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THE WORKERS' COMPENSATION COURT IN THE STATE OF MONTANA

DEBRA STAVENJORD, Petitioner, v. MONTANA STATE FUND, Respondent/Insurer.	WCC No. 2000-0207 **STATE FUND'S ANSWER BRIEF REGARDING RETROACTIVITY, COMMON FUND ENTITLEMENT, COMMON FUND FEES AND GLOBAL LIEN OF STAVENJORD'S COUNSEL**

COMES NOW the Respondent, Montana State Fund ("State Fund"), and hereby files its Answer Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees and Global Lien of Stavenjord's Counsel. For the reasons stated herein and in its Opening Brief, the State Fund asserts that *Stavenjord v. Mont. State Fund*, 2003 MT 67, 314 Mont. 466, 67 P.3d 229, applies prospectively only. The State Fund also contends that the application of the common fund doctrine is inappropriate in this case and the failure of Stavenjord's counsel to plead an entitlement to common fund attorney fees bars his post-remand attempt to collect those fees. Lastly, the State Fund asserts

that if the attorney fee lien of Stavenjord's counsel is effective, it should apply with equal force to all insurers and self-insurers in Montana.

INTRODUCTION

On March 5, 2004, the parties simultaneously exchanged opening briefs on four threshold issues. Both briefs were extensive and the parties fully set forth their positions. Upon simultaneous submission of the Answer Briefs, the four threshold issues will be fully briefed and ready for decision. Because the Court will be simultaneously considering the same issues in *Schmill* and *Stavenjord*, the State Fund incorporates by reference the arguments raised in its *Schmill* briefing which have applicability to *Stavenjord*.

ARGUMENT

In its Opening Brief, the State Fund set forth its positions regarding retroactivity and common fund fees. For the sake of brevity and in accordance with the operative rules of this Court, the State Fund will not repeat its earlier arguments and instead only responds to the new contentions of Stavenjord to which it takes exception.

A. THE *STAVENJORD* DECISION DID NOT DECLARE MONTANA CODE ANNOTATED § 39-72-405 (1997) UNCONSTITUTIONAL, SO STAVENJORD'S ARGUMENT THAT *STAVENJORD* MUST BE GIVEN RETROACTIVE APPLICATION BECAUSE THE STATUTE IS VOID *AB INITIO* HAS NO MERIT.

Stavenjord contends that the *Stavenjord* decision struck down Montana Code Annotated § 39-72-405 (1997) as unconstitutional. According to Stavenjord, an unconstitutional statute is void *ab initio* and must be given automatic retroactive application. *See* Stavenjord's Opening Br. On Post-Remand Issues 3-7 (Mar. 5, 2004) [hereinafter "Petr.'s Br."]. Stavenjord's arguments have no applicability to this case because *Stavenjord* did not hold that Montana Code Annotated § 39-72-405 (1997) was unconstitutional. In fact, the statute still remains available to OD claimants and entitles them to receive, in some instances, more partial disability benefits than those available to a worker whose injury is governed by Montana Code Annotated § 39-71-703. For example, an OD claimant who has a wage loss but no ratable impairment is still entitled to receive up to $10,000 in benefits under Montana Code Annotated § 39-72-405 (1997). However, a claimant who sustains an injury and has a wage loss but has no ratable impairment is not entitled to receive any benefits under Montana Code Annotated § 39-71-703. Therefore, although *Stavenjord* held that Montana Code Annotated § 39-72-405 (1997) violated the Equal Protection Clause as applied to

Stavenjord, the statute was not declared unconstitutional on its face and is still in existence. Accordingly, Stavenjord's argument that the *Stavenjord* decision rendered Montana Code Annotated § 39-72-405 (1997) void *ab initio* has no merit.

1. Even If *Stavenjord* Declared Montana Code Annotated § 39-72-405 (1997) Unconstitutional on Its Face, No Judicial Mandate Exists Which Requires the Automatic Retroactive Application of *Stavenjord*.

In support of her argument that Montana Code Annotated § 39-72-405 (1997) is void *ab initio* and must be automatically applied retroactively, Stavenjord cites to several cases, including *Trusty v. Consolidated Freightways* (1984), 210 Mont. 148, 681 P.2d 1085. *See* Petr.'s Br. 3-7. *Trusty* involved the first version of Montana's offset statute. In *McClanathan v. Smith* (1980), 186 Mont. 56, 606 P.2d 507, the Montana Supreme Court struck down as constitutionally unenforceable the first version of the offset provision codified at 39-71-702(2), which allowed for a 100% offset. As a result, the court in *Trusty* had to examine the effect of *McClanathan* on Trusty's claim because his injury occurred during the period when the 100% statute was in effect. The insurer wanted to apply the 50% offset statute to Trusty's injury, even though it was enacted after his injury. The Court noted that *McClanathan* concluded the 100% offset statute was constitutionally unenforceable, which meant that § 702's offset provision was void. With no offset remaining in effect, the Court concluded that no offset could apply to Trusty's claim. *See Trusty*, 210 Mont. at 151-152, 681 P.2d at 1087-1088.

At the time of *Trusty*, the Court's retroactivity considerations in workers' compensation cases were overly concerned with determining whether the changes in the law were substantive versus procedural because the law in effect at the time of a claimant's injury established the claimant's substantive right to benefits. Therefore, the Court focused its retroactivity analysis on whether the changes in the law – which were usually legislative ones because the Legislature sets and determines entitlement – were procedural or substantive. If the changes were procedural, then retroactive application was appropriate. *See e.g. Buckman v. Mont. Deaconess Hosp.* (1986), 224 Mont. 318, 321-322, 730 P.2d 380, 382; *Boehm v. Alanon Club* (1986), *222* Mont. 373, 377, 722 P.2d 1160, 1162, *overruled on other grounds*, *Richardson v. Corvallis Pub. Sch. Dist. No. 1* (1997), 286 Mont. 309, 950 P.2d 748; Mont. Code Ann. § 1-2-109 (2003). This explains why the Court in *Trusty* held that the 50% offset statute, which became effective on July 1, 1974, could not be retroactively applied to Trusty, whose injury occurred on May 21, 1974. *See Trusty*, 210 Mont. at 152-153, 681 P.2d at 1088. The *Trusty* opinion, like the opinions in *Kleinhesselink*, *Haugen,* and *Porter*, contains no in-depth discussion of retroactivity. *See Haugen v. Blaine Bank of Mont.* (1996), 279 Mont. 1, 8, 926 P.2d 1364, 1368 (in giving retroactive application to a decision which

changed a procedural matter under Montana Rules of Civil Procedure 41(e), the Court neglected to apply *Chevron Oil* but instead noted that judicial decisions on procedural matters may be applied retroactively); *Kleinhesselink v. Chevron, USA* (1996), 277 Mont. 158, 162, 920 P.2d 108, 111 (in applying *Stratemeyer* retroactively because it was decided shortly after Kleinhesselink filed his notice of appeal, the Court failed to analyze retroactivity and instead cited to *Porter*, a case which examined the retroactive application of a statute rather than a judicial decision); *Porter v. Galarneau* (1996), 275 Mont. 174, 182-185, 911 P.2d 1143, 1148-1150 (briefly mentioning *Harper* in dicta but the decision addressed the retroactive application of a statutory amendment to Montana's Scaffolding Act rather than the retroactive application of a judicial decision). Although *Trusty* was written twelve years after *Chevron Oil* was published, the test for non-retroactivity was not even mentioned in the decision. Instead, without any analysis, the *Trusty* opinion simply states: "To apply this 50% offset statute [which was enacted after Trusty's injury and was not in existence at the time of his claim] would produce retroactive application of the law." *Trusty*, 210 Mont. at 152, 681 P.2d at 1088. Had the Court invoked the *Chevron Oil* test and applied it to the *McClanathan* decision, the ultimate decision in *Trusty* may have been different. Like in *Kleinhesselink*, *Haugen* and *Porter*, the Court's failure to properly analyze retroactivity undermines the applicability of those cases to retroactivity issues. Accordingly, *Trusty* does not mandate the automatic retroactive application of *Stavenjord*.

a. The Montana Supreme Court has applied the *Chevron Oil* test to cases in which statutes were found to be unconstitutional.

The Montana Supreme Court has recently applied *Chevron Oil* to determine the potential retroactive application of a decision which found a statute unconstitutional. *See Seubert v. Seubert*, 2000 MT 241, 301 Mont. 399, 13 P.3d 365. *See also Brockie v. Omo Constr., Inc.* (1994), 268 Mont. 519, 887 P.2d 167, 171, *overruled in part by Porter*, 275 Mont. at 185, 911 P.2d at 1150[1] (in addressing a change in the law during the time of the appeal, the Court noted that statute which is declared unconstitutional may be void *ab initio*, but an exception exists when manifest injustice results). As discussed in the State Fund's Opening Brief, the Montana Supreme Court in *Seubert* held that Montana Code Annotated §§ 40-5-272 and -273 unconstitutionally violated the separation of powers clause because they allowed the Child Support Enforcement Division to modify a district court child support order. *See Seubert*, ¶ 25. In addressing

[1] *Porter* held that for purposes of changes in the law, an appellate court must apply the case law in effect at the time it renders its judicial decision, but changes in the law resulting from statutory amendments are not necessarily applied to cases pending on appeal at the time of the statutory amendment.

the retroactive effect of this decision in the civil context, the Supreme Court applied the *Chevron Oil* test and ultimately determined that the decision should apply prospectively only, with the logical exception that the decision applied with full force to the litigants in the case, Camille and Russell Seubert. *See* Order Clarifying Decision on Grant of Rehearing, *Seubert*, ¶ 56 (citing *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999)).

A similar result occurred in *Sheehy v. State* (1991), 250 Mont. 437, 820 P.2d 1257. In that case, the plaintiffs brought a class action suit against the State for refunds of taxes paid from 1983-1988 on the retirement benefits they received under the Federal Employees' Retirement Act. The plaintiffs challenged the constitutionality of Montana Code Annotated § 15-30-111(2)(c)(i) (1989), which allowed the State to collect income tax on FERA benefits in excess of $3,600. The legal basis for the suit was premised upon *Davis v. Mich. Dept. of Treas.*, 489 U.S. 803 (1989), a United States Supreme Court case which held that a similar statute in Michigan was unconstitutional. The parties agreed that Montana Code Annotated § 15-30-111(2)(c)(i) was unconstitutional, and the plaintiffs were essentially seeking to have *Davis*, and its finding that these types of taxation statutes were unconstitutional, applied retroactively. In analyzing the issue, the Court undertook a detailed application of the *Chevron Oil* test to the facts of *Sheehy*. The Montana Supreme Court concluded that even though *Davis* required a finding of an unconstitutional statute, the decision was not clearly foreshadowed, retroactive application would not promote the concept of intergovernmental tax immunity[2] and retroactivity would be inequitable. Therefore, the court held that *Davis* applied prospectively only and did not entitle the plaintiffs to a refund from the State for any taxes paid under Montana Code Annotated § 15-30-111(2)(c)(i) (1989). *See Sheehy*, 250 Mont. at 441-446, 820 P.2d at 1259-1262.

Although *Sheehy* was later abrogated by the United States Supreme Court decision in *Harper*, it still provides persuasive guidance to the retroactivity analysis in Montana because the *Chevron Oil* test is still used in this State. Accordingly, *Seubert* and *Sheehy* establish that in Montana, decisions which find a statute unconstitutional are not automatically applied retroactively.

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[2] In *Davis*, the United States Supreme Court held that the doctrine of inter-governmental tax immunity prohibited a state from imposing taxes on the retirement income of federal employees but not state employees.

b. Other jurisdictions have also applied the *Chevron Oil* test to cases in which statutes were found to be unconstitutional.

The Kansas Supreme Court has noted that the determination of whether a judicial decision which "holds statutory law to be unconstitutional should be applied prospectively or retroactively has been the subject of literally hundreds, if not thousands, of cases." *Sharp v. State*, 827 P.2d 12, 16 (Kan. 1992). Obviously, some jurisdictions automatically apply judicial decisions retroactively if there is a finding of an unconstitutional statute. However, Montana's position represents the more modern approach to retroactivity and finds ample support in cases from other jurisdictions. *See generally Salorio* (noting that the traditional view is that an unconstitutional act is void from its inception and everything done under it must be undone, whereas the modern and better-reasoned rule is that the invalidation of a statute does not automatically invalidate all prior transactions made in justifiable reliance upon the statute). In *Salorio*, the New Jersey Supreme Court concluded that a statute levying an emergency transportation tax on New York residents who commuted to New Jersey was unconstitutional. However, the Court held that its decision and invalidation of the emergency transportation tax statute would only apply prospectively. *See Salorio v. Glaser*, 461 A.2d 1100 (N.J. 1983). Cases from other jurisdictions follow the same line of reasoning as Montana and New Jersey. *See e.g. Simmers v. Packer*, 680 A.2d 904, 906-907 (Pa. Super. 1996) (holding that a prior decision, which declared unconstitutional a statute permitting courts to order parents bound by child support obligations to provide equitably for their children's educational costs, applied prospectively only); *Lovell v. Lovell*, 378 S.2d 418 (La. 1979), *superseded by statute*, *Teasdel v. Teasdel*, 454 S.2d 886 (La. App. 1984) (finding an alimony statute unconstitutional as violative of equal protection but holding that the decision would not be applied retroactively); *John E. v. Doe*, 164 A.D.2d 375, 388 (N.Y. App. Div. 1990) ("Accordingly, when a statute is declared unconstitutional, there is room to withhold retroactive application where there has been good-faith reliance on the statute, coupled with a demonstrably inequitable result"); *Vaughn v. Murray*, 521 P.2d 262, 270 (Kan. 1974) ("It has been said that an all inclusive statement of a principle of absolute retroactive invalidity [when a statute is found to be unconstitutional] cannot be justified") (citation omitted).

Based on *Sheehy* and *Seubert*, and consistent with the judicial approaches taken in other jurisdictions, no judicial mandate exists which requires courts to automatically apply a decision retroactively if the decision finds a statute unconstitutional. To the contrary, the more modern and better-reasoned approach is to continue to evaluate the potential retroactive application of *Stavenjord* under the *Chevron Oil* test. Accordingly, Stavenjord's demand for an automatic retroactive application should be disregarded.

For all the reasons herein and in the State Fund's Opening Brief, *Stavenjord* should be applied prospectively only.

B. *STAVENJORD* HAS NOT ALREADY BEEN APPLIED RETROACTIVELY.

Stavenjord claims that prior decisions from the Montana Supreme Court have already resolved the retroactivity issue. *See* Petr.'s Br. 8. In support of her argument, Stavenjord cites to a non-workers' compensation case, *Mitchell*, and to four workers' compensation cases: *Murer*, *Rausch*, *Flynn* and *Stavenjord*. However, none of these cases resolve the retroactivity question. *Mitchell* does not even mention retroactivity and instead involves an anti-stacking statute that violated substantive due process, an issue which is not part of this litigation. *Murer* and *Rausch* involved the payment of benefits under specific statutory timeframes and schemes, and *Chevron Oil* was not a part of the Court's analysis in either of those decisions. Finally, in *Flynn* and *Stavenjord*, the retroactivity issue was not addressed by the Montana Supreme Court. Therefore, none of the cases cited by Stavenjord support her position.

1. The Payment of Benefits to Stavenjord Herself Does Not Entitle Other Claimants to Retroactively Receive Payment of *Stavenjord*-Type Benefits.

Stavenjord seems to be relying on *Mitchell*, *Murer*, *Rausch*, *Flynn* and *Stavenjord* for the alternative argument that her receipt of full benefits under § 703 requires *Stavenjord* to be applied retroactively to all other claimants because to hold otherwise would violate notions of equal protection. *See* Petr.'s Br. 7-8, 10-11. According to Stavenjord, the payment of benefits to the named plaintiffs in *Mitchell*, *Murer*, *Flynn*, *Rausch* and *Stavenjord* equates to the retroactive application of those decisions because the payments were made to compensate for a harm that occurred in the past. *See* Petr.'s Br. 8. However, Stavenjord's argument is unpersuasive and convoluted because every judicial decision decided in favor of a plaintiff awards benefits for some prior harm done to the plaintiff. Stated differently, it is impossible to award benefits for injuries which have not yet happened. Quite simply, retroactivity is not so expansive that it includes every payment made to compensate a plaintiff for a past harm. Stavenjord's arguments ignore the fundamental purpose behind the *Chevron Oil* test, which was designed to address situations like the one presented here: to determine if non-parties whose injuries occurred prior to the date of a judicial decision are still entitled to receive the benefits of that decision.

Contrary to Stavenjord's contentions, the payment of benefits to the plaintiff involved in the precedent-setting litigation does not require retroactive application of the

decision to all other claimants. New decisions often operate retroactively upon the parties to the overruling case itself, but prospectively as to all other parties. This approach provides incentive for litigants to continue pursuing lawsuits which attempt to have outdated or unjust rules overturned. The Montana Supreme Court did exactly this in the *Seubert* case when it held that the decision would have prospective application except as to the Seuberts. *See* Order Clarifying Decision on Grant of Rehearing, *Seubert*, ¶ 56 (citing *Holmberg*). *See e.g. Lyons v. Westinghouse Elec. Corp.*, 235 F. Supp. 526 (S.D.N.Y. 1964) (although the overruling decision was retroactively applicable to the parties to the overruling case, it did not follow that the decision should be given general retroactive effect to other cases). Accordingly, applying a decision retroactively to the litigants involved in the case which establishes a new rule of law, but denying general retroactive application to other claimants, finds support in Montana law and law from other jurisdictions and is consistent with the policy of encouraging litigants to challenge laws they feel are unconstitutional or outdated. Therefore, the payment of benefits to Stavenjord does not require retroactive application of the *Stavenjord* decision to all other similarly situated claimants.

C. THE *CHEVRON OIL* TEST IS STILL UTILIZED IN MONTANA.

The State Fund's Opening Brief contains an in-depth analysis of the continued validity of the *Chevron Oil* test in Montana and the State Fund will not repeat its analysis. Stavenjord asserts that the *Chevron Oil* test is no longer recognized in Montana, and she relies heavily on the *Porter* case to support her position. *See* Petr.'s Br. 10. However, as the State Fund has already noted, *Porter* did not address the retroactive application of a judicial decision. Instead, it analyzed the retroactive application of a statutory amendment to Montana's Scaffolding Act. *Porter*, 275 Mont. at 182-185, 911 P.2d at 1148-1150. Further, neither the *Porter* decision nor its accompanying briefs contain any discussion of *Chevron Oil*.

Despite *Porter's* shortcomings, Stavenjord stands firm on her insistence that *Porter* signifies Montana's abandonment of the *Chevron Oil* test. However, three recent cases from the Montana Supreme Court (*Benson*, *Seubert* and *Ereth*) emphasize the continued validity of the *Chevron Oil* test in Montana. In an attempt to distinguish those cases, but without discussing *Seubert*, Stavenjord claims that *Benson* and *Ereth* are "anomalous cases" in which "counsel failed to apprise the Montana Supreme Court about the applicable retroactivity standard." Petr.'s Br. 13. In support of her contention, Stavenjord cites to a portion of this Court's decision in *Flynn*: "It is not at all clear to this Court that the *Benson* court intended to reject the blanket rule of *Harper* in favor of the *Chevron [Oil]* test or even considered the issue." Petr.'s Br. 13 (citing *Flynn*, ¶ 22). As discussed below, the Court's reasoning from *Flynn* verifies Montana's continued adherence to *Chevron Oil*.

A review of the history behind Montana's use of the *Chevron Oil* test leads to the inescapable conclusion that the three 1996 cases (*Porter*, *Haugen* and *Kleinhesselink*) are the "anomalous cases" that briefly departed from the *Chevron Oil* test. In 1978, Montana adopted the *Chevron Oil* test and the Montana Supreme Court utilized and applied the test in many subsequent cases. *See* Opening Br. 6-7 (listing some, but not all, of the cases which analyzed and applied the *Chevron Oil* test). In 1996, after relying upon and applying the *Chevron Oil* test for nearly two decades, the Court issued *Porter*, *Haugen* and *Kleinhesselink*, wherein the Court seemed to adopt a blanket rule of retroactivity. As this Court reasoned in *Flynn*, if the Montana Supreme Court truly intended to overrule two decades worth of decisional law, it would have addressed *Chevron Oil* in detail and explained why it was abandoning its non-retroactivity test. However, *Porter*, *Haugen* and *Kleinhesselink* make no mention of the well-established *Chevron Oil* test. Notably, neither do any of the briefs filed in those cases.[3]

Lacking a detailed discussion of the *Chevron Oil* test, it is reasonable to presume that the Montana Supreme Court did not intend to abandon eighteen years worth of case law in its three 1996 cases. This presumption is confirmed by the fact that the Montana Supreme Court returned to the *Chevron Oil* test in 1998 and has continued to apply it to civil cases as recently as December of 2003. Clearly, the pre-1996 history behind the Montana Supreme Court's use of the *Chevron Oil* test, as well as the return to the *Chevron Oil* test after 1996, establishes that the Court never intended to abandon the *Chevron Oil* test in *Porter*, *Haugen* and *Kleinhesselink* in favor of a blanket rule of retroactivity. Therefore, the *Chevron Oil* test is still valid in Montana.

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[3] None of the Supreme Court briefs in *Kleinhesselink*, *Haugen* or *Porter* mention or address the *Chevron Oil* test. *See* Appellants' Brief, Response Brief of Blaine Bank of Montana and William Larsen, Appellants' Reply Brief; *Haugen v. Blaine Bank of Mont.*, Mont. Sup. Ct. No. 95-554; Opening Brief of Appellant, Brief of Respondents, Reply Brief of Appellant; *Kleinhesselink v. Chevron, U.S.A.*, Mont. Sup. Ct. No. 95-524; Appellants' Brief, Respondent's Brief, Appellants' Reply Brief, Respondent's Brief Regarding Effect of House Bill No. 158; Appellants' Supplemental Brief Regarding Retroactivity Analysis, Memorandum in Reply to Appellants' Supplemental Brief Regarding Retroactivity Analysis, Appellants' Supplemental Reply Brief Regarding Retroactivity Analysis; *Porter v. Galarneau,* Mont. Sup. Ct. No. 94-552.

1. Stavenjord's Reliance on Criminal Cases to Support Her Assertion of a Blanket Rule Of Retroactivity Is Misguided.

As this Court has noted, decisions in criminal cases, which usually view retroactivity in terms of *ex post facto* laws, have no applicability to analyzing retroactivity in the context of civil litigation. Further, the State Fund already explained why any reliance on *Steinmetz* and *Waters*, two criminal cases, would be misplaced. *See* Opening Br. 5-6. In addition to those two cases, Stavenjord has cited to *State v. Goebel*, 2001 MT 155, 306 Mont. 83, 31 P.3d 340 (abrogated as applied to parole violations by *Gundrum v. Mahoney*, 2001 MT 246, 307 Mont. 96, 36 P.3d 890, 891). In *Goebel*, the Court stated that a judicial decision construing a criminal statute will not be given retroactive application if the construction was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Goebel*, ¶ 21 (citation omitted). Such a situation did not exist in *Goebel* because the judicial constructions of the statute were ones of first impression, so they were not "unexpected or indefensible." *Goebel*, ¶ 22.[4] However, the same cannot be said of *Stavenjord* because *Eastman* had rejected an identical constitutional challenge to the cap and other decisions had approved of the $10,000 cap. Thus, *Stavenjord* was "unexpected" and *Geobel* is inapplicable to this case.

D. UNDER THE *CHEVRON OIL* TEST, *STAVENJORD* APPLIES PROSPECTIVELY ONLY.

1. *Stavenjord* Was Not Clearly Foreshadowed.

Stavenjord claims that the *Stavenjord* decision was clearly foreshadowed by pre-1987 law and the 1999 decision in *Henry*. *See* Petr.'s Br. 18. As the Court is aware, the 1987 amendments were codifications of the common law. *See Stavenjord*, ¶ 54 (Rice, J., dissenting). However, Stavenjord claims that from 1987 forward, most attorneys seriously questioned the unequal application of the ODA versus the WCA. Petr.'s Br. 18. Stavenjord's supposition flies in the face of *Eastman's* specific holding on an identical issue that the difference in the degree of benefits payable under § 405 of ODA versus § 703 of the WCA was constitutionally permissible. Stavenjord's supposition also runs afoul of the Montana Supreme Court's express approval in 1993 of the constitutional analysis from *Eastman*, which underscores the notion that the difference in the degree of benefits payable under the § 405 ODA versus § 703 of the WCA was constitutionally permissible until *Stavenjord*. *See Stratemeyer v. Lincoln County* (1993), 259 Mont. 147, 154, 855 P.2d 506, 511 (citing to *Eastman*, with

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[4] *Goebel's* statements seem to mirror the "clearly foreshadowed" prong of *Chevron Oil*.

approval, on two separate instances when discussing an equal protection argument concerning the rational bases behind the remedies and benefits the legislature made available to claimants).

Employers and insurers justifiably relied on the *Eastman* decision and the presumed validity of Montana Code Annotated § 39-72-405 to determine entitlement and set rates. In fact, the Montana Supreme Court has accepted § 405's cap as appropriate in prior decisions. *See e.g. Smart v. Mont. Historical Soc'y* (1996), 277 Mont. 89, 918 P.2d 670 (holding that the WCC properly limited Smart's compensation to an award of up to $10,000 under § 405). A retroactive application would require the nonsensical invalidation of the cases in which the Court had specifically approved of the cap under § 405. In light of *Eastman*, *Stratemeyer* and *Smart*, the holding in *Stavenjord* was contrary to the existing law in Montana at the time and was also contrary to the express language of the governing statute.

Because no case had ever disturbed the cap prior to *Stavenjord*, the decision invalidating § 405 of the ODA was akin to a new rule of law. Such a drastic change in the rights of claimants and the obligations of insurers was not clearly foreshadowed. Because the first factor of the *Chevron Oil* test is satisfied, retroactive application is improper, so this Court should deny the request by Stavenjord to apply the decision retroactively to July 1, 1987.

a. <u>If *Stavenjord* is applied retroactively, it should not be applied to any OD claims which occurred prior to *Henry*.</u>

Without any mention of *Eastman*, Stavenjord claims that the *Stavenjord* decision was foreshadowed by *Henry*. The State Fund's Opening Brief contains a detailed discussion of *Henry* and it will not repeat its arguments. The State Fund does note, however, that Stavenjord's discussion of *Henry* fails to explain that *Henry* involved the wholesale denial of benefits, whereas *Eastman* involved an issue identical to the one addressed in this litigation. Stavenjord is attempting to extend the *Henry* holding to this case by arguing that *Henry* serves as the basis for invalidating any ODA provision on equal protection grounds. However, contrary to Stavenjord's implicit assertions, *Henry* did not invalidate the ODA in its entirety. Regardless, based on pre-*Henry* decisions, there had been no indication that the difference in the degree of benefits payable under the ODA was violative of the equal protection clause. Accordingly, if *Stavenjord* applies retroactively, its retroactivity should be limited to the timeframe post-*Henry*.

2. Prospective Application Will Not Retard the Holding of *Stavenjord.*

Stavenjord claims that the failure to apply *Stavenjord* retroactively would nullify the decision. *See* Petr.'s Br. 18. Stavenjord's contention is misleading and incorrect. Because of the *Stavenjord* decision, all OD claimants with entitlement dates occurring on or after May 22, 2001, are entitled to receive PPD benefits under § 703 of the WCA. *See* Stipulation Regarding Prospective Claims (Jan. 22, 2004). This entitlement exists even though the plain language of § 405 of the ODA limits benefits to $10,000. Therefore, even if *Stavenjord* is applied prospectively only, claimants with occupational diseases arising on or after May 22, 2001, will receive *Stavenjord*-type benefits because of the change in the law. Accordingly, because prospective application will not retard the holding of *Stavenjord*, prospectivity is proper.

3. Retroactive Application Is Improper Because It Will Result in a Substantial Inequity.

In an attempt to undercut the State Fund's arguments, Stavenjord claims that the State Fund's position is based on a "self-satisfying" set of facts that were compiled without the benefit of discovery. Stavenjord is distorting the method by which the factual stipulation was created. As Stavenjord is fully aware, her counsel agreed to create a stipulated set of facts in lieu of developing the factual record through a series of evidentiary hearings. After countless revisions and conferences, the parties finalized and filed the factual stipulation. The finalized version contains many facts from Stavenjord. Further, Stavenjord -- through her counsel -- approved of every single fact set forth in the stipulation. Although Stavenjord had the option of demanding an evidentiary hearing, she voluntarily chose to proceed with presenting the facts via a factual stipulation. The informal compilation of the factual stipulation was as extensive, if not more extensive, than formal discovery and the inflammatory comments by Stavenjord with respect to the factual stipulation should be disregarded because they are a discredit to the process the parties undertook to complete it.

Stavenjord contends that no hardship would result from a retroactive application because the State Fund has the money, the method and the means to implement *Stavenjord* retroactively. *See* Petr.'s Br. 19-21. Stavenjord's counsel seems to contend that Stavenjord's legal position under the hardship prong is based on the notion that he and the "claimants deserve this money more than the insurance companies deserve to keep it." Petr.'s Br. 19. Obviously, a proper legal analysis requires more than Stavenjord suggests. Because the State Fund has already fully explained why retroactivity is improper, it will only respond to the specific hardship arguments raised by Stavenjord.

a. The methods required to retroactively implement *Stavenjord* are much more complex than Stavenjord insinuates.

Stavenjord claims that the State Fund should have no problem implementing *Stavenjord* on a retroactive basis because it already had to re-adjust over 3,200 files as a result of the *Murer* decision.[5] Petr.'s Br. 19. If the State Fund could handle 3,200 files in *Murer*, then Stavenjord sees no reason why it cannot handle 3,500 files in *Stavenjord*. According to Stavenjord, any hardships claimed by the State Fund are nothing more than unjustified "excuses" that should be ignored. However, the State Fund's "excuses" are the same type of "excuses" that led to the insolvency of the Old Fund in the 1980s. As the Court can appreciate, *Murer* simply involved the recalculation of rates over a four-year time frame. Here, as the State Fund has already noted, *Stavenjord* would require the State Fund to retrieve older files over a fourteen-year period, undertake the massive task of obtaining vast amounts of missing medical and vocational information, and adjust the files based on the information obtained. Further, as the factual stipulation specifically notes, *Murer* offers no insight to the State Fund's ability to retroactively implement *Stavenjord* for the following reasons:

> At the time of the *Murer* decision and during almost all of the *Murer* implementation process, the State Fund was under a different organizational structure, one which was more conducive to accomplishing special projects. Even with a more flexible structure, completing the implementation process was a strain on the State Fund's business operations. This was so even though the *Murer* review was limited to a four year period, July 1, 1987 through June 30, 1991, and only involved the recalculation of the disability rate for those claimants at the maximum rate. Compared to *Murer*, a *Stavenjord* review process would involve a more complex review of each claim and cover a substantially longer period of time. The internal and external resources needed to accomplish a *Stavenjord* review, along with attended costs, would be considerably more than *Murer*.

Joint Statement of Stipulated Facts No. 65 (Feb. 11, 2004).

Stavenjord also claims that the NCCI's estimate of the cost impact of *Stavenjord* is more accurate than the State Fund's estimate, and the State Fund is "crying wolf"

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[5] Stavenjord also mentions *Broeker*, but information from *Broeker* was not included in the factual stipulation. Petr.'s Br. 19. However, the State Fund notes that *Broeker* only involved about 322 claimants.

with its facts and figures. Petr.'s Br. 20. Again, during the process of creating the factual stipulation, Stavenjord's counsel questioned the State Fund's estimates, demanded justification and upon receiving it, agreed to allow the State Fund to include its estimates into the factual stipulation. There is no basis for allowing Stavenjord to re-challenge the information contained in the stipulation. Regardless, the NCCI estimate addresses the costs associated with the prospective application of *Stavenjord*, not the costs associated with a retroactive application of *Stavenjord*.[6] *See* Petr.'s Br. 20. Therefore, Stavenjord's attempt to undermine the legitimate administrative hardships the State Fund will experience if *Stavenjord* applies retroactively is without merit.

b. The State Fund's current financial position weighs against retroactive application.

Stavenjord claims that the State Fund "gave away" the money that would have allowed it to absorb the financial impact of retroactively applying *Stavenjord*. *See* Petr.'s Br. 20. Stavenjord's assertions demonstrate her misunderstanding behind the payment of insurance dividends. Dividends are paid to policyholders who produced favorable results, and they provide all policyholders with incentives to provide a safe workplace and to return injured workers to employment as soon as possible. Notably, dividends are based on past performance and have no relationship to the forces driving future pricing. Therefore, the payment of dividends to certain policyholders in 2001, 2002 and 2003 was a reflection of the performance of those policyholders during those years; it had no relationship to the *Stavenjord* decision because that decision, once affirmed, would constitute one of the forces driving future prices.

Stavenjord also infers that the State Fund offered to give $26 million to the General Fund. *See* Petr.'s Br. 20. It is true that the Legislature has the potential to transfer $26 million from the Old Fund to the General Fund and it has already transferred $22 million. However, the Old Fund was powerless to prevent the Legislature from transferring this money, and to infer that the Old Fund volunteered to give this money to the General Fund is inaccurate. Accordingly, Stavenjord's attempts to downplay the Old Fund's financial problems should be disregarded.

In addition to the payment of dividends and the transfer of money from the Old Fund to the General Fund, Stavenjord argues that the State Fund's failure to raise

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[6] Stavenjord also cites to the ISO estimate to support her argument in favor of retroactivity. *See* Petr.'s Br. 21. However, as the factual stipulation notes, the ISO estimate is based on incomplete data obtained from the ERD database. As such, it is confined to claims coded as OD/PPD and fails to take into account any claims that are improperly coded. *See* Joint Statement of Stipulated Facts Nos. 89-90.

premiums in 2001 in response to *Stavenjord* indicates that the State Fund has the financial means to retroactively implement *Stavenjord*. *See* Petr.'s Br. 19-22. However, the Montana Supreme Court did not issue the *Stavenjord* decision until 2003, so raising premiums in 2001 would have been inappropriate. Further, raising premiums on current policyholders to pay for benefits potentially owed by past policyholders on prior claims targets the wrong group of policyholders. However, for several reasons, including the prospective costs associated with the 2003 *Stavenjord* decision, the State Fund was forced to raise premiums for fiscal year 2004 by 11.6%. If *Stavenjord* applies retroactively, the State Fund's surplus position will be impaired to levels below a prudent insurance operation. To rebuild surplus, the State Fund would need higher rates, over an extended period of time, than would otherwise be required. Therefore, the failure to raise rates in 2001 is not indicative of the State Fund's ability to absorb the financial impact of *Stavenjord*.

Lastly, Stavenjord claims that the amount of the State Fund's surplus is sufficient to allow a retroactive implementation of *Stavenjord*. Petr.'s Br. 21. Contrary to Stavenjord's claims, surplus does not exist for the purposes of paying common fund benefits and fees, and the amount of an insurance company's surplus cannot be viewed in a vacuum because those funds are necessary to maintain financial solvency and satisfy other obligations. The State Fund's long-range target is to have a reserve-to-surplus ratio of 1.5-2.0 to 1. In 2002, the ratio was 2.19 to 1, and in 2003 the ratio rose sharply to 3.4 to 1. The higher the ratio, the less adequate the reserve. Without adjusting the ratio to reflect the costs associated with a retroactive implementation of *Stavenjord*, the reserve-to-surplus ratio is already becoming alarmingly high. Therefore, the amount of surplus on-hand cannot serve as justification for retroactively implementing *Stavenjord*.

For all the administrative, claims-related and financial hardships addressed in the State Fund's Opening Brief, the third prong of the *Chevron Oil* test weighs in favor of prospective application. Therefore, Stavenjord's request to apply the decision back to July 1, 1987, should be denied.

E. *STAVENJORD* DOES NOT CREATE A COMMON FUND.

As an initial matter, the State Fund notes that Stavenjord's brief addresses some non-threshold implementation issues that are not part of the immediate briefing schedule (*i.e.*, settled claims should be included in the implementation process, the estates of deceased claimants should be entitled to increased benefits, etc.). Petr.'s Br. 22. Instead, those issues will be addressed only if the Court decides that *Stavenjord* applies retroactively.

As expected, Stavenjord argues that the *Stavenjord* decision created a common fund whose members include all claimants who suffered an occupational disease and sustained a wage loss or a ratable impairment. Petr.'s Br. 22. Citing *Murer*, Stavenjord alleges that her case "easily meets the three elements of the common fund test." Petr.'s Br. 22-24. However, the State Fund reiterates its position that the common fund doctrine has certain parameters attached to it, including economic ones. In cases like this one, where the $30,000 economic stake in the outcome of the litigation justified the expense of litigating the claim, application of the common fund doctrine is inappropriate. Further, unlike in the other common fund cases, determining the amount of increased benefits owed to claimants is not subject to a simple mathematical computation. Therefore, invocation of the common fund doctrine is inappropriate. *See* Opening Br. 23-25.

F. THE FAILURE OF STAVENJORD'S COUNSEL TO REQUEST COMMON FUND FEES IN THE INITIAL PROCEEDING PROHIBITS HIM FROM OBTAINING COMMON FUND FEES IN THE POST-REMAND LITIGATION.

Stavenjord's counsel simply relies on *Flynn* to support his argument he is entitled to invoke the common fund doctrine no matter when he first pled an entitlement to common fund fees. *See* Petr.'s Br. 32-33. However, as previously noted, the cases cited in *Flynn* all contained a catchall prayer for relief which encompassed a general claim for attorney fees. Therefore, the State Fund restates its position[7] that the failure of Stavenjord's counsel to plead *ab initio* an entitlement to common fund fees bars his post-remand request for common fund attorney fees. *See* Opening Br. 25-29.

G. THE GLOBAL LIEN ISSUE WILL BE GOVERNED BY THE APPELLATE DECISION IN *RUHD*.

Stavenjord's counsel spends a substantial amount of time arguing that if common fund fees are awarded, then his lien should apply with equal force to all insurers and self-insurers in Montana. *See* Petr.'s Br. 25-32. Stavenjord's counsel discusses the *Rausch* and *Ruhd* litigation and erroneously states that the State Fund appealed the *Ruhd* decision. *See* Petr.'s Br. 26-27. The claimants' attorneys from *Rausch* appealed the *Ruhd* decision, and the only involvement the State Fund had in that appeal was through an Amicus Curiae brief it filed with the Montana Supreme Court.

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7 The State Fund's position includes waiver, res judicata and estoppel. *See* Opening Br. 24-28.

On March 24, 2004, the Montana Supreme Court heard oral argument on the global attorney lien issue in *Ruhd*. During the arguments, the Montana Supreme Court seemed to suggest that its ultimate decision may require all insurers to abide by and implement the *Rausch* decision, but the recovery of common fund attorney fees will be limited to the attorney and the insurer involved in the precedent-setting litigation. If that is the final result, and if *Stavenjord* is applied retroactively and creates a common fund, then Stavenjord's counsel will be limited to recovering common fund fees from State Fund claimants. Although other insurers will be required to abide by and implement *Stavenjord*, no common fund fees will be payable on those claims. Stavenjord's counsel seems to be in agreement with the State Fund that the imminent appellate decision in *Ruhd* will provide an answer to the global lien issue. Until the *Ruhd* decision is published, the State Fund continues to maintain its position that the common fund global attorney fee lien should apply with equal force to all insurers and self-insurers in Montana.

CONCLUSION

Nothing in Stavenjord's Opening Brief changes the arguments and analysis set forth by the State Fund in its Opening Brief. Stavenjord mistakenly claims that the *Stavenjord* decision declared § 405 unconstitutional, making the statute void *ab initio*. *Stavenjord* did not invalidate § 405, and the statute still allows OD claimants who have a wage loss but no ratable impairment to recover benefits up to $10,000. Therefore, Stavenjord's argument that the statute is unconstitutional and must automatically be given retroactive application is without merit.

The *Chevron Oil* test is still utilized in Montana to determine if a judicial decision applies retroactively. The three cases in 1996 that failed to discuss *Chevron Oil* cannot form the basis for abandoning two decades worth of case law, especially since the Montana Supreme Court returned to the *Chevron Oil* test in 1998. Although only one of the three factors of the *Chevron Oil* test needs to be satisfied to prevent retroactive application, all three factors are met in this case. Therefore, retroactive application of *Stavenjord* is improper.

The common fund doctrine was not intended to apply to every decision of the Montana Supreme Court which granted benefits in excess of those allowed by the governing statute. Instead, the doctrine was meant to apply to situations where a claimant has minimal benefits at issue but still pursues a claim. Further, the doctrine was meant to apply to cases in which the increased benefits could be determined by a simple mathematical calculation. *Stavenjord* does not fit any of those criteria, and common fund treatment should be denied. In addition, the failure of Stavenjord's

counsel to plead an entitlement to common fund attorney fees or class certification prior to the appellate decision bars his post-remand request for common fund fees.

For the reasons stated herein and in its Opening Brief, the State Fund requests this Court hold that *Stavenjord* applies prospectively only and that common fund fees are inappropriate in this case.

DATED this 13th day of April, 2004.

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CERTIFICATE OF MAILING

The undersigned, a representative of the law firm of Garlington, Lohn & Robinson, PLLP, hereby certifies that on the 13 day of April, 2004, she mailed a true and correct copy of the foregoing *State Fund's Answer Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees and Global Lien of Stavenjord's Counsel*, postage prepaid, to the following:

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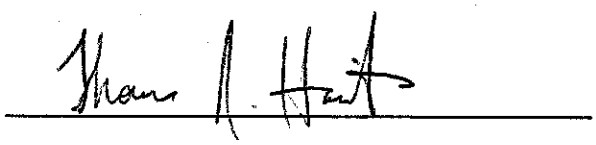

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