

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**WCC No. 2000-0222**

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

**Petitioners**

**vs.**

**MONTANA STATE FUND**

**Respondent/Insurer**

**and**

**LIBERTY NORTHWEST INSURANCE CORPORATION**

**Intervenor.**

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**ORDER REGARDING LIQUIDATION**

¶ 1 All parties to this case were given the opportunity to brief the issue of how this Court should deal with insurers who are in liquidation. Before this matter was ruled upon, a separate order determining the status of final, settled, closed, and inactive claims was appealed to the Montana Supreme Court, divesting this Court of jurisdiction to rule on the liquidation issue. The Supreme Court has ruled on that order, the matter has been remanded to this Court, and the present issue is ripe for decision.

¶ 2 Specifically at issue is how to determine who is responsible for the files of insurers who have been liquidated or are in liquidation and how those files should be handled. Montana Insurance Guaranty Association (MIGA) has briefed this issue, as discussed below.

¶ 3 MIGA, formed pursuant to the Montana Insurance Guaranty Association Act,<sup>1</sup> provides a mechanism for the payment of covered claims under certain insurance policies

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<sup>1</sup> § 33-10-101, MCA, *et seq.*

to avoid financial loss to claimants because of the insolvency of an insurer.<sup>2</sup> MIGA has the statutory responsibility to adjust claims against insolvent insurers, including workers' compensation claims.<sup>3</sup> MIGA may employ or retain people to handle claims and perform MIGA's other duties.<sup>4</sup> MIGA has done so, retaining Western Guaranty Fund Services (WGFS) to adjust Montana's workers' compensation claims.<sup>5</sup>

¶ 4 During the common fund proceeding of July 14, 2005, counsel for WGFS and for Reliance Insurance, which is currently in liquidation, clarified for the Court some of the details of the liquidation process. WGFS explained that it does not receive files from an insurer until after an order of liquidation has been issued. While the insurer remains in liquidation, claims must be made through the insurer. Reliance explained that any claim which is open at the time of liquidation would have its file forwarded to WGFS. Reliance further explained that claims which were closed but which have incidents which occurred after the date of the liquidation order would be filed with WGFS, while claims made on incidents which occurred prior to the date of the liquidation order would be made against the estate of the insurer.<sup>6</sup>

¶ 5 In its brief to this Court,<sup>7</sup> MIGA sets forth the following procedure which it uses to manage claims:

¶ 5a Once an insurer goes into liquidation, claims files where an ongoing benefit entitlement exists are forwarded to WGFS, which assumes responsibility for investigating, adjusting, compromising, settling, or otherwise resolving the claims.

¶ 5b Closed claims files for which benefits are not currently being paid are forwarded to the liquidated insurer or other entity designated by the statutory Receiver as the repository of the claims files.

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<sup>2</sup> § 33-10-101(2), MCA.

<sup>3</sup> § 33-10-105(1), MCA.

<sup>4</sup> § 33-10-105(3), MCA.

<sup>5</sup> Brief of Montana Insurance Guaranty Association (MIGA) at 2 (*citing* Exhibit A to its Brief, Aff. Gary J. Hale (Feb. 1, 2006)), Docket Item No. 457.

<sup>6</sup> Tr. at 9-17.

<sup>7</sup> Brief of MIGA at 2-3.

¶ 5c If an inactive claim becomes active due to a demand from a claimant, WGFS requests the claims file from the liquidated insurer or designated entity so that it can investigate, adjust, compromise, settle, or otherwise resolve the claim.

¶ 5d Upon final resolution of a claim, WGFS returns the file to the liquidated insurer or designated entity, which otherwise maintains control of all claims files.

¶ 6 Due to this procedure, MIGA notes, it has only a limited ability to review claims files to determine if they meet the criteria of any common funds. While WGFS is in the process of surveying its adjusters to determine whether any of the claims which it currently handles meet common fund criteria, MIGA argues that it is the obligation of the liquidated insurer or designated entity to review closed or inactive claims files to determine whether any of those claims meet the criteria for common funds. MIGA further points out that two of the major liquidated insurers, Reliance and Legion, have already agreed to this process and will forward any claims files to WGFS which the liquidated insurers determine meet common fund criteria.<sup>8</sup>

¶ 7 However, MIGA argues that it is not obligated to pay any benefit that may be payable pursuant to this litigation where the judicially created common fund liability accrued prior to the date of the insurer's insolvency. MIGA argues that it is neither an insurer nor a reinsurer, and that while it can soften the hardship of claimants in the case of insurer insolvency, it cannot do so on a continuous basis with every retroactive application of substantive changes to the law because it does not have an insurer's ability to absorb and recover the costs of the common fund cases through the vehicle of increased premiums. MIGA further notes that due to the timing of the common fund decisions in relation to the insurers' insolvency, the insolvent insurers were not able to recover, through increased premiums, the cost of the additional benefits that may be owed as a result of the retroactive application of the common fund decisions. Thus, MIGA concludes, this Court should limit MIGA's obligation to review only those claims which come into its possession for investigation, adjustment, and resolution, while the responsibility to review closed and inactive claims rests with the insolvent insurers. MIGA further argues that the Court should limit MIGA's obligation to pay claims to only those benefits which accrued subsequent to the date of the insurers' insolvency.<sup>9</sup>

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<sup>8</sup> Brief of MIGA at 3-4.

<sup>9</sup> Brief of MIGA at 4-5.

¶ 8 No other parties have submitted a brief on the liquidation issue; the Court can only assume that all other parties are in agreement with MIGA's position. Therefore, the Court will order accordingly.

ORDER

¶ 9 MIGA is obligated to review those claims files which come into its possession for investigation, adjustment, or resolution, and to determine whether those claims files meet the criteria for a common fund.

¶ 10 The insolvent insurers or their designated entities are obligated to review closed or inactive claims whose files are in their possession, and to determine whether those claims files meet the criteria for a common fund. The insolvent insurers are then obligated to forward any claims files which meet such criteria to MIGA for further action.

¶ 11 MIGA is obligated to pay claims for those benefits which accrued subsequent to the date of the insurer's insolvency.

¶ 12 Claims for benefits which accrued prior to the insurer's insolvency must be made against the estate of the insurer.

DATED in Helena, Montana, this 12<sup>th</sup> day of March, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
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JUDGE

c: Parties of Record Via Website