

IN THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

ROBERT CHEETHAM, JR.,) WCC No. 2002-0500
 Claimant,)
vs.)
LIBERTY NORTHWEST INSURANCE)
CORPORATION,)
Respondent/Insurer.)

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that the proceedings in the
above-captioned matter was heard before the
Honorable Mike McCarter, at the offices of the
Workers Compensation Court, 1625 Eleventh Avenue,
Helena, Montana, on the ~~25~~²⁸th day of August, 2003,
beginning at the hour of 1:30 p.m., before Laurie
Crutcher, Registered Professional Reporter, Notary
Public.

* * * * *

Page 2

A P P E A R A N C E S:

APPEARING FOR THE CLAIMANT:

MR. DAVID LAURIDSEN

Attorney at Law

P.O. Box 202

Columbia Falls, MT 59912

APPEARING FOR LIBERTY NORTHWEST:

MR. LARRY W. JONES

Attorney at Law

700 S.W. Higgins Ave., Suite 108

Missoula, MT 59803-1489

APPEARING FOR THE STATE FUND:

MR. THOMAS MARTELLO

Special Assistant Attorney General

Montana State Fund

P.O. Box 4759

Helena, MT 59604-4759

ALSO PRESENT:

MR. THOMAS J. MURPHY

Attorney at Law

P.O. Box 3226

Great Falls, MT 59403-3226

MR. JAMES C. HUNT

Attorney at Law

310 Broadway

Helena, MT 59601

MR. GEOFFREY ANGEL

Attorney at Law

125 West Mendenhall

Bozeman, MT 59715

MS. CAROL GLEED

MR. JAY DUFRECHOU

1 Whereupon, the following proceedings were
2 had:
3 * * * * *
4 THE COURT: Let's go to Robert Cheetham
5 versus Liberty Northwest Insurance Company. So
6 now I've got Dave down here. Laurie said she
7 wasn't sticking around, but she wanted me to tell
8 you that you needed to take careful notes as to
9 the conference so she'd know what legal research
10 and writing she would have to do.
11 MR. LAURIDSEN: Mr. Martello already
12 advised me, but thank you, I will.
13 THE COURT: And Larry again. The last
14 memorandum I have on this is July 2, 2003, and
15 that was where, Larry, you indicated that Liberty
16 hadn't made a final decision as to whether to
17 appeal or not, and I take it -- There's no notice
18 of appeal, so you have made a final decision not
19 to appeal.
20 MR. JONES: Right, Your Honor.
21 THE COURT: So where do we go from here?
22 MR. JONES: Your Honor, I think we're
23 going to have the same issues as in the Ruhd case.
24 Dave was here when we discussed it. I've
25 explained to Dave -- we sent a letter actually

1 explaining our software system, the same
2 information previously discussed in other cases,
3 and that we don't have a field that captures or
4 reflects if and how a COLA increase was
5 calculated.
6 And so these are common fund claims
7 against perm total disability claimants during the
8 period that the COLAs were given. That started in
9 1987. So I think that's probably as far back as
10 it would go.
11 And we have the same issue regarding
12 retroactive application, and classes of cases, and
13 settled cases, litigated cases, all the same
14 things again.
15 I've also explained to Dave, as he
16 heard, that this figure of 4,235 time loss claims
17 include temp total and temp partial, and there's
18 always the possibility that there are persons
19 who were on temp total who became perm total, but
20 there was no computer entry made to that effect.
21 So I need to talk to Dave to get clear
22 on just how broad the scope is, what he would like
23 to see done, and then we can see where we have
24 agreement and where I can talk to IT people, see
25 if there's a way to tease out any true perm

1 totals.
2 We've all heard Geoff suggest one
3 strategy would be total rate for two or more years
4 might be an interesting case to look at to see if
5 perm total.
6 THE COURT: There may be some other
7 ways, too. We don't really need to tease out who
8 is permanently total and temporary total, because
9 the Social Security offset doesn't depend on
10 classification as permanent. You can be temporary
11 and get the Social Security offset. So that's
12 really not the key factor, in looking at the key
13 factors, looking at some sort of rate reduction.
14 I think -- Tom is here. Do you remember
15 how we did that in Broeker? There was some way
16 where we did those calculations to figure out
17 whether or not they were receiving a -- there was
18 a Social Security offset, and then from that, we
19 reviewed those files for the COLAs.
20 MR. MARTELLO: We initially did it just
21 by rate reduction or change in the rate. The
22 problem was that it yielded 6,000 claims. So
23 then what we had to do, we eventually adjusted the
24 parameters for the rate change to be significant
25 enough that it just would be capturing either

1 significant lump sum advance recoveries, or more
2 likely the Social Security offset ones, and that
3 narrowed it down dramatically.
4 But if you do it by way of rate
5 reduction, you have to look at the amount, and
6 that made the biggest difference.
7 THE COURT: Do we have in the Court file
8 documentation of how you did that, and what you
9 looked at?
10 MR. MARTELLO: That I don't know. I
11 could check and advise the Court or the parties
12 what we did.
13 THE COURT: Why don't you let me know,
14 and let's share that information with Dave and
15 Larry, because I think we don't have to recreate
16 the wheel on this one. It's a query type of thing
17 for a computer. It shouldn't be that difficult to
18 do, as long as we have the parameters, and that
19 should probably bang most of those people out
20 pretty quickly. So let's find out, and look and
21 see, and maybe you can check with your computer
22 people, and see if that would be feasible, so --
23 MR. MURPHY: There wouldn't be a rate
24 reduction for the PPD benefits.
25 THE COURT: We're not dealing with PPD.

TRANSCRIPT OF PROCEEDINGS

<p style="text-align: right;">Page 7</p> <p>1 MR. MURPHY: I mean of the 4200. There 2 would be no rate reduction of those 4200. 3 THE COURT: The 4200 are temporary 4 totals. The PPD aren't going to be getting Social 5 Security benefits. 6 MR. LAURIDSEN: Well, you can, I guess. 7 MR. MARTELLO: You can't offset. 8 MR. MURPHY: The offset didn't come from 9 the insurer. It came from SSA. 10 THE COURT: Maybe they could offset, but 11 we could -- 12 MR. MARTELLO: They do on partials. 13 MR. HUNT: They're very careful about 14 that. 15 THE COURT: I didn't even know that. 16 MR. MURPHY: Overlapping laws. State 17 law is insurer gets the first choice, but if they 18 don't take it, then SSA will. 19 MR. HUNT: Not from perm partial 20 benefits, because they came in after 1973 when 21 that was the date that Congress instituted the 22 law. There's no grandfather. 23 The reason TTD and PPD are allowed to be 24 reduced, and Social Security doesn't take an 25 offset is because they were grandfathered in,</p>	<p style="text-align: right;">Page 9</p> <p>1 penalty. 2 MR. HUNT: I'll tell you, Dave, we have 3 claimed prospective benefits, and I've been talked 4 out of it. 5 THE COURT: Did I record that? 6 MR. HUNT: We have not. We were going 7 on the record, Tom, and we're going to be on the 8 record to do that. 9 MR. LAURIDSEN: That seems to be what 10 everyone else is doing, I don't want to be the 11 rogue in the group. 12 THE COURT: You won't be the rogue. 13 I'll let you withdraw. 14 MR. HUNT: So in Wild, what we're going 15 to do is retrospective from the date of the 16 Supreme Court decision, because it was reversed. 17 THE COURT: Could you file just a short 18 document stating that. 19 MR. HUNT: I will. 20 MR. LAURIDSEN: Larry, what about the 21 cases that you have -- the perm totals you have 22 settled since the date of the decision, June 17, 23 '03? Those would definitely count. We have the 24 three issues: Retroactivity, whether it's global, 25 going beyond Liberty to the Putmans, and the</p>
<p style="text-align: right;">Page 8</p> <p>1 because they existed in 1973. Permanent partial 2 didn't exist. So when Social Security decided to 3 take an offset, it doesn't include perm partial 4 benefits. So it's an area fraught with 5 malpractice. 6 THE COURT: Interesting. 7 MR. JONES: The other issue, Judge, 8 would be whether Dave is claiming prospective 9 common fund. 10 MR. LAURIDSEN: Sure. You always want 11 to claim it. Never surrender. Simple like that. 12 THE COURT: Overruled. Dave is claiming 13 prospective. 14 MR. JONES: There seems to be a split of 15 authority in that same office. 16 THE COURT: Laurie gave it up. 17 MR. LAURIDSEN: She did? 18 THE COURT: Yes. 19 MR. LAURIDSEN: She could probably 20 convince me to do that. 21 THE COURT: Why don't you talk to her. 22 You've got an uphill battle convincing me to 23 prospectively apply common fund, because after the 24 date of the decision, at least they have to follow 25 the law. If they don't, then you can get a</p>	<p style="text-align: right;">Page 10</p> <p>1 other -- 2 There's only a few people that we're 3 calculating this away from the main herd. And the 4 primary people being Liberty, and Putman, and 5 Hartford are the only three of I know of who 6 incorrectly calculated the COLAs. 7 So we have the issue of retroactivity, 8 and global common fund extending beyond Liberty, 9 and then whether it's going to apply to any 10 settled cases. And I think -- Is it pretty well 11 uniform that none of this is going to apply to 12 settled cases, or is that the main issue? 13 MR. HUNT: That's not an issue in our 14 case, so I don't know. 15 THE COURT: In Murer, I dealt with the 16 settled cases. I think there was a distinction 17 between cases settled after it came -- what was 18 the distinction? 19 MR. MARTELLO: The Supreme Court 20 indicated a pretty kind of blanket distinction 21 that settlements were out. Then when it came back 22 to you, the argument was made -- there were 23 certain representations made with regard to taking 24 care of people. And so then you made a 25 determination based essentially on notice at</p>

4 (Pages 7 to 10)

1 various stages -- Law Week I think was one of the
2 things that you pegged it to -- but that I think
3 was specific to some representations that were
4 made on the record in Murer. Generally
5 settlements were out, according to the Supreme
6 Court decision.

7 THE COURT: I think that's right. But
8 once we identify these cases, if there are any of
9 those, and we have questions, what we can do is
10 the same thing we did in Murer, and that is sit
11 down and talk about them, and if it looks like
12 there's an issue that needs to be resolved, we'll
13 brief it and figure it out.

14 MR. LAURIDSEN: As time goes by, more
15 and more of these PT's will be settled, so of
16 course, we would certainly argue that --

17 THE COURT: The common fund piece?

18 MR. LAURIDSEN: -- we're entitled to
19 anything that settles after June 17, '03, the date
20 of the decision, the date of your decision.

21 THE COURT: It settles afterwards, but
22 arose that there was -- that they had taken the
23 offset, an improper offset before that date.

24 MR. LAURIDSEN: Right. So how are you
25 red flagging any PT's that you're settling today?

1 MR. JONES: I'm not sure we've settled
2 any perm totals in this time period. It's
3 generally not done, for a couple reasons. I could
4 go into them. But it's generally not done.

5 MR. LAURIDSEN: So there might be one or
6 two of them out there, not probably very many. I
7 don't know about the Putman people. Where are you
8 at on that globalicity?

9 THE COURT: I've ruled it is not global.
10 That's the Ruhd decision. That's gone to the
11 Supreme Court already. And also I've ruled the
12 same thing in Fisch, Frost, and Rausch. And
13 that's appealed, too, as I recall.

14 MR. ANGEL: Did they do that? I didn't
15 hear about that. I had wondered if they were, but
16 I guess I never saw anything.

17 THE COURT: I think it has.

18 MR. DUFRECHOU: Yes.

19 MR. LAURIDSEN: Who was Claimant's
20 Counsel in Ruhd?

21 MR. DUFRECHOU: Geoff.

22 THE COURT: In Fisch, Frost, and Rausch,
23 it's Lon Dale, Monte Beck, and Steve Roberts,
24 except Steve is in Columbia most of the time.
25 He's got friends. Off the record.

1 (Brief discussion off the record)

2 THE COURT: Back on the record.

3 MR. LAURIDSEN: I guess can you state
4 again for me how you're going to go about
5 identifying these, then?

6 MR. JONES: Well, we already have 18
7 perm total claims we're supposed to know are
8 perm total coding in the computer. Tom is going
9 to let us know what strategy they used in the
10 Broeker case to deal with temp total case that may
11 in fact have gone to perm total. And it's a
12 variation on identifying rate reduction which
13 would reflect an offset, which in turn would
14 reflect award of Social Security, and that's the
15 issue I think we have in calculating the COLA.

16 THE COURT: So the 18 cases will be easy
17 to manually review. That's not a big deal. The
18 big deal is cutting that 4,235 cases, only
19 probably a fraction of which are going to be COLAs
20 in them, or even have Social Security offsets.

21 So Tom, what kind of time frame do you
22 think it will take you to do that? I know you're
23 volunteering.

24 MR. MARTELLO: I should be able to do it
25 within a couple weeks at the latest.

1 THE COURT: Do you want to try to look
2 at that maybe, and the two of you look at that,
3 and maybe report back in about four weeks?

4 MR. JONES: Right, Your Honor. If I
5 find, for example, a litigated case, I'll just ask
6 Dave, "Are you claiming litigated cases to be
7 reopened," and we have those issues of res
8 judicata and the statute of limitations on
9 reopening, if it's a settled case, statement of
10 fact, those kind of issues.

11 I guess we would also have, if there
12 were any demands for payment of those impairment
13 awards, and we denied them, then the two year
14 statute of limitations for filing a petition with
15 the Court could conceivably come up.

16 THE COURT: Okay. The first order of
17 business is to find out who is out there. Then
18 once we find out who's out there, we can sort
19 through what issues crop up in those contexts. So
20 let's do that. So why don't you report back to me
21 in about four weeks.

22 Tom, would you send me a copy of
23 whatever you send, and the only reason I ask that
24 is because I participated in that, and I have some
25 knowledge about how you do those queries. And

TRANSCRIPT OF PROCEEDINGS

Page 15

1 when I talk to Larry and Dave again, I may be able
2 to be helpful.

3 MR. LAURIDSEN: Will you be issuing
4 minute entries for this?

5 THE COURT: Yes. Also we're producing
6 these transcripts, too, all of the transcripts of
7 all these hearings, mostly because we cover so
8 many issues. This morning we identified all sorts
9 of things to brief, things to focus on. There's a
10 myriad of them. So the final word comes from
11 whatever we said here.

12 Okay. Anybody have anything else?

13 MR. JONES: Not from me, Your Honor.

14 MR. LAURIDSEN: No.

15 THE COURT: We'll close the hearing.

16 (The proceedings were concluded
17 at 1:55 p.m.)

18 * * * * *

19
20
21
22
23
24
25

Page 16

1 CERTIFICATE

2 STATE OF MONTANA)

3 : SS.

4 COUNTY OF LEWIS & CLARK)

5 I, LAURIE CRUTCHER, RPR, Court Reporter,
6 Notary Public in and for the County of Lewis
7 & Clark, State of Montana, do hereby certify:

8 That the proceedings were taken before me at
9 the time and place herein named; that the
10 proceedings were reported by me in shorthand and
11 transcribed using computer-aided transcription,
12 and that the foregoing -15- pages contain a true
13 record of the proceedings to the best of my
14 ability.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and affixed my notarial seal
17 this day of , 2003.

18
19 LAURIE CRUTCHER, RPR
20 Court Reporter - Notary Public
21 My commission expires
22 March 9, 2004.
23
24
25

6 (Pages 15 to 16)

LESOFSKI & WALSTAD COURT REPORTING
(406) 443-2010