THOMAS J. MURPHY
Murphy Law Firm
P.O. Box 3226
Great Falls, MT 59403-3226
Phone: 406-452-2345
Fax: 406-452-2999
Attorneys for Petitioner

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR, Petitioner, vs. MONTANA STATE FUND Respondent/Insurer	WCC No. 2002-0676 Petitioner's Brief on Common Fund Issues

COMES NOW the petitioner, Dale Reesor ("Reesor"), in accordance with the Court's order requesting legal arguments on the following issues:

1.) Does a common fund exist?
2.) Is there an ascertainable class?
3.) Is there an ascertainable fund?
4.) If there is a common fund, is it retroactive?
5.) Do laches or statutes of limitations apply?
6.) Does the application of the common fund doctrine violate constitutional guarantees of "freedom of contract and taking without just compensation"?

I. INTRODUCTION

Dale Reesor was injured at work on January 3, 2000. He was already 65 years old before his injury, and he was receiving full Social Security retirement benefits of $505.00 per month. Mr. Reesor's doctor assigned a 4% impairment rating; therefore, pursuant to §39-71-703 MCA (1999), the State Fund paid a permanent partial disability ("PPD") impairment benefit of $2,975.00. However, the State Fund refused to pay additional PPD benefits normally required by §39-71-703 MCA (1999), because of the age limitation on PPD benefits mandated by §39-71-710 MCA (1999). But for his

advanced age only, Mr. Reesor would have received additional PPD benefits of $20,081.25.

Since a younger claimant with the same injury would receive $23,056.25 in PPD benefits, and since the age limitation on PPD benefits mandated by §39-71-710 MCA (1999) reduced Mr. Reesor's PPD benefit to $2,975.00; Mr. Reesor challenged the age discrimination expressed in §39-71-710 MCA (1999) as a violation of the Equal Protection Clause of the Montana Constitution. In his appeal to the Montana Supreme Court, Reesor successfully argued that there was no rational governmental interest served by denying equal PPD benefits to elderly workers. The Supreme Court found that §39-71-710 MCA (1999) contravened public policy, which requires PPD to "bear a reasonable relationship to actual wages lost." Reesor v. State Fund, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019.

The Supreme Court decided Reesor on December 22, 2004, and subsequently remanded Reesor to this Court for further prosecution. The Reesor Claimants are proceeding with this case as a common fund action. Upon remand, the Workers' Compensation Court required service of process of the Reesor claim on all workers' compensation insurance companies that were licensed to provide workers' compensation insurance in Montana between July 1, 1987 and December 22, 2004. According to information provided by this Court on May 5, 2006, the Court sent out 633 summonses to the Insurers identified by the Department of Labor. Of the 633 Insurers served, 293 insurance companies appeared; and of the 293 insurance companies that appeared, Reesor stipulated to dismissal of 94 companies without prejudice.

II. SUMMARY OF THE REESOR ARGUMENT

A common fund exists, because the Reesor Claimants meet the three-element test required for common fund applicability: Reesor created a common fund PPD benefit for elderly claimants, Reesor incurred legal expenses, and the non-participating Reesor Claimants are easily ascertainable.

This Court should apply Montana's blanket retroactive application rule to find that Reesor applies to all open claims. Dempsey confirmed that this Court should not apply the Chevron exception to retroactive application. Finally, even if the Court applies the three-factor Chevron test, the Court should order retroactive application. The Insurers are unable to meet their burden of proof under the Chevron exception to escape liability under Reesor. The Insurers cannot show that this is a truly compelling case, nor can the Insurers prove any of the three Chevron factors. Therefore, the Court should find that Reesor is fully retroactive to all open PPD claims arising on or after July 1, 1987.

This Court should not allow the defenses of laches or statutes of limitations, because the Reesor Claimants were timely in their request for common fund

application. In order to request a common fund, the Reesor Claimants were first required to create a legal precedent. Therefore, the Reesor Claimants were not technically allowed to request common fund status until after the Montana Supreme Court decided Reesor on December 22, 2004. Here, the Reesor Claimants presented the common fund claim immediately upon remand, so the defenses of laches and statutes of limitations do not apply.

Finally, the Court should disregard the Insurers' arguments that the common fund doctrine violates constitutional guarantees of "freedom of contract and taking without just compensation." The Insurers involved in this case entered insurance contracts whereby the Insurers agreed to pay workers' compensation benefits. Those "benefits" have always been defined by the Workers Compensation Act and the Court decisions interpreting the Act. There is nothing unique in Reesor that "interferes" with the Insurers' contractual duty to pay workers' compensation benefits. On the contrary, if the Insurers' interference with contract argument prevails, then Insurers would never again be required to extend coverage if a court rendered a new or slightly different interpretation of a statute. In this same light, it is clear that the Reesor decision did not create a "taking without compensation." The Insurers eagerly entered the business of making money by taking actuarial risk. Part of that risk involved the possibility that the Supreme Court would one day halt the unconstitutional denial of equal PPD benefits to elderly workers. The Supreme Court has declared the arbitrary age limitation of §39-71-710 MCA unconstitutional. When the Supreme Court acted, it did not "take" anything from the Insurers. Certainly, the Insurers have no ability to launch a "taking" case that will stop the Supreme Court from correcting unconstitutional statutes.

III. ARGUMENT

A. The Issues At Bar Are Identical To Schmill And Stavenjord

The issues raised by defense counsel in Reesor are identical to the issues that the same defense attorneys raised in Stavenjord and Schmill. In Schmill v. Liberty Northwest Ins. Corp., 2005 MT 144, 327 Mont. 293, 114 P.3d 204 (6/7/05) (referred to as "Schmill II"), a unanimous Montana Supreme Court answered all of the present issues in favor of the Reesor Claimants.

Schmill II was the second time the Supreme Court addressed the Insurers' challenges to the Schmill Common Fund. In Schmill I, the Supreme Court held that it was a violation of the Equal Protection Clause of the Montana and United States Constitutions to allow for apportionment deductions for nonoccupational factors in the Occupational Disease Act, but not in the Workers' Compensation Act. Therefore, the Court concluded that the ODA's apportionment provision, § 39-72-706, MCA, was

unconstitutional. Schmill v. Liberty Northwest Ins. Corp., 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (referred to as "Schmill I")

On remand of Schmill I, the Workers Compensation Court found that the rule announced in Schmill I applied retroactively, and that Schmill I created a common fund with an attendant claim for common fund attorney fees. Unsurprisingly, the Insurers appealed again, but the Montana Supreme Court held in Schmill II that the Workers Compensation Court was correct on each point. Specifically, Schmill II found that the Schmill I ruling should apply retroactively, that the Workers' Compensation Court had jurisdiction to award attorney fees from the common fund, and that Schmill's attorneys were not precluded from seeking fees from the common fund after the Schmill I remand. Schmill II, ¶¶ 22, 23, and 28.

In the Stavenjord cases before this Court and the Montana Supreme Court, Debra Stavenjord successfully challenged the constitutionality of ODA §39-72-405 (2) MCA (1997), because it violated the Equal Protection Clause of the Montana Constitution. Stavenjord argued that her entitlement to PPD under ODA §39-72-405 (2) MCA (1997) should be equal to the PPD benefit she would receive as an injured worker under WCA §39-71-703 MCA (1997). Stavenjord v. Montana State Fund, 2001 MTWCC 25, affirmed, 2003 MT 67, 314 Mont. 466, 67 P.3d 229.

After the Montana Supreme Court affirmed and remanded Stavenjord to this Court, Stavenjord initiated a common fund action to secure equal PPD benefits for all similarly situated ODA claimants. The common fund maintained that Stavenjord created an additional benefit for all similarly situated OD PPD claimants with dates of onset on or after July 1, 1987. As it did here, the Workers' Compensation Court notified all workers' compensation insurers of the Stavenjord common fund action, and the Court instructed the insurers to withhold common fund attorney fees. Stavenjord 2003 MTWCC 30. Thereafter, the Insurers objected to the "retroactive" application of Stavenjord.

On August 27, 2004, the Workers' Compensation Court issued its Decision on Common Fund Retroactivity, which was amended on September 16, 2004, hereafter cited as Stavenjord 2004 MTWCC 62 and 62A. The Workers' Compensation Court, Judge McCarter presiding, decided that the Supreme Court holding in Stavenjord was partially retroactive. The Court held that Stavenjord "applied retroactively only with respect to those claims arising on and after June 30, 1987, where maximum medical improvement ("MMI") was reached after June 3, 1999." Stavenjord 2004 MTWCC 62, ¶ 36.

The Workers' Compensation Court reached the partial retroactively result by applying the Chevron test. See, Chevron Oil v. Huson (1971), 404 U.S. 97, 106-07, 92 S.Ct. 349, 355. The Court found that two of the three Chevron factors favored retroactive application; however, as to the third factor (the equity factor), the Court found

that equity only favored partial retroactivity. Although the Workers' Compensation Court held that two-and-one-half of the three Chevron factors supported retroactive application, the Court only retroactively applied Stavenjord from 1999 to 2001. The Workers' Compensation Court picked June 3, 1999, as the start date for retroactive application, because that was when the Montana Supreme Court decided Henry v. State Fund, 1999 MT 126, 294 Mont. 449, 982 P.2d 456.

Stavenjord appealed the partial retroactivity decision, and the Insurers cross-appealed arguing that no part of Stavenjord is entitled to retroactive application. After the parties appealed Stavenjord, the Montana Supreme Court decided the controlling retroactivity case of Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 Mont. 207, 104 P.3d 483 (12/30/04). Dempsey answered most of the questions raised in the present action.

B. Controlling Montana Precedent Requires Retroactive Application

Essentially, the Insurers ask this Court to depart from Montana’s "blanket retroactivity rule." In Dempsey, the Supreme Court confirmed that Montana's general rule prefers blanket retroactivity. In fact, the Court said that it would require truly compelling reasons to depart from the general retroactivity rule. Finally, the Court said that it would not depart from the general retroactivity rule unless the Insurer proved all three Chevron factors. Dempsey, ¶¶ 29-30.

The Dempsey Court made a specific yet simple statement that controls the present case:

> [A]ll civil decisions of this court apply retroactively to cases pending on direct review or not yet final, unless all three of the Chevron factors are satisfied.

Dempsey, ¶ 31.

The Reesor Claimants are defined as elderly PPD claimants with open (non-final) claims that arose between July 1, 1987 and December 22, 2004; therefore, the Reesor Claimants respectfully ask this Court for the same PPD benefit that is granted to elderly PPD claimants with claims arising after December 22, 2004. The Reesor Claimants submit that they also should receive additional PPD as a result of the Reesor precedent.

Fundamentally, the Insurers demand an unfair and inequitable application of Reesor. The Insurers ask this Court to enforce Montana's unconstitutional age limitation on PPD benefits, from 1987 to 2004, so that these Insurers can benefit monetarily. The Insurers’ proposal is similar to Allstate's attempt to avoid the retroactive application of Hardy v. Progressive Speciality Ins. Co., 2003 MT 85, 315 Mont. 107, 67 P.3d 892. In

Dempsey v. Allstate, the Supreme Court comprehensively analyzed Montana retroactivity jurisprudence, and the Court decided by a six-to-one majority that Hardy applies retroactively. Dempsey, ¶ 4. As in Dempsey, this Court should find that Reesor applies retroactively to all open (non-final) claims that arose between July 1, 1987 and December 22, 2004.

C. Montana's Retroactive Application Jurisprudence And Dempsey

Generally, all judicial decisions are retroactively applied, but in 1971, the U.S. Supreme Court adopted the Chevron exception. The Chevron exception required courts to consider three factors if a party argued against the norm that judicial decisions should be retroactively applied. Chevron Oil v. Huson (1971), 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296, ___. Seven years after the U.S. Supreme Court decision, the Montana Supreme Court adopted the Chevron exception in LaRoque v State (1978), 178 Mont. 315, 583 P.2d 1059.

Afterwards, courts across the country began to encounter indefensible conflicts between "retroactive" and "prospective" judicial decisions. Certain parties were entitled to rely on prior court decisions, but other parties were denied equal standing if they were relegated to a "non-retroactive" status. The courts discovered that the Chevron exception created rifts in the law, which did not protect similar parties equally. Therefore, in 1993, the U.S. Supreme Court overruled the Chevron exception. Harper v. Virginia Dept. of Taxation (1993), 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74; and see, Reynoldsville Casket Co. v. Hyde (1995), 514 U.S. 749, 115 S.Ct. 1745; or see, Toms v. Taft (2003), 338 F.3d 519, 529 (6th Cir.).

In 1996, three years after the U.S. Supreme Court overruled Chevron, the Montana Supreme Court also apparently abandoned the Chevron exception. Porter v. Galarneau (1996), 275 Mont. 174, 911 P.2d 1143. Subsequently, in Kleinhesselink, the Court indicated that the Porter retroactivity rule was Montana's general rule. Kleinhesselink v. Chevron, U.S.A. (1996) 277 Mont. 158, 162, 920 P.2d 108, 111.

The Porter decision 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 holding in Harper:

> 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).

Porter made two strong points by according its decision with Harper. First, Montana adopted the Harper language 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 Court recognized the fundamental reasoning that compels courts to follow Harper: "[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 principle buttressing the Porter and Harper decisions is compellingly demonstrated in the case at bar. Reesor pressed his case to decision, and, on remand, he received his full Reesor benefit. However, without retroactive application, other similarly situated claimants, with identical (or even later) onset dates, will be denied their constitutionally mandated benefit. Without retroactive application, there will be an unequal treatment of similarly situated claimants. The Porter/Harper rule prevents such an unjust outcome by confirming that courts should not divvy up decided law into prospective and retroactive categories. The compelling principle buttressing the Porter/Harper rule is that courts must treat similarly situated litigants equally. Thus, Porter established an unambiguous mandate, which requires the retroactive application of Reesor to all open PPD claims. Porter, 275 Mont. at 185, 911 P.2d at 1150.

Porter was followed by two other Montana Supreme Court decisions, which concretely affirmed the Porter/Harper retroactivity rule. See, 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.

Thereafter, Montana law subsequently became clouded by a few mistaken references to the Chevron test in a few errant cases. Therefore, in Dempsey, the Montana Supreme Court comprehensively analyzed Montana's retroactivity jurisprudence and reconfirmed the applicability of the Porter/Harper general rule. After the Dempsey Court discussed the history and status of the Chevron exception, the Supreme Court stated:

> We agree with the Harper court that limiting a rule of law to its prospective application creates an arbitrary distinction between litigants based merely on the timing of their claims. Interests of fairness are not served by drawing such a line, nor are interests of finality. In the interests of finality, the line should be drawn between claims that are final and those that are not (the line drawn in Harper). "New legal principles, even when applied retroactively, do not apply to cases already closed."

Dempsey, ¶ 28; citing Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758, 115 S.Ct. 1745, 1751, 131 L.Ed.2d 820, 830.

The Dempsey Court specifically reaffirmed Montana's general retroactivity rule very concisely as follows:

> Therefore today we reaffirm our general rule that "[w]e give retroactive effect to judicial decisions."

Dempsey, ¶ 29; citing Kleinhesselink 277 Mont. at 162, 920 P.2d at 111.

Secondly, Dempsey significantly restricted the Chevron exception by stating that it only applies in "truly compelling" cases. Dempsey, ¶ 29. Finally, Dempsey confirmed that the Chevron exception only applies if the Insurers prove all three Chevron factors. Dempsey, ¶¶ 29-31.

D. The Chevron Exception Only Applies If The Insurers Prove All Three Chevron Factors

The Chevron non-retroactivity exception only applies if all three Chevron factors favor non-retroactive application. Dempsey, ¶¶ 29-31. In Stavenjord II, the Workers Compensation Court found that the first and second Chevron factors fully favored retroactive application. Stavenjord 2004 MTWCC 62, ¶¶ 17-18. As to the third factor (the equity factor), the Court found that equity favored partial retroactivity. Stavenjord 2004 MTWCC 62, ¶ 33. Thus, the Workers' Compensation Court held that two-and-one-half of the three Chevron factors supported retroactive application, yet the Court denied retroactive application for twelve years from 1987 to 1999. Id.

In fairness, it should be noted that Judge McCarter did not have the benefit of Dempsey when he issued his decision in Stavenjord II. Judge McCarter issued the final Stavenjord II decision on 9/16/04, and the Supreme Court decided Dempsey three months later on 12/30/04. It is respectfully submitted that Judge McCarter would have decided Stavenjord II differently had he had the benefit of Dempsey.

The Reesor Claimants submit that none of the Chevron factors support non-retroactivity. There is simply no legal basis to use any date other than July 1, 1987, because it was the Legislature's statutory changes in 1987 that created the unconstitutional denial of PPD benefits to elderly claimants. Any other date retards the application of Reesor, and results in the unequal treatment of similarly situated PPD claimants.

In weighing the equities between the parties, a greater inequity results by denying retroactive application than by allowing it. As the Workers' Compensation Court noted in Flynn:

[I]f policyholders must absorb the costs of complying with Flynn, they have

> already reaped the benefits … The inequities of applying the decision retroactively are offset by financial gain the State Fund previously reaped.

Flynn 2003 MTWCC 55, ¶ 38.

When this Court examines whether the Chevron exception applies, the Court should find that the Insurers failed to carry their burden of proof. None of the three Chevron factors support nonretroactivity, so this Court should follow the well-principled rule set forth in Dempsey to hold that Reesor is retroactive from July 1, 1987 forward.

E. The Insurers Have The Burden Of Proof To Establish The Chevron Exception

In proposing not to apply Reesor retroactively, the Insurers have a heavy burden of proof. First, they may only argue against retroactive application if they prove that there are "truly compelling" reasons not to apply Reesor retroactively. Dempsey, ¶ 29. Next, the Insurers have the burden to prove that all three Chevron factors support a finding of non-retroactivity. As noted by the Workers' Compensation Court:

> [E]ven under Chevron retroactive application of judicial decisions is favored. The factors considered under Chevron 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).

F. The Three Chevron Exception Factors

Under Montana law, the Chevron test requires three factors, which were set forth in the Dempsey decision as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' "

Dempsey, ¶ 21; quoting Chevron, 404 U.S. at 106-07, 92 S.Ct. at 355, 30 L.Ed.2d at 306; see also, Schmill v. Liberty Northwest Ins. Corp., 2005 MT 144, 327 Mont. 293, 114 P.3d 204 (6/7/05) (referred to as "Schmill II"); see also, LaRoque v. State (1978), 178 Mont. 315, 583 P.2d 1059; and Riley v. Warm Springs State Hospital (1987), 229 Mont. 518, 748 P.2d 455.

As to the first Chevron factor, the Supreme Court's decision in Reesor was "clearly foreshadowed." Before it decided Reesor, Montana Courts had previously struggled with the inequities contained in §39-71-710 MCA. In Johnson v. Peter Kiewit & Sons, Inc., WCC No. 8411-2704 (1985), the claimant was 67 years old at the time of her injury, and she was receiving Social Security Retirement Benefits. The Workers Compensation Court ruled that §39-71-710 MCA entitled the claimant who had been receiving total disability benefits to receive PPD benefits despite the fact that she was considered "retired" under the statute. The Court reasoned that the Legislature had left PPD benefits available under the former §39-71-710 MCA; therefore, equity demanded that totally disabled individuals be compensated to some degree for their injuries. Otherwise, the Court reasoned, a nonsensical result would follow whereby a partially disabled claimant would recover, but a totally disabled claimant would not recover.

The equitable PPD rule from Johnson was reviewed by the Montana Supreme Court in Hunter v. Gibson Products of Billings Heights, Inc. 224 Mont. 481, 730 P.2d 1139 (1986). The Hunter Court affirmed the equitable PPD rule developed in Johnson:

> As noted by the Workers' Compensation Court in Johnson, supra, strict construction of § 39-71-710, MCA, would result in an absurdity: A worker injured past the age of 65 may recover compensation if partially disabled but not if totally disabled. We agree with the court's interpretation of § 39-71-710, MCA, allowing for payment of permanent partial disability benefits to a permanently totally disabled claimant who has reached the age of 65.

Hunter, 730 P.2d 1139, 1141, 224 Mont. 481, 484-485.

In his dissent in Hunter, Justice Weber overtly confirmed that §39-71-710 MCA created a denial of "equal treatment" (and Equal Protection) for elderly claimants:

> The section accords unequal treatment to those who are totally disabled and those who are partially disabled. As this case demonstrates, it suggests a legislative policy which would prohibit any type of disability benefits to a person who is totally disabled when working after he attains 65 years of age. As an example, if a 66 year old person receiving social security retirement benefits becomes totally disabled while working, that person is apparently not entitled to total disability benefits. I cannot imagine that was the intention of the legislature at the time of the adoption of this section. I therefore request the

> legislature to consider the inequalities and contradictions contained in the present section.

Hunter, 730 P.2d 1139, 1142, 224 Mont. 481, 486, (J. Weber dissenting) (emphasis added).

Indeed, because of Justice Weber's dissent in Hunter, the Legislature amended §39-71-710 MCA to disallow both PTD and PPD. However, the issue of the statute's "unequal treatment" was explicitly identified, and thus, "clearly foreshadowed" the Reesor decision. Simply stated, PPD benefits were allowed to elderly claimants up to 1987, so it was clear that someone would challenge the Legislature's elimination of those benefits based on an arbitrary age limitation. Therefore, this Court should find that the first Chevron factor favors retroactive application of Reesor, because his challenge was "clearly foreshadowed."

As to the second Chevron factor, whether retroactive application will further or retard the ruling, the Reesor Claimants submit that the answer is obvious. Applying the decision retroactively promotes the rule of law announced in the Reesor decision by assuring that elderly PPD claimants denied their constitutional rights are treated equally. Conversely, a failure to apply Reesor retroactively essentially nullifies the decision.

Retroactive application is the only way to "further" the Reesor ruling. The converse is also true - it would "retard" the Reesor ruling if this Court fails to require retroactive application. Incongruently, the Insurers disingenuously argue that it would further the Reesor ruling if this Court foregoes retroactive application. In essence, the Insurers argue that it furthers the Reesor ruling if this Court denies equal PPD benefits to elderly claimants. In Reesor, the Supreme Court corrected an unjust and unconstitutional practice of unequal PPD benefit disparity. Therefore, the only way to further the Reesor ruling is to require equal PPD benefits. The Insurers' strained argument should not stand. Failure to apply Reesor retroactively would "retard" the decision.

Courts demand retroactive application, because anything less results in unequal treatment of equally deserving claimants. Obviously, the workers' compensation insurance companies want to keep the money, but the Supreme Court found that it was unconstitutional to deny equal PPD benefits to elderly claimants. In this regard, the Workers' Compensation Court's statement in Miller v. Liberty Mutual is applicable:

> 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, ¶ 27.

In Schmill II, the Insurers argued that Schmill I satisfied all three factors, so they argued that it should be applied prospectively only. The Workers' Compensation Court disagreed and so did the Montana Supreme Court:

> [W]e conclude that Schmill I does not meet the second factor. Because this conclusion is dispositive, we do not decide whether the decision meets the first and third factors. See, Dempsey, ¶ 33 (declining to address the second and third factors because the decision in question failed factor one).

Schmill II, ¶ 14. As in Schmill II, the second Chevron factor clearly supports retroactive application of the Reesor decision, so this Court does not need to address the other Chevron factors.

Finally, as to the third Chevron factor, the equity of retroactive application is manifest. Potentially, hundreds of elderly claimants are now entitled to a relatively small increase in their PPD benefit. These claimants need the additional benefit; because they suffered work-related injury, incurred permanent partial impairment, were unable to return to their time of injury jobs, incurred wage loss, and lost future earning capability. In fairness and in equity, these claimants deserve the additional PPD money more than the insurance companies deserve to keep it.

Equity demands that these elderly PPD claimants receive the same wage loss benefit that younger claimants receive. This was the purpose of the Reesor decision. Reesor pressed his case to decision, and on remand, he received an equal PPD benefit. Without retroactive application, there would be an inequity, because other similarly situated claimants would be denied equal PPD benefits. Therefore, equity favors retroactivity.

Most Workers' Compensation Insurers in Montana have extensive experience with common fund cases. Therefore, this Court should not allow the Insurers to escape coverage, because they have questions involving identification and payment of retroactive benefits. For instance, in Stavenjord II, the State Fund conceded that it processed approximately 3,200 Murer claimants (Stip. Fact # 65 (a)). In addition, the State Fund agreed that it also handled large numbers of claimants in other common fund cases. See e.g., Flynn v. State Fund, 2002 MT 279, 312 Mont. 410, 60 P.3d 279; and Broeker v. State Fund (1996), 275 Mont. 502, 914 P.2d 967. With this kind of extensive experience, the Insurers should be able to pay Reesor benefits.

In the Murer case, the State Fund began the claimant identification process after the Supreme Court rulings in 1994 (Murer II), and 1997 (Murer III). Thus, the State Fund began developing identification and payment methods in workers' compensation cases between nine and twelve years ago. In the present appeal, the Reesor Claimants anticipate that the Insurers will offer many excuses about their inability to identify Reesor Claimants, but this Court should seriously question why Reesor is any different

from Murer. Insurers in Montana were put on notice of potential common fund liabilities twelve years ago; therefore, the Insurers should not be allowed to escape common fund liability by contending that they failed to take proper precautions in their record keeping or file storage.

This Court should require the Insurers to pay additional PPD benefits to deserving Reesor Claimants, as opposed to allowing the Insurers to keep their "unconstitutional" gains. Equity favors the injured claimant who lost his job to injury. Conversely, equity and fairness do not favor the Insurance Company. The Insurer operates in the business of selling insurance, taking actuarial risks, and making money. Therefore, the Insurer has the ability to stay in business and to recoup losses. Fairness favors the injured worker who lost his ability to earn a high paying wage. Finally, equity favors the constitutional more than it favors the unconstitutional. Thus, equity requires the Insurers to pay constitutionally mandated PPD benefits.

Undoubtedly, the Insurers will assert scary exposure numbers, but this Court should ask if the Insurers truly identified how many Reesor claims have closed. In Stavenjord, the Workers' Compensation Court recognized that many potential Stavenjord claims would be non-actionable: "Some claimants may have returned to their time-of-injury jobs or jobs paying just as much. … Many may have settled their claims entirely, thus barring them from seeking further benefits. Stavenjord 2004 MTWCC 62, ¶ 30. This Court should ask for real facts if the Insurers try to use scary numbers to discourage retroactive application. Furthermore, Reesor asserts the principle that, "Cost-control alone cannot justify disparate treatment which violates an individual's right to equal protection of the law." Heisler v. Hines Motor Company, 282 Mont. 270, 283, 937 P.2d 45, 52 (1997).

In the case at bar, the Supreme Court decided that it was unconstitutional to deny equal PPD benefits to elderly claimants. That holding meant that the statute was unconstitutional as applied from the date of its enactment - not merely from the date of the Supreme Court Reesor decision. Equity demands equal PPD for all open claims. To hold otherwise results in a judicially repugnant and unequal treatment of similarly situated PPD claimants.

G. Reesor I Created A Common Fund With Accrued Benefits

Because of the Montana Supreme Court Reesor decision, the Reesor Claimants submit that a common benefit was created, increased, and/or preserved for all elderly PPD claimants with dates of injury or disease onset on or after July 1, 1987. Elderly claimants entitled to additional Reesor benefits have a vested right that accrued at maximum medical improvement, despite subsequent injury or death. Reesor 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 confirmed that "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.

The Reesor Claimants submit that Breen is still controlling law, and that fact is evidenced by the favorable reference 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 relating to "compensation accrued prior to the death, but unpaid at the time of the death." Monroy, 246 Mont. at 371, 805 P.2d at 1346.

In accord with Murer v. State Compensation Mutual Ins. Fund, 238 Mont. 210, 942 P.2d 69 (1997) (Murer III), Reesor asks this Court to apply the common fund doctrine. Reesor submits that the application of the common fund doctrine is the most expeditious and equitable method available to deliver additional 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 action certification and instead applied the common fund doctrine. The common fund theory was obviously affirmed on appeal (Murer III, 942 P.2d at 72), and in that respect, the Murer case was applied retroactively from July 1, 1987 through June 30, 1991.

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. After remand, the Murer claimants asked for class certification again, but this Court refrained because it already had the inherent power under the common fund doctrine to supervise the payment of common fund benefits to absent claimants.

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.

Three criteria must be met for the Court to find a common fund and to award attorney fees. Those criteria were summarized in Flynn v. State Fund, ¶ 15, 2002 MT 279, 312 Mont. 410, 60 P.3d 279, 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.

Reesor easily meets the three elements of the common fund test. First, Reesor "created, increased, and/or preserved" a common benefit for other elderly PPD claimants. Reesor satisfies the first criteria, because he litigated and created the precedent that formed the common fund; therefore, he was the active beneficiary. Second, Reesor incurred legal fees in establishing the common fund; thus, he 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 to the case at bar.

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 that 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. In its discussion of the common fund doctrine in the workers' compensation context, the Murer Court held:

> 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.
>
> ...
>
> 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 said 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 in Flynn v. State Fund, supra.

As in Murer, Rausch, and Flynn, Reesor should be entitled to common fund attorney fees. Reesor engaged in complex and lengthy litigation that resulted in the development of an important legal precedent. His action directly benefited a substantial number of claimants who neither were parties to, nor directly involved in, the Reesor litigation. See, Murer III, 283 Mont. at 223, 942 P.2d at 76. In addition, Reesor "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 Reesor'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 Reesor I created a common fund. Furthermore, the Court should find that the Reesor attorneys are entitled to reasonable attorney fees.

H. The Reesor Claimants Made A Timely Request For Common Fund Attorney Fees

After establishing the obligation of the Insurers to pay equal PPD benefits to ODA claimants in Stavenjord I, the Stavenjord Claimants asked the lower court to apply the common fund doctrine. Under the Common Fund Doctrine, the claimants had to wait for a successful decision in Stavenjord I, before they had the right to make that request.

The Reesor Claimants acknowledge that Rule 24.5.301(3) ARM requires the typical claim for attorney fees to be specifically pled in the petition. Furthermore, Reesor admits that he did not plead common fund attorney fees prior to the remand of Reesor I. However, as noted below, the Workers' Compensation Court has previously held that attorney fees do not always need to be asserted in the underlying pleading. Reesor submits that his request for common fund attorney fees could only be raised after the Supreme Court decided the merits of Reesor I.

The first element for a common fund action is the setting of a legal precedent; therefore, Reesor asks how he could request common fund attorney fees for an action wherein he had not yet set a precedent. Moreover, Reesor does not seek common fund attorney fees against the State Fund; rather, Reesor's fee request is asserted against non-participating PPD claimants. Entitlement to fees from these benefited claimants will only arise if Reesor succeeds in the case at bar.

In Flynn, supra, the Workers' Compensation Court addressed the question of whether common fund attorney fees could be requested after remand. The Court stated, "the Court's rule regarding the pleading of attorney fees is aimed at providing notice where claimant seeks imposition of attorney fees against an insurer pursuant to section 39-71-611 or -612 MCA. The rule was not calculated to cover common fund fees." Flynn 2003 MTWCC 55, ¶ 9.

In Flynn, the Court cited Kunst v. Pass, wherein the Supreme Court held that a plaintiff in a dispute involving the Residential Landlord and Tenant Act could seek attorney fees despite failing to mention attorney fees in earlier pleadings. See, Kunst v. Pass, 1998 MT 71, ¶ 38, 288 Mont. 264, 957 P.2d 1. In Kunst, the Supreme Court specifically noted that the plaintiffs did not become entitled to attorney fees until after they prevailed on the merits:

> In this case, the complaint does not specifically request attorney's fees. However, the complaint itself was brought pursuant to the Residential Landlord and Tenant Act. . . . The Act itself provides that attorney's fees may be awarded to the prevailing party in an action "arising under this chapter." Section 70-24-442(1), MCA. According, although the Plaintiffs did not specifically request attorney's fees, it should have been apparent to Defendants that if Plaintiffs prevailed, an award of attorney's fees was possible. . . .

> Second, any claim by the Defendants of unfair surprise or that they had no opportunity to defend themselves lacks merit. The Defendants had a full opportunity to file objections to the request for attorney's fees and to be heard at oral arguments as to why the Plaintiffs should not receive such an award. We conclude that the Defendant did indeed have notice and an opportunity to defend themselves.

Kunst v. Pass, ¶¶ 36-37.

In Flynn, the Workers Compensation Court went on to cite the case of In re Estate of Lande, 1999 MT 179, 295 Mont. 277, 983 P.2d 316, wherein the Supreme Court held that if a specific statute provides for an award of attorney fees, fees may be awarded post-trial even though the petitioner did not request that relief in the pretrial order. The Court employed the following rationale:

> The purposes of pretrial orders are to "prevent surprise, simplify the issues, and permit the parties to prepare for trial." Nentwig v. United Industry, Inc. (1992), 256 Mont. 134, 138-39, 845 P.2d 99, 102. Requiring inclusion in the pretrial order of a request for attorney fees pursuant to § 72-12-2-6, MCA, which mandates such fees in the event a party successfully defends the validity of a will, would not further those purposes. Indeed, where attorney fees are a straightforward statutory entitlement in the event a party prevails in the action, no surprise could result from a post trial claim by such a successful party for the statutorily-mandated fees. In addition, inclusion in the pretrial order of the subject of attorney fees which become an entitlement only after the prevailing party has been determined at trial could neither simplify trial issues nor allow for better trial preparation, since no evidence need be presented on the question and no legal determination are required before or during trial.

Flynn 2003 MTWCC 55, ¶ 11; citing, In re Estate of Lande, ¶ 26.

The Workers Compensation Court in Flynn cited the case of Mountain West Farm Bureau Mutual Ins. Co. v. Brewer, 2003 MT 98, 315 Mont. 231, 69 P.3d. 652, wherein the Supreme Court rejected the argument that by failing to raise attorney fees in conjunction with a motion for summary judgment or on appeal of that judgment, the plaintiffs waived their right to request them in post-remand proceedings. Flynn 2003 MTWCC 55, ¶ 12. The Court read West Farm Bureau Mutual Ins together with Estate of Lande to find that plaintiffs did not waive their right to seek attorney fees by first pursuing the claim on its merits. Afterwards, the plaintiffs were allowed to seek attorney fees. Id.

Finally, after it reviewed the above-cited cases, the Workers Compensation Court in Flynn stated:

> The logic of Estate of Lande is persuasive in the present case. 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 the statutory entitlement, common fund fees are a legal consequence of claimant prevailing in the original action and thereby benefiting other claimants. As in Estate of Lande, inclusion of the request for attorney fees in the petition or pretrial order would not have simplified trial issues or enhanced trial preparation. I therefore hold that claimant's request for common fund fees with respect to benefited claimants is not barred by his failure to make the request at an earlier stage of these proceedings.

Flynn 2003 MTWCC 55, ¶¶ 13-14.

In Schmill II, the Insurers said that Schmill's attorneys could not request common fund attorney fees, because the attorneys did not make that request in their initial petition. Rebuffing that argument, the Montana Supreme Court said that the Insurers "ignore the fact that a common fund does not arise until after the initial round of litigation." Schmill II, ¶ 23. Following the lead of the Workers' Compensation Court in Flynn, the Supreme Court also cited the Kunst precedent. Schmill II, ¶ 23. Finally, in the same paragraph, the Supreme Court concluded the issue by stating:

> Therefore, it was proper for Schmill's attorneys to wait until post-remand proceedings to request common fund attorney fees. Furthermore, again, because the common fund did not arise until after we issued Schmill I, Schmill's attorneys are not now estopped from requesting common fund attorney fees and there is no due process violation.

As in Flynn and Schmill II, this Court should decide that the Reesor Claimants made a timely request for common fund attorney fees.

I. The Laches Defense Is Inapplicable

In support of its laches argument, the Insurers may lament the fact that there is no statute of limitations in pre-1997 workers compensation cases. Therefore, the Insurers may argue that the defense of laches is available when a claimant has demonstrated a lack of diligence that prejudiced the defendant. Liberty Mutual previously argued the laches defense in an earlier Workers' Compensation Court common fund case entitled Lee Miller v. Liberty Mutual Fire Ins. Co. 2003 MTWCC 6. The Lee Miller Court thoroughly discussed the inapplicability of the laches defense in a

common fund action. The Lee Miller Court cited Marriage of Hahn and Cladouhos, wherein the Supreme Court stated:

> Laches is a concept of equity that can apply when a person is negligent in asserting a right, and can apply where there has been an unexplained delay of such duration or character as to render the enforcement of the asserted rights inequitable. Fillner v. Richland (1991), 247 Mont. 285, 290, 806 P.2d 537, 540. Each case must be determined on its own unique facts. Fillner, 806 P.2d at 540. When a claim is filed within the time set by the statue of limitations, "the defendant bears the burden to show that extraordinary circumstances exist which requires the application of laches." Id. 263 Mont. at 319, 868 P.2d at 601.
> . . .
> The doctrine of laches does not bar the present claim.

Lee Miller, 2003 MTWCC 6, ¶ 30; citing, Marriage of Hahn and Cladouhos, 263 Mont. 315, 318, 868 P.2d 599, 601 (1994).

In the case at bar, the Insurers will not be able to show "extraordinary circumstances" that would justify the use of the laches defense. In addressing the issue in Lee Miller, the Court stated:

> I fully understand that it may be impossible or impractical to identify all claimants insured by Liberty to whom Broeker benefits may be payable, but we faced a similar hurdle in Broeker. In Broeker we adopted the best means available to identify some of the older claimants, including newspaper notices. It may turn out that some cut-off date is necessary, or that some sort of published notice with respect to older claims, is the best method for identifying older claims.
> . . .
> With respect to the individual claim of Miller in the present case, which dates back to as early as 1987, Liberty has failed to show extraordinary circumstances which would bar his claim. His present request for benefits is not barred by the statute of limitations and Liberty has failed to show how it has been prejudiced by his delay in seeking the additional benefits.

Lee Miller v. Liberty Mutual Fire Ins. Co. 2003 MTWCC 6, ¶¶ 31 & 33. As in Lee Miller, this Court should decide that the laches defense is inapplicable.

J. Retroactive Application Does Not Unconstitutionally Impair Contracts

The Insurers also persist with their novel impairment of contract argument. Obviously, the Montana Constitution prohibits a statute from retroactively impairing a contract; however, the Insurers incorrectly assert the impairment of contract argument in a Court decision case. Reesor I is a court decision that is being retroactively applied

(not a statute); and, as with all court decisions, Reesor I construes the statute's meaning from its inception and "not from the date of the decision." Therefore, there was no impairment of contract, because the Reesor I holding is considered part of the existing contract. In other words, Reesor I established that the offending 1987 statute was always unconstitutional, so no pre-existing contract could construe it otherwise.

Essentially, the Insurers argue that prior contracts between employer and insurer somehow have the power to preclude a claimant from receiving his constitutionally mandated benefit. If the Insurers' argument held, then this Court would never be able to interpret a statute or declare it unconstitutional. That argument is obviously wrong because the Supreme Court has implicitly affirmed retroactive application (without impairing contracts) in every appealed workers' compensation common fund case. In Murer, Rausch, Flynn, and Schmill the Montana Supreme Court approved the retroactive application of each precedent-setting decision without concern about impairment of contract. Each case was decided well after the dates of benefit entitlement at issue.

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 Insurers now attack that as "impairment of contract" or "retroactive application." In analyzing previous common fund cases, it is clear that the Montana Supreme Court does (and should) "retroactively" apply its holdings.

Reesor submits that no party can enter a contract to diminish the legal rights of a workers' compensation claimant. Certainly, an employee cannot enter a contract that will abrogate his right to full workers' compensation benefits; yet, the Insurers contend that employers can (and did) enter such contracts. Section 39-71-409 MCA (1997) states, "No agreement by an employee to waive any rights under this chapter for any injury to be received shall be valid." This Court should hold that Reesor I did not impair any contract, and this Court should disregard the Insurers' novel impairment of contract argument.

IV. CONCLUSION

Courts do not discriminate. After Dale Reesor successfully challenged Montana's unconstitutional age limitation on PPD benefits, Reesor obtained an equal PPD benefit. Here, the Reesor Claimants ask the Court to apply Reesor to all open cases. If Reesor is not retroactively applied, other similarly situated claimants will be unfairly denied equal PPD benefits. The general rule in Montana requires retroactive application, and the Insurers cannot meet their burden of proof to establish the Chevron exception. Therefore, the Reesor Claimants ask this Court to find that the Reesor Common Fund may pursue Reesor benefits in all open PPD claims arising between July 1, 1987 and December 22, 2004.

DATED this 5th day of May, 2006

MURPHY LAW FIRM
P.O. Box 3226
Great Falls, MT 59403-3226
(406) 452-2345

____
Thomas J. Murphy
Attorney for the Reesor Claimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of May, 2006, a copy of the foregoing Brief was served upon the Attorneys for the Insurers by mailing a true and correct copy of said document via first class mail to the addresses listed below:

Bradley J. Luck
Garlington, Lohn & Robinson
PO Box 7909
Missoula, MT 59807

Tom Martello
State Fund
PO Box 4759
Helena, MT 59604-4759

Larry Jones
Jones & Garber Law Office
700 SW Higgins Ave #108
Missoula, MT 59803-1489

Steven Jennings
Crowley, Haughey, Hansen Toole & Dietrich
P O Box 2529
Billings, MT 59103-0537

KD Feeback
Gough, Shanahan, Johnson & Waterman
P O Box 1715
Helena, MT 69624

Bryce R. Floch
Hammer, Hewitt & Sandler PLLC
P O Box 7310
Kalispell, Mt 59904-0310

Andrew Adamek
Browning, Kaleczyc, Berry & Hoven
P O Box 1697
Helena, Mt 59624

Robert James
Ugrin, Alexander, Zadick & Higgins
P.O. Box 1746
Great Falls, MT 59403

Thomas M. Welsch
Poore, Roth & Robinson, PC
P O Box 2000
Butte, MT 59702

____
THOMAS J. MURPHY
Attorney for Petitioner