IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 62

WCC No. 2000-0207

DEBRA STAVENJORD

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

DECISION ON COMMON FUND RETROACTIVITY

Appealed to Supreme Court 09/21/04
Reversed and Remanded at 2006 MT 257

Summary: The claimant urges that the decision in this case – *Stavenjord v. State Compensation Ins. Fund,* 2001 MTWCC 25, *aff'd,* 2003 MT 67, 314 Mont. 466, 67 P.3d 229 – applies retroactively and seeks common fund attorney fees.

Held: *Stavenjord v. State Compensation Ins. Fund,* 2001 MTWCC 25, *aff'd,* 2003 MT 67, 314 Mont. 466, 67 P.3d 229, is retroactive but only to June 3, 1999. A common fund exists with respect to claimants reaching maximum medical improvement after June 3, 1999, and the claimant is entitled to common fund attorney fees with respect to post-June 3, 1999 Stavenjord entitlements.

Topics:

Pleading: Attorney Fees. The claimant need not plead the request for common fund fees in the original petition.

Pleading: Class Action. A request for class certification must be made in the case-in-chief. A request made after the merits of the case are adjudicated is too late and will be refused.

Courts: Retroactivity of Decisions. The void *ab initio* doctrine does not make the decision in *Stavenjord v. State Compensation Ins. Fund,* 2001 MTWCC 25, *aff'd,* 2003 MT 67, 314 Mont. 466, 67 P.3d 229, retroactive. The statute declared unconstitutional in *Stavenjord is* unconstitutional only as applied, not on its face.

Courts: Retroactivity of Decisions. As recently determined in *Schmill v. Liberty Northwest Ins. Corp.,* 2004 MTWCC 47, Montana decisions concerning retroactivity of judicial decisions are in conflict; however, the latest decision available to the Workers' Compensation Court indicates that Montana follows the three-part test laid out in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), rather than the per se rule of *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993).

Courts: Retroactivity of Decisions. If any one of the three *Chevron* factors preponderates against retroactive application, a decision applies prospectively only. *Poppleton v. Rollins,* 226 Mont. 267, 271, 735 P.2d 286, 289 (1987).

Courts: Retroactivity of Decisions. The equity factor under *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), preponderates in favor of retroactive application of *Stavenjord v. State Compensation Ins. Fund,* 2001 MTWCC 25, *aff'd,* 2003 MT 67, 314 Mont. 466, 67 P.3d 229, back to June 3, 1999, which is the date on which *Henry v. State Compensation Ins. Fund,* 1999 MT 126, 294 Mont. 449, 982 P.2d 456 was decided. But in light of the failure of any claimant to prosecute a constitutional challenge to the 1987 occupational disease act for nearly a decade, and the administrative hardship and expense of going back seventeen years to recompute benefits due claimants, the factor preponderates against retroactive application prior to June 3, 1999. Accordingly, *Stavenjord* applies retroactively only to June 3, 1999.

Attorney Fees: Common Fund. A common fund is created where all of the following three factors are satisfied: (1) The decision in the case-in-chief must "create, reserve, increase, or preserve a common fund;" (2) the party bringing the action incurred legal fees in establishing the common fund; and (3) ascertainable, non-participating beneficiaries are benefitted.

Attorney Fees: Common Fund. For the common fund to apply, it is not enough that the claimant establishes a general principal of law applicable to other claimants; she must show that the litigation entitles similarly situated, identifiable claimants to specific monetary benefits.

Attorney Fees: Common Fund. A common fund is created where the precedent established in the case-in-chief entitles individual, identifiable claimants to additional benefits and the additional benefits can be calculated pursuant statutorily mandated formulas.

Attorney Fees: Common Fund. A common fund was created by *Stavenjord v. State Compensation Ins. Fund,* 2001 MTWCC 25, *aff'd,* 2003 MT 67, 314 Mont. 466, 67 P.3d 229, but only with respect to those claimants reaching maximum medical improvement after June 3, 1999 and who are entitled to additional benefits on account of the *Stavenjord* decision. Since claimant incurred legal fees in establishing that entitlement, her attorney is entitled to common fund attorney fees.

Attorney Fees: Common Fund. The common fund doctrine extends only to those claimants who are insured by the respondent in this case.

¶1 In my original decision in this case – *Stavenjord v. State Compensation Ins. Fund,* 2001 MTWCC 25 – I held that claimants suffering from occupational diseases after June 30, 1987, are entitled to the same permanent partial disability (PPD) benefits as workers under the Montana Workers' Compensation Act (WCA) **if** the latter benefits are more favorable than those available under section 39-72-405, MCA. The Supreme Court affirmed that decision in *Stavenjord v. State Compensation Ins. Fund,* 2003 MT 67, 314 Mont. 466, 67 P.3d 229, and remanded the matter for further proceedings.

¶2 Upon remand, the additional benefits due the claimant were paid. The only remaining issues involve a request for common fund attorney fees. Respondent, Montana State Fund (State Fund), opposes the request, urging that it is belated and that in any event there is no common fund because the *Stavenjord* decision is not retroactive. The issues have been more particularly framed as follows:

¶2a Does the failure of the claimant to request common fund fees or class certification in the pre-remand proceedings in this case bar her from now seeking common fund fees or requesting class status?

¶2b Does the prior decision in this case apply retroactively?

¶2c Did the prior decision in this case create a common fund and entitle claimant's attorney to common fund fees from benefitted claimants?

¶2d If there is a common fund, is it limited to claimants insured by the respondent insurer or does it extend to all claimants irrespective of which insurer is responsible for their benefits?

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I. Failure to Earlier Request Common Fund Fees or Class Certification

¶3 The State Fund urges that the claimant cannot seek common fund fees or class certification because she failed to request either prior to this Court's *Stavenjord* decision. I have previously held it unnecessary to plead the common fund doctrine in the main case, *Flynn v. State Compensation Ins. Fund,* 2003 MTWCC 55, and reaffirm that determination here. On the other hand, I recently found that a request for class action is untimely where made after the main action has been fully adjudicated and judgment entered. *Mathews v. Liberty Northwest Ins. Corp.,* 2004 MTWCC 55. I stand by that decision as well. I therefore conclude that *Stavenjord's* common fund request is timely but that any class action request is not.

II. Retroactivity

¶4 The retroactivity issue is tied to the claimant's request for common fund attorney fees. If *Stavenjord* is not retroactive, then claimants reaching maximum medical improvement prior to the date of the decision[1] are not entitled to any additional benefits and no common fund exists.

A. *Ab Initio* Argument

¶5 The claimant initially argues that *Stavenjord* is retroactive because section 39-72-405, MCA (1987–present), is void *ab initio*. Void *ab initio* means that the statute is "null from the very beginning." Black's Law Dictionary (5th Ed.) The rule has been applied to unconstitutional statutes.

¶6 The void *ab initio* rule regarding unconstitutional statutes is summarized in American Jurisprudence:

> [A]n unconstitutional statute, whether federal or state, though having the form and name of the 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

[1]Reaching maximum medical improvement is a prerequisite to a claim for permanent partial disability (PPD) benefits. Therefore, it is not a retroactive application to apply *Stavenjord* with respect to PPD claims that arise after the date of the original *Stavenjord* decision.

never been passed and never existed, that is, it is void *ab initio.*

16 Am. Jur. 2d, § 203(footnotes omitted). Montana decisions, *e.g.*, *Brockie v. Omo Construction, Inc.*, 268 Mont. 519, 525, 887 P.2d 167, 171 (1994); *Ex parte Anderson,* 125 Mont. 331, 238 P.2d 910 (1951); *Sadler v. Connolly*, 175 Mont. 484, 489, 575 P.2d 51, 54 (1978); *Trusty v. Consolidated Freightways,* 210 Mont. 148, 151-52, 681 P.2d 1085, 1087-88 (1984), have invoked and applied the rule.

¶7 The void *ab initio rule* applies to statutes which are unconstitutional on their face and which therefore have no effect whatsoever. For example, in *Ex parte Anderson,* the Supreme Court held that a criminal statute, unconstitutional on its face, was "void, and is as no law," thus it created no crime. 125 Mont. at 336-37, 238 P.2d at 913. In *Sadler*, the Court held that a freeholder eligibility requirement for city office was facially unconstitutional and therefore void. In *Trusty,* a workers' compensation case, the Court held that a 100% social security offset provision was unconstitutional and unenforceable.

¶8 The statute at issue here – section 39-72-405, MCA, – is void only when applied to particular facts. In its various forms since 1987,[2] section 39-72-405, MCA, has limited permanent disability benefits for conditions less than totally disabling to $10,000. Under all post-1985 versions of section 39-72-405, MCA, payment of benefits is premised on wage loss. In *Theda Bouldin v. Liberty Northwest Ins. Corp.*, 1997 MTWCC 68, I held that the obvious purpose of section 39-72-405, MCA (1993), "is to provide some sort of compensation for claimants who experience a partial wage loss as a result of their occupational diseases." *Id.* at 7. I noted that the section does not provide any time limit for determining wage loss, but I found the 350-week PPD limit prescribed in the WCA "helpful" in determining whether a $10,000 award was appropriate. *Id.* at 8. Based on a weekly wage loss of approximately $39 a week, and applying the two-third's formula for determining wage-loss benefits under section 39-71-703, MCA, I found that Bouldin would reach the $10,000 level in approximately 383 weeks. I then awarded her the full $10,000.

¶9 In retrospect, my logic concerning the time in which Bouldin would have been entitled to the $10,000 under section 39-71-703, MCA, was flawed. Under section 39-71-703, MCA (1993), the rate of PPD compensation was two-thirds of Bouldin's average weekly wage, up to a maximum of one half of the state's average weekly wage. Using the state's average weekly wage, her PPD rate was $174.50. Since she suffered a wage loss less than $2.00, under section 39-71-703, MCA (1993), she would have been entitled to

[2]Since 1987, the section has been amended three times, however, the basic provision, including the $10,000 limit on benefits, has remained unchanged. The 1987 statute and the subsequent, amended versions are set out as Addendum A to this decision.

35 weeks of benefits at $174.50, or $6,107.50. If the PPD rate under section 39-71-703, MCA, had applied, the $10,000 mark would have been reached in 57.3 weeks. In any event, the period of wage loss under section 39-72-405, MCA, is unlimited.

¶10 Under *Stavenjord*, Bouldin would be entitled to seek benefits under section 39-71-703, MCA (1993), which provided:

> **39-71-703. Compensation for permanent partial disability.** (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award.
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> (2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.
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> (3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American [M]edical [A]ssociation Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:
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> (a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;
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> (b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education or who has received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;
>
> (c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of $2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than $2 an hour as a result of the industrial injury, 20%; and
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> (d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%.
>
> (4) The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of injury, but the rate may not exceed

one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(5) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

(6) As used in this section:

(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;

(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;

(c) "light labor activity" means the ability to lift up to 25 pounds occasionally or up to 10 pounds frequently; and

(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently.

¶11 A component of PPD benefits is the impairment award. Under 1993 law, which applied in *Bouldin*, the injured worker was entitled to the percentage of 350 weeks of PPD benefits which was equal to her impairment. In addition, the worker was entitled to the specific percentages assigned for age, education, wage loss, and physical restrictions, however, the maximum award was limited to 350 weeks even if the impairment rating plus the percentages assigned to the additional factors exceeded 100%. Simple arithmetic shows that the non-impairment factors can amount to a maximum of 46%, or 161 weeks of benefits. Thus, to obtain the full 350 weeks of benefits available under section 39-71-703, MCA (1993), a claimant has to have a 54 percent impairment and also prove:

- She is more than fifty-five years of age. (3%.)
- She has less than nine years of education. (3%.)
- She has a wage loss of more than $2.00 an hour. (20%.)
- She was working at heavy labor in the time-of-injury job and is restricted post-injury to light or sedentary work. (20%.)

¶12 In Bouldin's case, wage-loss benefits under section 39-71-703, MCA (1993), would have yielded her $6,107.50. That amount is based on 35 weeks of benefits (*10% of 350 weeks*) since her wage loss was less than $2.00.[3] The maximum amount available to her for the education factor was 3%. Since her education was not at issue, I will assume that she was entitled to the full amount, which is another $1,832.25 (*350 weeks times 3% times $174.50/week*). My decision in her case also does not reflect her age, however, she most certainly was less than age 56 since she had a young child and my recollection is that she

[3]Her PPD rate was $174.50.

appeared to be in her in her late 20s or early 30s. Thus, at best, the age factor would have entitled her to another $1,221.50 (*350 weeks times 2% times $174.50/week*). The claimant's job – painting animal decoys, primarily ducks – involved no more than light labor. On that basis, her physical restrictions would have entitled her to no additional benefits. Thus, the maximum award under section 39-71-703, MCA (1993), available to her was approximately $9,161.25, excluding consideration of any impairment award. Given the nature of her condition (fibromyalgia), it is not clear she had a rateable impairment. If she did, it was small.

¶13 Under some versions of the post-1985 WCA, workers who did not have rateable impairments were not entitled to PPD benefits at all even if they suffered a wage loss. §§ 39-71-116(22), MCA (1995), 39-71-116(23), MCA (1997–2003). Thus, some claimants suffering from occupational diseases may be better off seeking benefits under section 39-72-405, MCA, than under section 39-71-703, MCA, either because they have no rateable impairments or because their wage losses over the long term entitle them to greater benefits under section 39-72-405, MCA, than under section 39-71-703, MCA.[4] In any event, section 39-72-405, MCA (1987-1997), does not on its face provide lesser benefits than section 39-71-703, MCA (1987-1997). It is only in the application that it is unconstitutional. I therefore conclude that the void *ab initio* rule regarding unconstitutional statutes is inapplicable.

B. *Harper v. Chevron*

¶14 Claimant further argues that *Stavenjord* is retroactive under both *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), and *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971. In *Chevron*, the United States Supreme Court adopted a three-part test to determine whether judicial decisions should be applied retroactively. In *Harper* the Supreme Court abandoned the *Chevron* test and held that judicial decisions are *per se* retroactive.

¶15 The Montana Supreme Court expressly adopted the *Chevron* analysis in *LaRoque v. State*, 178 Mont. 315, 583 P.2d 1059 (1978). However, it appeared to embrace *Harper* in *Porter v. Galarneau,* 275 Mont. 174, 186, 911 P.2d 1143, 1150 (1996). In *Schmill v. Northwest Liberty Northwest Corp.,* 2004 MTWCC 47, I comprehensively analyzed recent cases regarding retroactivity and concluded that Montana still follows *Chevron*. I therefore conclude that *Stavenjord* is not automatically retroactive. Rather, retroactivity must be determined under the *Chevron* factors.

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[4]This creates an interesting dilemma: If section 39-72-405, MCA, provides greater benefits in some cases than under the WCA PPD provisions, can injured claimants elect benefits under section 39-72-405, MCA?

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C. *Chevron* Analysis

¶16 The *Chevron* test is set out in *Riley v. Warm Springs State Hosp., Dept. of Institutions,* 229 Mont. 518, 748 P.2d 455 (1987), as follows:

> Three factors are considered before adopting a rule of nonretroactive application of a judicial decision. *Jensen v. State, Dept. of Labor and Industry* (Mont.1984), [213 Mont. 84] 689 P.2d 1231, 1233, 41 St.Rep. 1971, 1973, *aff'd after remand*, 718 P.2d 1335, 43 St.Rep. 621. First, the ruling to be applied nonretroactively must establish a new principle of law either by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed. Next, the new rule must be examined to determine whether retroactive application will further or retard its operation. Third, the equity of retroactive application must be considered.

229 Mont. at 521, 748 P.2d at 457. If a single one of the *Chevron* factors preponderates in favor of non-retroactive application, then the decision cannot be applied retroactively: "The general rule is that a rule of law will not be applied retroactively if **any** of the [*Chevron*] factors listed below are present."[5] *Poppleton v. Rollins,* 226 Mont. 267, 271, 735 P.2d 286, 289 (1987) (emphasis added).

¶17 Factor one requires consideration of whether the *Stavenjord* decision established a new principle of law either by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed. I recently considered this factor in my decision in *Schmill,* 2004 MTWCC 47. I held that Schmill's successful challenge to the apportionment provision of the occupational disease act (ODA), § 39-72-706, MCA (1987 and post), was not all that surprising. I specifically noted the Supreme Court's 1999 decision *Henry v. State Compensation Ins. Fund,* 1999 MT 126, 294 Mont. 449, 982 P.2d 456, where the Court held that *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 777 P.2d 862 (1989), which had rejected an equal protection challenge to the pre-1987 ODA, was

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[5]I have read *Chevron* and *Poppleton.* There is nothing in *Chevron* which states or suggests that one factor favoring non-retroactive is conclusive as to non-retroactivity and *Poppleton* cites no case to support the proposition that one factor favoring non-retroactive application is conclusive. It would be of academic interest to research post-*Chevron* decisions to determine whether any of those decisions other than *Poppleton* have expressly addressed whether one factor is conclusive. But in light of the express holding in *Poppleton,* it is unnecessary to further research the matter.

readily distinguishable.[6] I also noted that the *Eastman* decision was a 4-3 decision, thus indicating that the constitutional challenge was a close call even under pre-1987 law.[7] *Schmill*, 2004 MTWCC 47, ¶ 30. I reaffirm that analysis and find that factor one favors retroactive application of the decision in this case.

¶18 Similarly, I find that factor two is met. Applying the decision retroactively promotes the rule of law announced in the decision by assuring that all persons denied their constitutional rights are treated equally.

¶19 Factor three presents the most difficulty. Certainly, it is equitable to vindicate the constitutional rights of claimants.[8] On the other hand, the *Eastman* decision stood unchallenged for a decade following the 1987 amendments to the ODA, thus giving comfort to insurers that the 1987 amendments to the ODA did not affect the constitutionality of the benefit provisions under the ODA. Indeed, although *Eastman* addressed the pre-1987 ODA, it was decided after the 1987 amendments to the ODA and WCA. Despite that fact, nothing in *Eastman* hints that the Court might reach a different result under the 1987 amendments. During the decade following the adoption of the 1987 amendments and the decision in *Eastman*, any claimant could have prosecuted a petition challenging the constitutionality of the 1987 ODA, as Henry and, later, Stavenjord and Schmill, ultimately did. During those years, there were upwards of 3,000 permanently partially disabled OD claimants, many of whom were surely represented by attorneys conversant in workers'

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[6]The Supreme Court reaffirmed and repeated this analysis in its *Stavenjord* decision. 2003 MT 67 at ¶¶ 42-44. In a talking points memo provided by the State Fund at the most recent conference regarding the pending issues, the State Fund urged that the Supreme Court's analysis was erroneous and it requested this Court to correct the Supreme Court's alleged errors. I decline that invitation. As an inferior court, this Court is bound by the Supreme Court's determinations and must follow them. The arguments should be addressed to the Supreme Court.

[7]The State Fund urges that the Supreme Court's citation to *Eastman* in *Stratemeyer v. Lincoln County,* 259 Mont. 147, 154, 855 P.2d 506, 511 (1993), shows that the Supreme Court embraced *Eastman* even after the adoption of the 1987 ODA amendments. I have examined the citations in *Stratemeyer*. The citations are in support of general equal protection principles set out in *Eastman* and do not amount to an endorsement of the result in *Eastman.* Citations to prior cases must be read in the context in which they are made.

[8]The State Fund estimates that the potential benefits due ODA claimants if *Stavenjord* is applied retroactively to 1987 could amount to $19 to $26 million just for the State Fund's insureds.

compensation law. Yet, not one claimant prosecuted any equal protection challenge to the 1987 benefit provisions until Henry.[9]

¶20 The failure to challenge the constitutionality of the 1987 ODA is compounded by the fact that once a claim is filed there is no statute of limitations with respect to benefits. A claimant may seek benefits years and even decades after her injury or disease. She may do so as long as she has filed a timely claim for compensation and timely notified her employer of her injury or disease. §§ 39-71-601 and 603, MCA (1987–present); § 39-72-403, MCA (1987–present). In 1997 the legislature adopted a provision requiring that any "petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." § 39-71-2905(2), MCA. However, that statute has limited application since the two-year limitations period does not begin running until there is a denial of the benefits sought. In some cases, claimants seek benefits years after their injuries and occupational diseases.

¶21 Even though a court can, in hindsight, find significant constitutional differences between the pre-1987 ODA benefit provisions and the 1987 provisions, if the unconstitutionality of the 1987 ODA was so obvious, why did it take nearly a decade for a claimant to first litigate an equal protection challenge regarding benefits under the 1987 ODA? And, why did it take more than a decade for a claimant to challenge the constitutionality of section 39-72-405, MCA (1987–present), in cases where PPD benefits under the WCA are more generous?[10]

¶22 Even though the decisions in *Henry* and *Stavenjord* suggest that the results in those cases were clearly foreshadowed, it is also clear that the foreshadowing was not evident to either insurers or to the claimants' bar. Thus, for ten years, claims were adjusted under the assumption, and without significant challenge, that *Eastman* was good law and that lesser benefits provided under the ODA were constitutional. To now reach back and apply *Stavenjord* to claims arising more than twelve years prior to the filing of *Stavenjord* is unfair, i.e., it is inequitable.

¶23 The equity of applying *Stavenjord* must also be considered in light of administrative difficulties and costs. These difficulties and costs are significantly greater than in *Schmill.* Retroactive application of *Schmill* involves simple, mathematical calculations. The statute

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[9]*Henry* was filed with this Court on July 28, 1997, fully ten years after the 1987 amendments were enacted and eight years after the *Eastman* decision. My decision, rejecting the constitutional claim, was filed May 13, 1998. The Supreme Court's decision reversing me was issued June 3, 1999.

[10]*Stavenjord* was filed with this Court on October 20, 2000.

involved in that case was a provision requiring that indemnity benefits be proportionately reduced by the percentage of non-occupational factors which contributed to the claimant's occupational disease. That percentage will be evident upon review of the files of affected claimants. Computation of additional benefits will then be a simple matter of paying that percentage.

¶24 Calculation of *Stavenjord* benefits is significantly more complex and significantly more expensive. The State Fund has identified numerous administrative difficulties and costs in applying *Stavenjord* retroactively. While the question of retroactivity cannot be decided on an insurer-by-insurer basis, it is appropriate to consider that evidence as indicative of the likely difficulties which will be encountered by all insurers.[11]

¶25 The initial difficulty is determining which claimants *may be* entitled to *Stavenjord* benefits. Through computer analysis, the State Fund has identified approximately 3,500 claimants, which is just a few more than the 3,200 claimants identified in Murer.[12] (State Fund's Opening Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees and Global Lien of State Fund's Counsel at 17; Joint Statement of Stipulated Facts, ¶ 65.a.)

¶26 However, identification of potential beneficiaries is only the beginning. Each individual claim will have to be reviewed to determine whether the claimant suffered a permanent partial disability. This requires review not only of hard copy files but also microfilmed and microfiched files. If the file review indicates the claimant may be permanently partially disabled, then further information will have to be obtained to determine PPD entitlement. That entitlement will then have to be compared to the entitlement under section 39-72-405, MCA.

¶27 In determining potential PPD benefits, impairment ratings will be required since section 39-71-703, MCA (1987-1999), provides initially for an impairment award.

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[11]In considering the evidence tendered by the State Fund, the Court notes that it invited other insurers to participate in the briefing and argument of the retroactivity and common fund issues. No insurer other than Liberty Northwest Insurance Corporation offered any sort of evidence, and the evidence offered by Liberty was extremely limited. *See Schmill v. Northwest Liberty Ins. Corp.*, 2004 MTWCC 47, ¶ 4. The facts offered by Liberty are interesting, however, in that they show that less than 1 in 30 of its claims (approximately 3.4%) are ODA claims. The remaining claims are WCA claims.

[12]*Murer* involved three Supreme Court decisions. The last, which held that a common fund existed, was *Murer v. State Compensation Mut. Ins. Fund,* 283 Mont. 210, 942 P.2d 69 (1997).

Impairment ratings are irrelevant under section 39-72-405, MCA, and the State Fund's affidavit indicates that impairment ratings were not routinely obtained for claimants with occupational diseases. Thus, in many cases, any calculation of 703 benefits will require the claimant to return to his or her treating physician for an impairment rating. Some treating physicians do not render impairment ratings[13] and others may be reluctant to do so given the passage of time since the claimant reached maximum medical improvement (MMI). Lacking the treating physician's willingness to render an impairment rating, referral for an independent medical exam will be required.

¶28 Impairment ratings are typically provided at the time a claimant reaches MMI. § 39-71-711, MCA (1987–present). In cases where the claimant has not suffered a subsequent injury or aggravation to the same body part, a current impairment rating may suffice since it should be the same as when the claimant reached MMI.[14] But in cases where the claimant has suffered a subsequent injury or aggravation, retrospective determination of an impairment rating at the time of MMI promises to be difficult.

¶29 To determine wage loss, insurers may be required in some cases to conduct a retrospective vocational assessments. Wage loss is typically measured by what the claimant earns after returning to work, however, such earnings may not be the final measure where the claimant fails to return to work or is underemployed upon return to work. *Cf. Siegler v. Liberty Ins. Corp.,* 2001 MTWCC 23, ¶ 73.

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[13]In addition to the evidence offered through the State Fund's affidavit, I take judicial notice of this fact based on my eleven years of hearing cases. In a number of those cases, independent medical exams were required to come up with impairment ratings because treating physicians refused to render impairment ratings as a matter of policy.

[14]If a claimant's condition has deteriorated due to a natural progression of his original injury, a current impairment rating could conceivably be greater than the rating which would have been assigned at MMI. However, the claimant would still be entitled to an award based on the increased rating. Section 39-71-739, MCA (1987–present), provides:

> **39-71-739. Compensation in case of changes in degree of injury.** If aggravation, diminution, or termination of disability takes place or is discovered after the rate of compensation is established or compensation is terminated in any case where the maximum payments for disabilities as provided in this chapter are not reached, adjustments may be made to meet such changed conditions by increasing, diminishing, or terminating compensation payments in accordance with the provisions of this chapter.

¶30 The State Fund estimates its "hard costs" associated with retroactive application of *Stavenjord* at $7.5 million. That figure is based on its estimate of $1,300 in vocational costs **on each file** and $850 for obtaining impairment ratings, again **on each file**. (State Fund's Opening Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees and Global Lien of State Fund's Counsel at 17, emphasis added.) The difficulties and costs identified by the State Fund are offset to some degree by other factors. Some claimants may have returned to their time-of-injury jobs or jobs paying just as much. Others may already have impairment ratings. Some may have already established wage losses. Many may have settled their claims entirely, thus barring them from seeking further benefits. *See Murer v. State Compensation Mut. Ins. Fund,* 283 Mont. 210, 220-21, 942 P.2d 69, 75 (1997). On its face, the State Fund's estimate is a worst case scenario, not a realistic estimate of actual costs. It is highly unlikely that every file will require the degree of work-up suggested by the State Fund. On the other hand, it is not unreasonable to expect that the hard costs will be substantial.

¶31 The State Fund also indicates that it will incur substantial "soft costs" due to the time spent by its employees in reviewing and copying files, corresponding with physicians and vocational consultants, and calculating benefits. There is no figure put on their employees' time, but certainly it will be significant.

¶32 Even though the costs and financial burden of retroactive application may be less than alleged by the State Fund, one thing is for sure: Identifying and paying *Stavenjord* benefits back to 1987 will be tedious, difficult, and time consuming. I base this conclusion on my own experience in *Murer*. In *Murer v. State Compensation Mut. Ins. Fund,* 267 Mont. 516, 885 P.2d 428 (1994) (*Murer II*), the Supreme Court held that 1987 and 1989 caps on benefits were temporary, not permanent. Subsequently, in 1997 the Supreme Court held in *Murer v. State Compensation Mutual Insurance Fund,* 283 Mont. 210, 942 P.2d 69 (1997) (*Murer III*), that its earlier decision created a common fund entitling other similarly situated claimants to benefits. Since that 1997 decision, this Court has overseen the implementation of the common fund. I have held numerous conferences with the parties, issued rulings regarding specific entitlement issues, reviewed and approved complex computer queries to identify claimants entitled to *Murer* benefits, reviewed and approved the methodology for calculating benefits, and ruled on attorney fees. Seven years later, the process is nearly complete but the case is still not closed.

¶33 The third *Chevron* factor requires this Court to consider the "equity" of retroactive application. "Equity" is simply a matter of fairness. Based on the foregoing discussion, I conclude that it is fair and equitable to apply *Stavenjord* retroactively to June 3, 1999, the date on which the Supreme Court published its decision in *Henry*. After *Henry*, insurers in Montana were on notice of the likelihood that the ODA provisions providing lesser benefits than available under the WCA would be declared unconstitutional under the equal

protection clauses of the United States and Montana constitutions.[15]

¶34 On the other hand, I find it unfair and inequitable to apply *Stavenjord* retroactively prior to June 3, 1999. My conclusion is based especially on the long lapse of time between the adoption of the 1987 ODA amendments and the prosecution of constitutional challenges to the 1987 ODA. The1987 ODA and the *Eastman* decision stood unchallenged for almost a decade, thus giving comfort to insurers that the 1987 ODA benefits were constitutional. Indeed, the very claimants who would benefit from a decision applying *Stavenjord* retroactively sat on their hands and did nothing during that entire decade.

¶35 My conclusion is also based upon and reinforced by the difficulties involved in applying *Stavenjord* retroactively. While none of the difficulties is insurmountable, they are substantial and far greater than in *Schmill*.

¶36 As I noted earlier, if any of the *Chevron* factors weigh against retroactive application, then *Stavenjord* must be applied prospectively only. I have found that the equity factor weighs against retrospective application prior to June 3, 1999. I therefore find and hold that *Stavenjord* is retroactive to June 3, 1999, but not prior to that time. Therefore, claimants suffering occupational diseases after June 30, 1987 but reaching MMI after June 3, 1999, are entitled to *Stavenjord* benefits. Retroactivity is based on MMI rather than on the date of injury since entitlement to PPD benefits does not arise until MMI is achieved.

¶37 In so finding, I acknowledge that my analysis in this case may not be entirely consistent with my analysis in *Schmill,* 2004 MTWCC 47, which held that the decision in that case was retroactive to 1987. In *Schmill*, I did not give adequate consideration to the

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[15]In its affidavit and briefs, the State Fund has also argued that the financial burden placed upon it by <u>any</u> retroactive application of *Stavenjord* is unreasonable since it fixed premiums long before *Stavenjord.* It argues that retroactive application will financially impair both the old and new State Fund. The problem with its argument is that the new State Fund declared dividends totaling $12 million in 2001, 2002, and 2003, <u>after</u> the decision in *Henry*. Similarly, in 2003, the legislature transferred $21 million of the existing reserves of the old State Fund to the general fund and other state accounts. § 39-71-2352(5), MCA (2003)(as amended by 2003 Mont. Laws, ch. 588, § 1). The transfer was undertaken despite the Supreme Court's decision in *Henry*, and its common fund decisions in *Murer* and in *Rausch v. State Compensation Ins. Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25. These decisions should have put insurers on notice of a significant risk that section 39-71-405, MCA, would be declared unconstitutional and that such decision could create a retrospective common fund.

fact that the 1987 ODA amendments and *Eastman* went unchallenged for a decade.[16]

D. Impairment of Contract Argument

¶38 Finally, the State Fund argues that ***any*** retroactive application of *Stavenjord* would impair the contracts between the State Fund and its policy holders because the State Fund justifiably relied on the apportionment statutes when issuing policies. The argument is without merit. "Laws existing at the date a contract is executed are as much a part of the contract as if set forth therein." *Neel v. First Federal Sav. and Loan Assoc. of Great Falls*, 207 Mont. 376, 386, 675 P.2d 96, 102 (1984). Moreover, "[p]arties cannot privately waive statutes enacted to protect the public in general," *Phoenix Physical Therapy v. Unemployment Ins. Div., Contributions Bureau*, 284 Mont. 95, 104, 943 P.2d 523, 528 (1997), and the same is true regarding constitutional protections. The constitutions of the State of Montana and the United States are part of the law to which all contracts are subject. Thus, insurance contracts are subject to the constitutional rights of claimants.

III. Common Fund

¶39 In my recent decision in *Schmill v. Northwest Liberty Northwest Corp.,* 2004 MTWCC 47, I discussed the common fund doctrine in some detail and will not repeat everything I said there. A common fund exists only if three criteria are satisfied. In summary form, the three criteria are:

> ¶39a The party in the case-in-chief must "create, reserve, increase, or preserve a common fund."
>
> ¶39b The party to the case-in-chief "must incur legal fees in establishing the common fund."
>
> ¶39c "[T]he common fund must benefit ascertainable, non-participating beneficiaries."

Schmill at ¶ 45, citing and quoting from *Rausch v. State Compensation Ins. Fund,* 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

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[16]I do not need to determine whether my present analysis would change my determination in *Schmill* since my decision in that case has been appealed. *Schmill* differs from the present case in that benefits can be computed simply and mathematically, a factor that may still tip the scales in favor of full retroactive application in that case.

¶40 As I said in *Schmill*, "[I]t is not enough that the petitioner in this workers' compensation case establishes a general principal of law applicable to other claimants; she must show that the litigation entitles similarly situated, identifiable claimants to specific monetary benefits." ¶ 46. The question in this case, as in *Schmill*, is whether the decision in the case-in-chief entitles other claimants to specific benefits.

¶41 *Stavenjord* established more than a mere precedent. Montana common fund cases do not limit the doctrine to cases in which there is a pool of money which can be identified without consideration of individual claims. *Murer III* makes this point clear. In that case, there was no fixed sum to which multiple claimants could lay claim, rather, the fund was determined by the individual entitlements of the claimants. Similarly, in *Rausch v. State Compensation Ins. Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25, the Court held that a common fund existed with respect to permanently totally disabled claimants whom it found were entitled to impairment awards even though those awards had to be determined on an individual basis. In this case, the fund is similarly determined by calculating individual entitlements pursuant to section 39-71-703, MCA (1987–present), then subtracting benefits already paid pursuant to section 39-72-405, MCA (1989–present). Factors one and three are satisfied.

¶42 As to the second criteria for common fund status, the claimant in this case incurred substantial attorney fees in establishing her entitlement to benefits and the entitlement of other beneficiaries. The State Fund has attempted to refute this factor by pointing out that the benefits the claimant obtained in this case – approximately $30,000 – resulted in a significant attorney fee. The fee is approximately $7,500 based on the regulations governing attorney fees. ARM 24.29.3802(3)(b). That fee is a paltry one given the claimant's attorney's time and efforts in not only this Court but in the Supreme Court. Moreover, the Court must consider the return in other potential cases. While this case involved $30,000, other cases will involve far less, thus providing a disincentive to litigate the issues joined in this case. Factor two is satisfied.

¶43 I therefore hold that *Stavenjord* created a common fund and that Stavenjord's attorney is entitled to common fund fees. However, the common fund is limited to claimants whose OD claims arose after June 30, 1987, and who reached MMI after June 3, 1999, the date on which *Henry* was decided.

IV. Global Lien

¶44 Stavenjord's attorney claims a lien on all benefits that are payable under *Stavenjord* and this decision, irrespective of the insurer responsible for the benefits. I have previously characterized this sort of claim as a "global lien" and rejected it. *Ruhd v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 38. While my decision in *Ruhd* had been appealed, I find no reason to reconsider or deviate from it.

JUDGMENT

¶45 The decision in *Stavenjord v. State Compensation Ins. Fund,* 2003 MT 67, 314 Mont. 466, 67 P.3d 229, is retroactive only with respect to those claims arising on and after June 30, 1987, and where MMI was reached after June 3, 1999.

¶46 A common fund exists with respect to occupational disease claims arising on and after June 3, 1987, where MMI is reached after June 3, 1999. The common fund extends only to the State Fund.

¶47 Claimant's attorney is entitled to attorney fees with respect to those claims identified in the previous paragraph.

¶48 The Court reserves jurisdiction to oversee the identification of those claimants entitled to additional PPD benefits from the State Fund as a result of this decision; to determine the amounts payable to those claimants; and to fix the amount of attorney fees due the claimant's attorney.

¶49 Any party has twenty days within which to request reconsideration or amendment of this Decision.

¶50 This Decision is certified as final for purposes of appeal and all other purposes.

DATED in Helena, Montana, this 27th day of August, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Thomas J. Murphy
Mr. Bradley J. Luck
Mr. Thomas J. Harrington
Submitted: July 14, 2004

ADDENDUM

1985–1987

39-72-405. General limitations on payment of compensation. (1) Compensation may not be paid when the last day of the injurious exposure of the employee to the hazard of the occupational disease has occurred prior to July 1, 1959.

(2) When an employee in employment on or after January 1, 1959, because he has an occupational disease incurred in and caused by the employment which is not yet disabling, is discharged or transferred from the employment in which he is engaged or when he ceases his employment and it is in fact, as determined by the medical panel, inadvisable for him on account of a nondisabling occupational disease to continue in employment and he suffers wage loss by reason of the discharge, transfer, or cessation, the division may allow compensation on account thereof as it considers just, not exceeding $10,000.

1989–1991

39-72-405. General limitations on payment of compensation. (1) Compensation may not be paid when the last day of the injurious exposure of the employee to the hazard of the occupational disease has occurred prior to July 1, 1959.

(2) When an employee in employment on or after January 1, 1959, because he has an occupational disease incurred in and caused by the employment which is not yet disabling, is discharged or transferred from the employment in which he is engaged or when he ceases his employment and it is in fact, as determined by the medical panel, inadvisable for him on account of a nondisabling occupational disease to continue in employment and he suffers wage loss by reason of the discharge, transfer, or cessation, the department may allow compensation on account thereof as it considers just, not exceeding $10,000.

1993–Present

39-72-405. General limitations on payment of compensation. (1) Compensation may not be paid when the last day of the injurious exposure of the employee to the hazard of the occupational disease has occurred prior to July 1, 1959.

(2) When an employee in employment on or after January 1, 1959, because the employee has an occupational disease incurred in and caused

by the employment that is not yet disabling, is discharged or transferred from the employment in which the employee is engaged or when the employee ceases employment and it is in fact, as determined by the medical panel, inadvisable for the employee on account of a nondisabling occupational disease to continue in employment and the employee suffers wage loss by reason of the discharge, transfer, or cessation, compensation may be paid, not exceeding $10,000, by an agreement between the insurer and the claimant. If the parties fail to reach an agreement, the mediation procedures in Title 39, chapter 71, part 24, must be followed.