

MONTANA WORKERS' COMPENSATION COURT

Minute Book Hearing No. 4377
Volume XXIII

Helena, Montana
March 8, 2012

ROBERT FLYNN and CARL MILLER
Individually and on Behalf of Others
Similarly Situated

Rex Palmer

vs.

MONTANA STATE FUND

Bradley J. Luck
Thomas E. Martello

and

LIBERTY NORTHWEST INSURANCE COMPANY

Larry W. Jones

WCC No. 2000-0222

CASSANDRA SCHMILL

Laurie Wallace

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Larry W. Jones

and

MONTANA STATE FUND

Bradley J. Luck
Thomas E. Martello

WCC No. 2001-0300

DALE REESOR

vs.

MONTANA STATE FUND

Bradley J. Luck
Thomas E. Martello

WCC No. 2002-0676

DEBRA STAVENJORD

vs.

MONTANA STATE FUND

Bradley J. Luck
Thomas E. Martello

WCC No. 2000-0207

An omnibus hearing in the above matters came on Thursday, March 8, 2012, at 8:30 a.m., at the Workers' Compensation Court, 1625 11th Avenue, Helena, Montana. The Honorable James Jeremiah Shea, Judge of the Workers' Compensation Court, presided. The court reporter was Kim Johnson.

Rex Palmer participated on behalf of Robert Flynn and Carl Miller (Flynn). Bradley J. Luck and Thomas E. Martello participated on behalf of Montana State Fund (MSF). Kathy Strobel, claims examiner for MSF, also attended. Larry W. Jones participated on behalf of Liberty Northwest Insurance Corporation (Liberty). Laurie Wallace participated on behalf of Cassandra Schmill. Ronald W. Atwood and Steven W. Jennings participated on behalf of various Respondent insurers and self-insureds.

The Court initiated this omnibus hearing to discuss the procedures that are being implemented to identify claimants covered by the common funds, and to ensure compliance with all court rulings.

I approved MSF's status reports and motions of finalization of settlement in *Reesor* and *Stavenjord*, and will issue the Orders approving the settlement implementation process and final listing of potentially entitled claimants.

I questioned whether insurers have any process which allows them to flag a claimant's file who had a claim that was paid in full prior to the implementation date, but moved into the class for reasons such as a change in condition. Mr. Luck explained that MSF is unsure how to flag these claimants, the identification is difficult, and suggested it would identify such claimants on a case-by-case basis. Mr. Luck raised concerns whether the Court would require MSF to be held to a strict standard to identify claimants who may in the future become a part of the class, and requested an Order giving the process some finality. I am not prepared in any of these cases to issue a prospective Order that finalizes the review process or determines reasonableness. However, I will not require the insurers to send notice to claimants not presently in the class. The parties must work together to determine what defines the class. If insurers identify cases in the normal course of business which were not previously in the class but later become a part of the class, the

insurer should handle these on a case-by case basis, and any party may bring any reasonableness issues to the Court on a case-by-case basis.

MSF has paid benefits to the *Schmill* claimants which it identified in 2007. Mr. Luck advised that MSF has subsequently identified a few additional claimants for which it will issue additional payments. MSF will follow the procedure for noticing up attorney fee hearings.

Mr. Jennings will speak to Tom Murphy regarding the *Reesor* and *Stavenjord* cases and submit settlement proposals to the Court regarding Mr. Jennings' insurer/self-insured clients. Mr. Jennings will work with Mr. Palmer and Ms. Wallace to draft contact letters for potential claimants.

Mr. Jennings has recently submitted several affidavits for dismissal in the *Flynn* and *Schmill* cases which trigger the 90-day discovery period. Ms. Wallace objected to Mr. Jennings' amendment to the affidavit form which stated that the insurers have not located any *Schmill* claims pursuant to the summons and *Flynn*, believing the insurers should be required to identify all *Schmill* claims under the original summons.

I advised that "paid in full" is one of the critical things that defines the class, and if claimants are paid in full under *Flynn*, they are not in the class. The date of the judicial determination is the starting point, and each insurer must give notice to claimants that are in the class. Mr. Jennings will confirm with his clients that they used the correct starting date for screening under *Schmill*.

Ms. Wallace stated that this Court never certified Hearing Examiner Jay Dufrechou's Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Workers' Compensation Court in *Schmill*, docket item No. 380, adopted by this Court, as final. This Order set forth a definition of "paid in full." Ms. Wallace believes this Order controls in *Schmill* and that the most recent Supreme Court Order in *Flynn* delineating the meaning of "paid in full" does not control in *Schmill* because the statute at issue in *Flynn* was enacted after all of the *Schmill* claims. I granted Ms. Wallace 30 days to file a motion requesting certification of Mr. Dufrechou's Order.

Mr. Palmer renewed his motion to take Rule 30(b)(6) depositions to test the reasonableness of Respondent insurers' remediation efforts. I granted Mr. Palmer's motion. Should Respondents have objections, they may move to quash.

The last few appeals to the Montana Supreme Court, as well as decisions from this Court, have established some parameters of what constitutes the class. Counsel must work together to begin the processes of identifying potential claimants. Should issues arise

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which counsel cannot resolve amongst themselves, they may bring them before the Court for determination.

As pertains to Liberty, Mr. Jones asked for guidance under *Reesor* and *Stavenjord*, given the absence of a common fund attorney. I stated that I have no authority to order remediation efforts or to determine if Liberty is conducting remediation efforts reasonably because these cases have not been certified as common funds. However, I noted that it may be in Liberty's best interest to conduct remediation efforts reasonably.

Court adjourned at 10 a.m. A final transcript of this hearing will be posted on the Court's website.

JAMES JEREMIAH SHEA
Judge

Minute Entry served on all parties of record via website.

JJS/JMB/RB/JP