, a request for attorney fees was made in the Petition for Hearing. The fact that the request was not for common fund attorney fees is not relevant. There are no facts in the *Schmill* case which establish that the insurer would have defended the underlying claim any differently had there been a claim for common fund attorney fees. The issue in *Schmill* was the constitutionality of a statue. Nothing in the argument surrounding that issue turned on whether or not Claimant's counsel would seek common fund attorney fees if successful on appeal. Therefore, regardless of the breath of the attorney fee claim, the fact remains that an attorney fee claim was made in the Petition for Hearing, consistent with the facts of *Mountain West*. In light of such facts, neither estoppel, nor res judicata would apply.

On the issue of notice and opportunity to be heard, the Supreme Court found in *Mountain West* that the defendant's rights in that regard were satisfied when the Court held a hearing on the plaintiffs' motion for attorney fees. The defendants in the common fund cases are certainly getting plenty of opportunity to defend against the attorney fee claims and thus have no basis to claim lack of notice.

Moreover, it would not appear that a notice argument is a valid defense in this case. Unlike *Mountain West*, where the plaintiff was asking the Court to order the insurance company to pay attorney fees from the insurer directly, the plaintiffs in the common fund cases are asking that attorney fees be paid from the claimants' benefits which comprise the common fund. While the insurer has to do some administrative work in order to issue payment of the claimed attorney fees, the fees, themselves, are not coming directly from the insurer's assets, but from other claimants' benefits. Under such circumstances, the insurer has no right to claim lack of notice.

The definition of the common fund doctrine itself, further supports the foregoing arguments. The common fund doctrine provides:

> "[W]hen 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." [Emphasis added.] *Murer v. State Com. Mut'l Ins. Fund,* 283 Mont. 210, 222, 942 P.2d 69, 76 (1997).

According to the foregoing definition, payment of attorney fees from the proceeds of a common fund is in the nature of a "reimbursement," not a "claim." The attorney fee reimbursement arises (1) when a party with an interest in the common fund (2) incurs legal fees in order to establish the fund. *Mountain West Farm Bureau Mut'l Ins. Co. v. Hall,* 308 Mont. 29, _____, 38 P.3d 825, _____ (2001). Therefore, since a common fund attorney fee reimbursement does not arise until after the fund is created, there can be no requirement to request such fees in advance. That would be the equivalent of making a demand for settlement before the claim was even filed. The law does not require frivolous acts. *Lindey's v. Professional Consultants,* 244 Mont. 238, 242, 797 P.2d 920, 923 (1990).

Lastly, there can be no dispute that common funds were created in each of the cases before the Court. With regard to *Schmill*, each claimant whose benefits were reduced pursuant to the apportionment statute will now be entitled to receive those unpaid benefits. The payment of such benefits creates a common fund "which directly benefits an ascertainable class of nonparticipating beneficiaries." *Murer,* 283 Mont. at 223, 942 P.2d at 76.

For the foregoing reasons, the Court should find that the timing of the request for common fund fees does not bar the validity of the request. If the criteria are met, the right to attorney fee reimbursement arises as a matter of law. The undersigned would ask the Court to so rule.

II. Retroactivity

There is nothing in the arguments advanced by the defendants which should persuade the Court not to apply the holdings in the common fund cases retroactively. First, there can be no real dispute that the law in Montana requires retroactive application of judicial decisions. In 1993, the U.S. Supreme Court adopted a blanket rule that all judicial decisions were to be given retroactive affect. *Harper v. Virginia Dept. of Tax'n,* 509 US 86, 113 S.Ct. 2510, 125 L. Ed. 2nd 74 (1993). Following

immediately in the shadow of that decision came four rulings from the Montana Supreme Court which employed the blanket rule and gave full retroactive affect to the judicial decisions in question. *Kleinhesselink v. Chevron USA,* 277 Mont. 158, 920 P.2d 108 (1996); *Porter v. Galarneau,* 275 Mont. 174, 911 P.2d 1143 (1996); *Lacock v. 4B's Restaurants, Inc.,* 277 Mont. 17, 22, 919 P.2d 373, 376 (1996); *Haugen v. Blaine Bank of Montana,* 279 Mont. 1, 8, 926 P.2d 1364, 1368 (1996).

While acknowledging this case law, the defendants argue that Montana has reverted back to the old retroactivity test by directing the Court's attention to two cases decided in 1998 and 2000. *See, Seubert v. Seubert,* 301 Mont. 399, 13 P.3d 365 (2000); *Benson v. Heritage Inn, Inc.,* 292 Mont. 268, 971 P.2d 1227 (1998). It is true that both cases used the old retroactivity test, however, it is also true that they did so without any discussion or recognition of the four cases between 1993 and 1996 which adopted the new rule. This fact makes those decisions suspect.

When the Montana Supreme Court overrules a prior decision, it does so cautiously and with a full explanation. This is so because of the rule of stare decisis, "which means to abide by or adhere to decided cases." The rule exists to preserve "stability, predictability, and equal treatment." *Sleath v. West Mont Home Health Ser., Inc.,* 304 Mont. 1, 19, 16 P.3d 1042, 1053 (2000); *Haugen,* 926 P.2d at 1368. "The doctrine is meant to keep courts from lightly overruling past decisions, in order to heed the necessity for stability and predictability in the law." *Sleath,* 304 Mont. at 19, 16 P.3d at 1053.

Neither of the recent cases which employed the old retroactivity test acknowledged that conflicting case law existed, let alone explained the departure from the recently established precedent of giving full retroactivity to judicial decisions. As such, these decisions must be rejected as inconsistent with Montana law and thus inapplicable to the present common fund fee cases.

Even if the Court feels compelled to judge each of the common fund cases by the old retroactivity test (hereafter *"Chevron Oil"*), the decision in *Schmill* should be applied retroactively. The retroactivity factors set out in *Chevron Oil* are as follows:

> 1. Whether the ruling to be applied retroactively 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 rule's operation; and

3. Whether retroactive application will result in a substantial inequity. *Benson,* ¶24 (quoting *Riley v. Warm Springs State Hosp.,* 229 Mont. 518, 748 P.2d 455, 457 (1987).)

Considering the first factor, it is undisputed that *Schmill* did not establish a new principle of law by overruling precedent or deciding an issue of first impression whose result was not clearly foreshadowed. The holding in *Schmill* was that the apportionment statute contained at section 39-72-706, MCA, was unconstitutional on equal protection grounds. In *Henry v. State Compensation Ins. Fund,* 294 Mont. 449, 982 P.2d 456 (1999), the Montana Supreme Court struck down a portion of the Workers' Compensation Act as unconstitutional on the same equal protection grounds. The issue in *Henry* was whether occupationally diseased workers could be denied rehabilitation benefits solely on the basis that their condition was classified as an occupational disease as opposed to an industrial injury. The Supreme Court found that such disparate treatment was unconstitutional based upon the Legislature's revised definition of industrial injury in the 1987 Workers' Compensation Act. The Court went onto use the same reasoning in *Stavenjord v. Montana State Fund,* 2003 MT. 67, when it held that occupational disease claimants were entitled to settlement benefits under the industrial injury provisions of the Workers' Compensation Act. Both of these cases foreshadowed the *Schmill* decision and thus the first retroactivity factor set forth in *Chevron Oil* would be answered in the negative.

The second factor requires a determination of whether the retroactive application of the *Schmill* decision will further its operation. It is clear that it will. The affect of the *Schmill* decision is to treat injured workers and occupationally diseased workers the same when it comes to the calculation of their temporary total disability rates. In other words, the elimination of the apportionment will require insurers to pay occupational disease claimants the same TTD benefits as injury claimants. If the decision is applied retroactively, the same equalization of benefits will occur. What is important about the *Schmill* decision being applied retroactively is that there is no potential for a negative impact upon any claimant. Therefore, the retroactive application of the decision will further its operation.

The last factor asks whether a retroactive application will result in substantial inequity. As note above, retroactive application of the *Schmill* decision will not result in any persons or entities being adversely affected. On the other hand, a failure to apply the decision retroactively would result in substantial inequity. For example, a

pre-June 22, 2001, claimant assessed a 50% apportionment as a result of a pre-existing back condition which was aggravated by an occupational disease would receive $219.50 per week in TTD benefits, while a claimant who suffered a similar occupational disease on June 25, 2001, would receive $439.00 per week in TTD benefits. This difference in TTD rates would constitute a substantial inequity.

In terms of inequities to the insurer, the retroactive application of the decision would create little to no inequities. To remedy the apportionment the insurer simply needs to do a quick mathematical calculation. Since apportionment did not apply to medical benefits even before the decision in *Schmill,* and since there was no entitled to impairment benefits, rehabilitation benefits, or settlement benefits greater than $10,000.00, the only calculations needed to remedy past inequities would be the recalculation of the TTD rate, and the recalculation of the claimant's entitlement to the full $10,000.00 in settlement monies. The number of occupational disease claims which had been apportioned is not likely to be large considering the fact that there are substantially fewer occupational disease claims than industrial injury claims to begin with. Moreover, not all occupational disease claims involve apportionment. As such, there would be no inequity to the insurers were it determined that the *Schmill* decision should be applied retroactively.

CONCLUSION

Common fund attorney fees arise as a matter of law after a judicial decision is rendered if three requirements are met. Provided the claimant's attorney requested attorney fees in the original petition for hearing, there is no reason to deny an application for common fund attorney fees even if it is not made until after the case is remanded. Additionally, since Montana follows the federal rule that judicial decisions have retroactive affect, the Court should apply each of the common fund attorney fee cases retroactively. If the Court is going to apply the *Chevron Oil* test, the undersigned would argue that the decision in *Schmill* passes that test and should be applied retroactively.

DATED this 11 day of July, 2003.

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 11 day of July, 2003, I served a true and accurate copy of the AMICUS CURIAE BRIEF OF LAURIE WALLACE 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

Robin Stephens
Robin Stephens