

WORKERS' COMPENSATION COURT

Hearing No. 3623
Volume XVIII

Helena, Montana
July 14, 2005

CASSANDRA M. SCHMILL

Laurie Wallace

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Larry W. Jones

and

MONTANA STATE FUND

Bradley J. Luck

WCC No. 2001-0300

ALEXIS RAUSCH, et al.

Lon J. Dale

v.

MONTANA STATE FUND

Thomas E. Martello
Bradley J. Luck
Thomas J. Harrington

and

JEREMY RUHD

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Larry W. Jones
Carrie L. Garber

WCC No. 9907-8274R1

ROBERT FLYNN and CARL MILLER

Rex Palmer

vs.

MONTANA STATE FUND

Bradley J. Luck

Re: Schmill v. Liberty Northwest, et al.
Rausch, et al. v. Montana State Fund, et al.
Flynn, et al. v. Montana State Fund, et al.
Reesor v. Montana State Fund
July 14, 2005

and

Thomas J. Harrington
Thomas E. Martello

LIBERTY NORTHWEST INSURANCE CORPORATION
(Intervenor)

Larry W. Jones

WCC No. 2000-0222

DALE REESOR

Thomas J. Murphy

vs.

MONTANA STATE FUND

Bradley J. Luck
Thomas J. Harrington

WCC No. 2002-0676

An in-person conference was held in the above-entitled matters on Thursday, July 14, at 1:00 p.m., in the Workers' Compensation Court, Helena, Montana. The Honorable Mike McCarter, Judge of the Workers' Compensation Court, presided. The court reporter in this matter was Sherron Walstad. The following attorneys and/or parties appeared and participated in the conference: Leo S. Ward, David A. Hawkins, Carrie L. Garber, Thomas A. Marra, Rex Palmer, Mark E. Cadwallader, Brian J. Hopkins, Lon J. Dale, Michael P. Heringer, Larry W. Jones, Thomas E. Martello, Thomas J. Murphy, Bryce R. Floch, Greg E. Overturf, Steven W. Jennings, Susan C. Witte, Debra Gilcrest, Thomas J. Harrington, Bradley J. Luck, Laurie Wallace, James G. Hunt, K.D. Feedback, Richard H. Davenport, Carol Gleed, Ronald A. Thuesen, Julia W. Swingley, Nancy Butler, and Carol Gleed. The following attorneys and/or parties appeared by telephone: Ronald W. Atwood, Sandi Pack, Julie B. Pollack, Gail Burgess, and Lloyd Williams.

Regarding All Common Fund Cases:

List of Parties:

The Judge requested each party to send to the Court a list of each party they represent in each of the different common fund cases.

Re: Schmill v. Liberty Northwest, et al.
Rausch, et al. v. Montana State Fund, et al.
Flynn, et al. v. Montana State Fund, et al.
Reesor v. Montana State Fund
July 14, 2005

Confidential Claimant Information:

The Judge asked the parties to identify any document they send to the Court that contains confidential (claimant) information by making a prominent note of the confidential nature of the document, preferably by endorsing "CONTAINS CONFIDENTIAL INFORMATION" on the front page just below the title of the document. One attorney suggested that a check box for confidentiality be put on all documents submitted to the Court. The manner of the endorsement will be left to the individual attorneys, at least at present.

Insurers in Liquidation:

Discussion was held regarding insurers that are in liquidation. Mr. Harrington and Mr. Kelly M. Wills (not present at the conference) are handling Western Guaranty Fund claims. Mr. Harrington advised the Court that the insurer must have an order of liquidation before the file is sent to the Western Guaranty Fund. Mr. Harrington will provide the Court with a complete list of companies in liquidation.

Ms. Burgess, who participated on behalf of the Reliance insurance companies, advised the Court that Reliance is subject to an October 3, 2001 liquidation order and that liquidation is proceeding. At the Court's request, Ms. Burgess explained the process Reliance is proceeding under and that a proof of claim must be filed with the estate. If the claim was prior to the liquidation order, the claim would go to the liquidator. After that date, the claim goes to the Guarantee Fund. This is an open-ended process and is expected to take a lengthy period of time.

Mr. Palmer, *Flynn* claimant counsel, stated that there must be an identification process that starts with the insurer. Mr. Murphy, *Reesor* claimant counsel, stated the Workers' Compensation Court has the power to tell Reliance to discern which claimants deserve benefits. The Court requested Ms. Burgess' input on the process and she will discuss the issue internally with the liquidator for Reliance to determine if Reliance will voluntarily attempt to identify claimants who may be entitled to benefits in the various cases. The Judge identified two issues: 1) Does the Workers' Compensation Court have jurisdiction to order insurers in liquidation to identify claimants who may be entitled to benefits in common fund cases; and (2) assuming the Court does, can it order the payment of the claims or do proofs of each claim then have to be submitted to the Court overseeing the liquidation. Since none of the counsel present nor the Judge were familiar with limitations resulting from the liquidation proceedings, Judge McCarter requested if Ms. Burgess could provide the Court with a short memo regarding the matter with citations so

Re: Schmill v. Liberty Northwest, et al.
Rausch, et al. v. Montana State Fund, et al.
Flynn, et al. v. Montana State Fund, et al.
Reesor v. Montana State Fund
July 14, 2005

we have a starting point to look into how the Court will handle insurers in liquidation. She agreed to do so.

Insurers Who Have Not Written Workers' Compensation in Montana:

Ms. Garber sent an e-mail to the Court, asking for guidance concerning insurers served with summonses who have not written workers' compensation insurance during the time frames in question or who have no claims or claims that do not qualify for further benefits.

Mr. Murphy has reviewed responses of such insurers in the *Reesor* case and agreed to dismiss many of them. Dismissal has been without prejudice. Mr. Palmer agreed that such insurers should be dismissed but suggested that if they request dismissal with prejudice they provide a sworn affidavit or similar evidence in support of their requests for dismissal. If the insurer has ever written workers' compensation insurance in Montana, the Court will require an affidavit prior to dismissal.

Mr. Thuesen (representing ACE Companies) asked if the Court could provide a list of insurers on which service was attempted in each case. Some insurers have received summonses in one case, and not other cases. The Court has created spreadsheets which lists each insurer in *Rausch*, *Flynn*, and *Reesor* and will put these on the WEBSITE and/or e-mail them to the parties. The spreadsheets contain an alphabetical list of the insurers on which service has been attempted. Where summonses were served by mail and returned to the Court as undeliverable, or the summonses were not returned but the insurers have not responded, the summonses will be re-served by the Insurance Commissioner in the case of insurers or on the registered agents in the case of self-insurers.

Schmill

The Supreme Court said that it is a common fund and it is global. The next step is to serve the summons.

Mr. Jones, Liberty companies, asked if the Employment Relations Division (ERD) could check its lists to limit the insurers to just those who reported occupational disease claims to the ERD. Ms. Gleed, from the ERD, explained this was not a search their system could perform. It appears the summons must be served on all insurers writing insurance since July 1, 1987.

Re: Schmill v. Liberty Northwest, et al.
Rausch, et al. v. Montana State Fund, et al.
Flynn, et al. v. Montana State Fund, et al.
Reesor v. Montana State Fund
July 14, 2005

Ms. Wallace, counsel for *Schmill*, recommended weeding out the insurers who have been dismissed from other common fund cases because they did not write insurance and simply omit them from the case. An attempt will be made to do that.

Ms. Wallace will draft and circulate a summons for approval. Service of the summons will be done by claimants' counsel with the Court's assistance. The applicable dates of injury for purposes of the summons is the same as set out in the attorney lien – July 1, 1987 to June 22, 2001.

Mr. Thuesen questioned the dates in the summons – are the insurers held to those dates if that is what is set forth in the summons – are they waiving any defenses? The Judge replied that the insurers can raise any defenses in their responses to the summons, including any defenses to the particular dates.

Mr. Davenport, Putman & Associates, questioned the parameters of the summons – are all claims inclusive? Judge McCarter replied that it will apply only to occupational disease claims in which benefits were reduced because of apportionment of the disease to non-occupational factors.

The Judge wondered if *Stavenjord* could be done at the same time if *Stavenjord* is affirmed and a Supreme Court decision is forthcoming. Mr. Luck, representing the State Fund, advised that to his knowledge *Stavenjord* has not been classified at the Supreme Court. Clara Wilson, Deputy Clerk of the Court, called the Supreme Court Clerk's office and ascertained that it indeed has not been classified.

Mr. Floch commented that service of the summons should be the claimants' responsibility, as opposed to the Court. Ms. Swingley advised that the Uninsured Employers' Fund (UEF) has always served the summonses. The Judge believes the burden of serving the summons will fall on claimants' counsel.

Ms. Pollack, North American Elite, advised that her company has been served with some summonses but not others. The Court will address this issue and is in the process of identifying insurers who need to be re-served.

Mr. Jones raised the issue of "closed" cases for purposes of retroactive application of the common fund decisions. The Judge advised counsel that the issue will be taken up and resolved soon in the *Rausch* case and that any and all counsel are invited to file *amicus* briefs in *Rausch* since whatever is decided in *Rausch* will apply to all cases. The briefs will be treated as *amici* briefs.

Re: Schmill v. Liberty Northwest, et al.
Rausch, et al. v. Montana State Fund, et al.
Flynn, et al. v. Montana State Fund, et al.
Reesor v. Montana State Fund
July 14, 2005

If any party wishes to raise legal issues, they must obtain Montana counsel. If an insurer has responded by letter indicating they have no claims or have supplied information, the Court has not required them to obtain local counsel. Similarly, it has not required respondents who have provided information identifying claimants who may be entitled to benefits, or have agreed to do so, to secure counsel as they have not raised legal issues and are complying with the Court's summons for information.

Mr. Cadwallader brought up the issue of unlawful practice of law – if corporate counsel in another state replied to a summons and they are not licensed to practice law in Montana, is that an issue? Mr. Hunt said the Court might want to issue *pro hac vice* admissions. Mr. Luck noted it may cost the insurers more money to obtain counsel than it would cost to pay their claims. The Judge noted that he takes responsibility for how the replies are being treated and that, although all documents are being “filed,” he did not deem replies on behalf of insurers which provide information indicating they do not write insurance, or are in liquidation, or are willing to comply with Court directives in the identification and payment of claimants, as constituting “appearances” of counsel. However, he also concluded it would be a good idea to consult with the Commission on Unauthorized Practice of Law to assure that the Court's process in allowing the noted responses to be submitted by out-of-state counsel or non-counsel does not run afoul with rules on unauthorized practice.

Tracking procedures were discussed. The Court will discuss tracking with individual claimants' counsel.

Mr. Harrington questioned payment of benefits that were apportioned - do we have a stay issued? The Judge responded – he would like the insurers to pay the benefits and withhold the lien, rather than wait (at least where the insurers are not contesting liability for the payments). Mr. Harrington will draft an order authorizing insurers to withhold attorney fees (25%) for the Court's review.

Reesor

The re-service issue was discussed. The Court will discuss re-service on insurers who have not responded in *Reesor* with claimants' counsel.

Mr. Harrington advised the Court that Skaggs is a part of Albertson's, and he will be filing an answer on its behalf.

Re: Schmill v. Liberty Northwest, et al.
Rausch, et al. v. Montana State Fund, et al.
Flynn, et al. v. Montana State Fund, et al.
Reesor v. Montana State Fund
July 14, 2005

There was then a lengthy discussion regarding legal defenses raised by various insurers in their responses to the summonses.

Ms. Gilcrest, Montana Resources, questioned whether the defenses are applicable to all or does each party need to raise each and every defense in order to get the benefit. There were also questions as to whether insurers who responded to the summonses by providing claimant information and without raising legal defenses could avail themselves of the Court's rulings regarding any of the defenses raised by others if those defenses are favorable.

The Judge indicated that up to this point, he had considered any insurer providing information and not filing responses raising legal defenses as acquiescing to application of the common fund doctrine. However, there was some debate on this point and also regarding whether insurers who raised certain defenses but not others could benefit from favorable rulings on issues they did not specifically raise. The Judge indicated his preference that rulings as to insurers raising defenses apply to all.

Mr. Davenport does not want to waive his legal defenses but wants to be cooperative.

Mr. Murphy argued that if it is a defense and not raised, then it is waived.

Some participants questioned whether some of the issues were defenses in the legal sense or simply points of law that needed to be addressed in order to apply the common fund doctrine. Judge McCarter noted that he does not view some issues as needing to be raised as a specific defense in the response – such as whether the effect of settlements are implementation issues. Some issues may not be identified until the implementation process is underway.

Mr. Hunt requested the Court to categorize the issues that need to be briefed. The Judge agreed to do so. Some issues may be consolidated. Ultimately, a respondent can raise any issue. [Following the hearing, Judge McCarter has determined that he needs to provide further guidance as to the applicability of rulings, including whether they are going to apply universally, only to the parties who specifically raised them, or only to parties responding with one or more defenses, and identify any differences between what may be regarded as implementation issues and those regarded as defenses. A proposed order will be drafted shortly and circulated for comment.]

Re: Schmill v. Liberty Northwest, et al.
Rausch, et al. v. Montana State Fund, et al.
Flynn, et al. v. Montana State Fund, et al.
Reesor v. Montana State Fund
July 14, 2005

A briefing schedule will be promulgated once the Judge has stated the issues. It will be far enough in advance to allow insurers who need to be re-served to participate in the briefing.

Mr. Murphy reported that there will be no joint statement of stipulated facts between the petitioner and the State Fund as had been previously discussed. Rather, the State Fund will file an affidavit in connection with its legal arguments regarding common fund issues.

Rausch - Ruhd

The Court will set a briefing schedule on "closed cases." (Those cases that are final, settled, or inactive.) Mr. Jones will write a short statement on what he thinks closed or final or settled means, within one week. Mr. Luck will collaborate with Mr. Jones on this statement. The Court will set a briefing scheduled with simultaneous briefs due in mid-August.

The parties are continuing to review Liberty files. Ms. Garber is halfway through the cases that are not settled.

The FFR attorneys are seeking attorney fees as claims are paid. The Court noted that no attorney fees were paid in *Broeker* or *Murer* until all claimants had been identified and a hearing held on the amount of attorney fees. Mr. Dale believes *Rausch* is different from *Murer* and *Broeker*. Mr. Dale wants to treat attorney fees on an insurer-by-insurer basis. As he proposed it, once claimants of a particular insurer have been identified and paid, they would be asked if they had any objection to the fees proposed by the FFR attorneys; if not, the fees would be paid out of the lien amounts withheld by the insurer and any balance remitted to the claimants. The Court is not going to rule on that issue right now. Mr. Dale is to look for case law regarding procedures for payment of common fund fees and present a more formal proposal to the Court.

Flynn

The issues raised in *Flynn* are similar to those in *Reesor*. To great extent, those issues will be resolved in *Reesor*.

Re: Schmill v. Liberty Northwest, et al.
Rausch, et al. v. Montana State Fund, et al.
Flynn, et al. v. Montana State Fund, et al.
Reesor v. Montana State Fund
July 14, 2005

Satterlee

The parties agreed to an extension of time for briefing. (Initial brief due August 8, 2005; reply due August 18, 2005).

Uninsured Employers' Fund

Mr. Cadwallader advised the Court that the UEF has underway a case that is "going to break the UEF's bank." The Court requested Mr. Cadwallader, or his co-counsel, to file a response outlining the issues it has. It is not necessary for the UEF to appear in *Satterlee* and *Hiett*.

Ms. Wallace questioned when the UEF paid its claims – if it was solvent the year of the claim, is it responsible to pay the claim? Mr. Cadwallader replied that historically, if the UEF was insolvent the year of claim, the claim does not need to be paid.

Mr. Cadwallader informed the Court that the UEF has no claims applicable in *Reesor*. The UEF will get more information on claims applicable in *Rausch*.

Court adjourned at 4:35 p.m.

PATRICIA J. KESSNER
Clerk of Court

By: Jackie Bockman
Deputy Clerk of Court

Minute Entry e-mailed to parties on July 18, 2005.