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FILED

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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

Attorneys for Respondent/Intervenor Teck Cominco American, Inc.

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2000-0222

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

Petitioners,

v.

MONTANA STATE FUND,

Respondent/Insurer,

and

LIBERTY NORTHWEST INSURANCE CORPORATION,

Intervenor.

**RESPONDENT Teck Cominco AMERICAN INCORPORATED'S
OPENING BRIEF ON RETROACTIVE APPLICATION OF PETITIONERS NOTICE
OF ATTORNEY LIEN FOR COMMON FUND ATTORNEY FEES**

Respondent Teck Cominco American, Inc., ("Teck Cominco") pursuant to the Court's Order and Schedule, respectfully submits the following Opening Brief to provide information to the Court on how to proceed with respect to the retroactive application of the worker's compensation matters addressed in *Flynn v. State Fund*, 202 MT 279, 312 Mont. 410, 60 P.3d397. See Jan. 3, 2006, Order.

In addition to the Court's instruction on how to proceed with respect to self-insurers, the Court also sought briefing on how to proceed concerning other insurers, guaranty funds in liquidation, and determining what constitutes "the final, closed, or inactive issue" with respect to retroactive application. Jan. 3, 2006, Order. The State

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Fund has submitted a comprehensive brief on the matter of “final, closed, or inactive” issues. As Teck Cominco has nothing substantive to add to the State’s Brief, and in the interest of avoiding docket congestion, Teck Cominco will join in the State’s Opening Brief on those issues and confine its argument herein to the issue of self-insured business entities, specifically Teck Cominco American, Inc.

Argument

Teck Cominco is a self-insured business entity and has operated in Montana as such throughout the term of its business dealings in Montana. Consequently, Teck Cominco must be dismissed from the subject litigation because it cannot be included within the traditional scope of common fund doctrine as set forth by the Montana Supreme Court in *Flynn* and associated line of cases. See e.g., *Murer v. State Compensation Mut. Ins. Fund*, 283 Mont. 210, 942 P.2d 69 (1997).

I. Common Fund Issue.

Teck Cominco is not an insurance company and as such occupies an entirely different posture with respect to compensation benefits than the balance of respondents herein who are insurance companies. Teck Cominco operated in Montana during the relevant time frame and may indeed have paid out compensation to injured workers that could be affected by the holding in *Flynn*. As noted to the Court in previous filings, Teck Cominco is investigating whether or not records relevant to the issue have survived several corporate reorganizations and changes in Teck Cominco’s place of business.

However, notwithstanding the location of records, during the term of its Montana operations, Teck Cominco did not participate in any sort of group/common fund or in the State Fund; rather, Teck Cominco paid compensation benefits, if any, from its own corporate operating accounts. Of course Teck Cominco’s corporate accounts are completely internal and are neither enriched or depleted by extra-corporate litigation. As such, Teck Cominco’s compensation program may not permissibly be considered a “common fund” with respect to the holding in *Flynn* which was clearly directed at the State Fund, or to the other “common fund” cases which are equally clearly directed at insurance companies in general.

Common fund doctrine allowing for attorney fees contributions from unrepresented parties benefitting from a favorable legal decision is firmly rooted in equity, arises from notions of quasi-contract, and is founded in the equitable remedy of restitution and recapture of unjust enrichment. See e.g., *Trustees v. Greenough*, 105 U.S. 527, 532-537 (1882); *accord Means v. Montana Power Co.*, 191 Mont. 395, 405, 625

P.2d 32, 38 (1981). Simply put, where a common fund is created and dispersed to parties who were not part of the litigation and/or did not retain legal counsel, equity requires *pro rata* contribution to the attorney expense of the party responsible for creating the benefit. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977) (“... the doctrine is designed to spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the “stranger” beneficiaries do not receive their benefits at no cost to themselves.”).

The Montana Supreme Court described a traditional common fund as follows:

Recently, in *Mountain West Farm Bureau v. Hall*, 2001 MT 314, 15-18, 308 Mont. 29, 15-18, 38 P.3d 825, 15-18, we summarized the elements of the common fund doctrine as follows:

- ▶ 1) an active beneficiary must create, reserve, or increase a common fund;
- ▶ 2) the active beneficiary must incur legal fees in establishing the common fund; and
- ▶ 3) the common fund must benefit ascertainable, non-participating beneficiaries. We enforce this doctrine because equity demands that all parties receiving a benefit from the common fund share in the cost of its creation (internal cites omitted).

Flynn v. State Compensation Ins. Fund, 2002 MT 279, ¶ 15, 312 Mont. 410, ¶ 15, 60 P.3d 397, ¶ 15.

In light of the Court’s holding, Petitioners’ attorney’s lien is ineffective as against Teck Cominco. Teck Cominco did not at any time participate in the State Fund or in any other insurance policy or program with respect to compensation benefits; it follows that any enrichment to the Fund or any other applicable insurance policy, attributable to Petitioners’ counsel did not in any manner affect claimants, if any, under Teck Cominco’s internal compensation program. Further, Petitioners neither offer proof nor allegation that Teck Cominco’s corporate operating accounts were enriched through their efforts or indeed, that any of Teck Cominco’s workers incurred legal fees of any description that might be relevant. Moreover, although Petitioners claim common fund attorney fees dating back to July 1974, Petitioners provide nothing that may be fairly construed as evidence that there are “ascertainable, non-participating beneficiaries” that participated in Teck Cominco’s worker’s compensation program. Teck Cominco’s worker’s compensation program was at all times funded completely out of corporation accounts, and was not a “common fund.”

II. Due Process Issues.

Because of the fact that Teck Cominco has no legal nexus with the State Fund, it cannot be considered a proper party to the instant litigation under well-settled notions of due process doctrine. It is axiomatic that under both the U.S. Constitution and Montana's Constitution that no person shall be "deprived of life, liberty, or property without due process of law." U.S. Const. am.s V, XIV; *accord* Mont. Const. art. II, § 17.

Petitioners presented the Court with a Statement of Scope of Attorney's Lien wherein Petitioners claim a broad right to attorney fees, asserting "any entity providing workers' compensation benefits to Montana workers at any time" is obligated to contribute attorney fees if said entity "had a practice of taking an offset for the full Social Security award received by an injured claimant, without accounting for the costs incurred by the claimant to recover the award." Petitioners base their theory on the Montana Supreme Court's holding in *Flynn, et al. v. State*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397. Petitioners further assert attorney fees are proper pursuant to the common fund doctrine as set forth in *Flynn. Id.*

"As long as the litigant has created a fund for others, it need only establish that others have benefitted to seek fees from the fund based on the common fund doctrine." Ralph I. Miller, *et al.*, *Attorneys' Fees*, 58 SMU L. Rev. 529, 533 (2005). Because Teck Cominco has no connection with the State Fund, it is an improper party to the instant litigation. It is settled law that basic due process awards a litigant sufficient notice and the opportunity to be heard. *Crismore v. Montana Board of Outfitters*, 2005 MT 109, ¶ 15, 327 Mont. 71, ¶ 15, 111 P.3d 681, ¶ 15. The Workers' Compensation Court's rules of procedure plainly recognize parties to litigation must have the opportunity to conduct adequate discovery and fact investigation prior to trial on the merits. Mont. Admin. R. § 24.5.301, *et seq.*

To date Petitioners have neither alleged or offered proof that Teck Cominco's private corporate accounts are in some way commingled or joined with the State Fund, or any other insurance vehicle, such that there exists some commonality. "The party claiming common fund bears the burden of establishing both its value and the resulting enrichment of others that justifies an equitable award of attorney's fees." 20 Am.Jur.2d *Costs*, § 66 (2005) (*citing Knebel v. Capital Nat. Bank in Austin*, 518 S.W.2d 795 (Tex. 1974)). Petitioners have not borne the burden of doing so and arbitrarily including Teck Cominco as a participant in some "common fund" such as the State Fund, or for that matter, any other insurance company, such that its corporate assets somehow become a "common fund" is consequently impermissible.

Petitioners are likely to cite recent Supreme Court decisions supporting the notion

of a global common fund and distinguishing among numerous insurers as to potential liability for benefits or attorney fees is a matter of law. *See e.g., Ruhd v. Liberty Northwest Ins. Corp. et al.*, 2004 MT 236, 322 Mont. 478, 97 P.3d 561 (holding “the common fund for attorney’s fees created by *Rausch* includes fees culled from all claimants regardless of insurer.”); *Rausch v. State Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25 (holding counsel is entitled to common fund attorney’s fees where, “through active litigation” a “common fund which directly benefits an ascertainable class of non-participating beneficiaries” is created.)

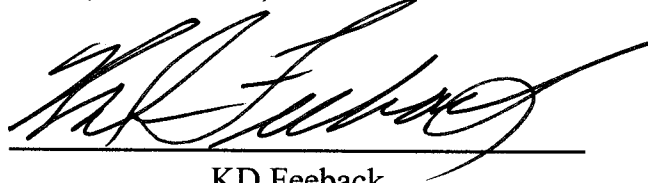
However, the plain threshold requirement of a common fund is that it indeed be common. Assuming for illustration that Teck Cominco has made compensation payments that may be affected by the cited cases, it did so out of internal, corporate accounts, and any of said expenditures are considered line-item costs of operation; there is no tangible nexus whatsoever to commonality with any but Teck Cominco.

Conclusion

For the reasons set forth above, Petitioners’ Notice of Attorney Lien as directed at Teck Cominco, or other applicable self-insured business entities, cannot be sustained.

Dated and submitted this 30th day of January, 2005.

GOUGH, SHANAHAN, JOHNSON & WATERMAN

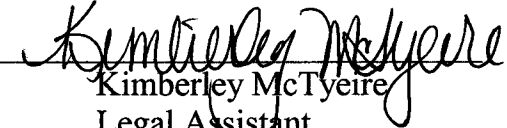
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KD Feedback
Attorneys to Teck Cominco American, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January 2006, a true and correct copy of the foregoing *Opening Brief* was electronically filed with the court and the following:

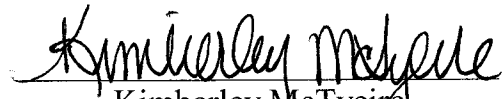
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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January 2006, a true and correct copy of the foregoing *Opening Brief* was electronically filed with the court and the following:

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