

WORKERS' COMPENSATION COURT

Hearing No. 3669
Volume XVIII

Helena, Montana
February 16, 2006

ROBERT FLYNN and CARL MILLER

Rex Palmer

vs.

MONTANA STATE FUND

Thomas E. Martello

WCC No. 2000-0222

A hearing was held this date for the purpose of taking testimony regarding the percentage of attorney's fees withheld from additional benefits paid to Montana State Fund claimants who benefitted from the common fund. Mr. Rex Palmer, on behalf of the claimants, Mr. Thomas E. Martello, on behalf of the Montana State Fund, and Mr. Steven W. Jennings, on behalf of various insurers, participated in the hearing. The court reporter in this matter was Ms. Laurie Crutcher.

Two letters regarding this issue were received and filed by the Court on January 17, 2006. Mr. Virgil N. Hanson's letter is docketed as WCC #417 and Mr. David E. Wagner's letter is docketed as WCC #418. No other persons appeared or submitted correspondence in response to the Court's January 3, 2006 Order for Notification of Common Fund Fee Settlement and Hearing Date.

Mr. Palmer provided the Court with updated information. He noted that the Court's December 1, 2005 Minute Entry No. 3645 stated the average per person recovery for claimants was \$14,000. This figure should have read \$1,400. Mr. Palmer advised that, at this point, 525 claimants were disqualified from the 800 notices that were sent out. Many claimants were disqualified as they did not respond, did not have attorney's fees and costs, or they had died prior to December 1, 2002. The \$1,400 average per person recovery figure is now reduced to \$1304 per person. The twenty-five percent attorney's fee average is \$325. Mr. Palmer further advised that not all of the State Fund claims have been paid, but that Cris McCoy of the State Fund was still working on getting the claims paid.

Mr. Jennings testified on behalf of his various insurance clients. His argument was made for the purpose of protecting his clients' argument in the *Flynn* and other common fund cases that the payment of across-the-board twenty-five percent attorney's fees is a misapplication of the common fund doctrine. Mr. Jennings's arguments were made on the record and are set forth verbatim in the transcript of proceedings.

Mr. Martello noted that Mr. Jennings was correct with regard to the traditional approach to the common fund doctrine. However, Montana has not adopted the traditional approach to common fund. Mr. Jennings' same arguments were submitted to the Supreme

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Court in the *Murer* case. Mr. Martello noted that a number of cases have followed the Montana version of the common fund doctrine in *Murer*, *Broeker*, *FFR*, and *Flynn*.

After hearing testimony, the twenty-five percent attorney's fee figure for all Montana State Fund benefitted claimants, including the claimants who objected, Mr. Wagner and Mr. Hanson, is **approved**.

As Mr. Jennings' intent was to preserve a record, he is not estopped from maintaining this argument, and he is allowed to supplement his position in writing to the extent it may not have been fully set forth during his oral argument to the Court.

James Jeremiah Shea
JUDGE

Minute Entry e-mailed to Flynn Distribution List on February 17, 2006.