

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Case No. DA 10-0368

Bradley J. Luck
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine • P.O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595
bjluck@garlington.com

FILED

AUG 25 2010

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

Attorneys for Appellee/Cross-Appellant Montana State Fund

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

Appellant/Cross-Appellee,

v.

NOTICE OF CROSS-APPEAL

MONTANA STATE FUND,

Appellee/Cross-Appellant,

and

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Respondent/Insurer.

NOTICE is given that Montana State Fund, the Cross-Appellant above-named and who is a Respondent/Insurer in the action filed in the Workers'

Compensation Court of the State of Montana, as WCC No. 2000-0222, hereby cross-appeals to the Supreme Court of the State of Montana from the Order Re: Paid in Full, issued by the Montana Workers' Compensation Court on July 1, 2010, and certified as final for appeal purposes on July 26, 2010.

THE CROSS-APPELLANT FURTHER CERTIFIES:

1. The Montana State Fund has standing to bring this cross-appeal pursuant to Montana Rule of Appellate procedure 4(5)(a)(i) which states: "In civil cases . . . the notice of appeal shall be filed with the clerk of the supreme court within 30 days from the date of entry of the judgment or order from which the appeal is taken. In all other cases in which the United States of America or the State of Montana, or any political subdivision thereof, or any officer or agency thereof is a party, the notice of appeal shall be filed within 60 days from the entry of the judgment or order from which appeal is taken." The Montana State Fund has the same standing as a Montana state agency. Mont. Code Ann. § 39-71-2314.
2. This cross-appeal is subject to the mediation process required by Montana Rule of Appellate Procedure 7. The money judgment being sought is not less than \$5,000.
3. This cross-appeal is not an appeal from an order certified as final under Montana Rule of Civil Procedure 54(b). The Order appealed from (Order Re: Paid in Full (July 1, 2010)), was certified as final by the Workers'

Compensation Court on July 26, 2010, pursuant to Administrative Rule of Montana 24.5.348(2). A true copy of the Workers' Compensation Court's certification order is attached hereto as Exhibit "A."

4. This action does not involve a challenge to the constitutionality of any Act of the Montana Legislature and, therefore, no notice has been issued pursuant to Montana Rule of Appellate Procedure 27.

5. No transcripts have been ordered for the purposes of this appeal because no transcripts were generated in the underlying proceedings relevant to this appeal.

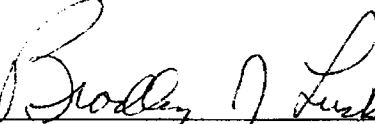
6. According to Montana Code Annotated § 25-1-402, Montana State Fund is exempt from having to provide the filing fee prescribed by statute.

DATED this 24th day of August, 2010.

Attorneys for Appellee/Cross-Appellant
Montana State Fund:

GARLINGTON, LOHN & ROBINSON, PLLP
199 W. Pine • P.O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

By


Bradley J. Luck

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing NOTICE OF CROSS-APPEAL with the Clerk of the Montana Supreme Court, via telefax on August 24, 2010, at 11:00 a.m., and that I have served true and accurate copies, via U.S. Mail, of the foregoing NOTICE OF CROSS-APPEAL upon the Clerk of the Workers' Compensation Court, each attorney of record, and each party not represented by an attorney in the above-referenced Workers'

Compensation Court action, as follows:

Clara Wilson, Clerk
Montana Workers' Compensation Court
P.O. Box 537
Helena, MT 59624-0537

Rex Palmer
Attorneys, Inc.
301 W. Spruce
Missoula, MT 59802


Thomas E. Martello
Montana State Fund
P.O. Box 4759
Helena, MT 59604-4759

Larry W. Jones
Law Offices of Larry W. Jones
2291 W. Broadway, Ste. 3
Missoula, MT 59808

Steven W. Jennings
Crowley Fleck PLLP
P.O. Box 2529
Billings, MT 59103-2529

Laurie Wallace
Bothe & Lauridsen
P.O. Box 2020
Columbia Falls, MT 59912

DATED this 24 day of August, 2010.



Jackie Lawrenson
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine • P.O. Box 7909
Missoula, MT 59807-7909
Secretary to Bradley J. Luck

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

vs.

MONTANA STATE FUND

Respondent/Insurer

and

LIBERTY NORTHWEST INSURANCE CORPORATION

Intervenor.

FILED

JUL 26 2010

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

ORDER OF CERTIFICATION

¶1 A telephonic conference came on July 26, 2010, at 10:00 a.m. to discuss certifying as final the most recent Orders issued by this Court: (1) Order Re: Paid in Full, Docket Item No. 615; (2) Order Denying Common Fund Insurers' General Motion to Dismiss, Docket Item No. 616; and (3) Order Granting Petitioners' Motion to Amend Petition for Hearing, Docket Item No. 617. Rex Palmer participated on behalf of Petitioners Robert Flynn and Carl Miller. Bradley J. Luck and Thomas E. Martello participated on behalf of Respondent Montana State Fund. Steven W. Jennings participated on behalf of Common Fund Insurers.¹

¹ AIU Ins. Co., American International Pacific Ins. Co., American Home Assurance Co., Birmingham Fire Ins. Co. Commerce & Industry Ins. Co., Granite State Ins. Co., Ins. Co. of the State of Pennsylvania, National Union Fire Ins. Co. of Pittsburgh, Pa, New Hampshire Ins. Co., AIG National Ins. Co., American International Specialty Lines Ins., American International Ins. Co., Illinois National Ins. Co., American General Corp., American Alternative Ins. Corp., American Re-Insurance Co., Bituminous Fire & Marine Ins. Co., Bituminous Casualty Corp, Old Republic Ins. Co., Old Republic Security Assurance Co., Centre Ins. Co., Clarendon National Ins. Co., Everest National Ins. Co., Truck Ins. Exchange, Mid Century Ins. Co., Farmers Insurance Exchange, Federal Express Corporation, Great American Ins. Co., Great American Ins. Co. of NY, Great American Assurance Co., Great American Alliance Ins. Co., Great American Spirit Ins. Co., Republic Indemnity of America, Hartford Accident & Indemnity Co., Hartford Casualty Ins. Co., Hartford Fire Ins. Co., Hartford Ins. Co. of the Midwest, Hartford Underwriters Ins. Co., Property & Casualty Ins. Co. of Hartford, Sentinel Ins. Co. Ltd., Twin City Fire Ins. Co., Trumbull Ins. Co., Market Ins. Co., Petroleum Casualty Co., SCOR Reinsurance Co., Sentry Ins. Mutual Co., Sentry Select Ins. Co., Middlesex Ins. Co., PPG

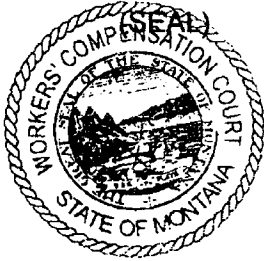
EXHIBIT

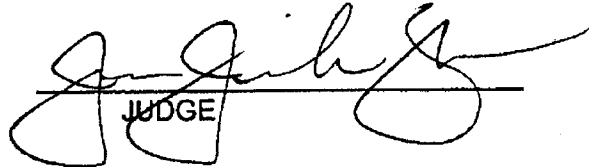
A

DOCKET ITEM NO. 621

¶2 For the reasons set forth in the attached transcript of the conference, the above-referenced Orders are certified as final pursuant to ARM 24.5.348(2), and, for purposes of appeal, this Order shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 26th day of July, 2010.




A handwritten signature in black ink, written over a horizontal line. Below the line, the word "JUDGE" is printed in capital letters.

c: Parties of Record Via Website

Industries, Inc., Connie Lee Ins. Co., Fairfield Ins. Co., United States Aviation Underwriters, Universal Underwriters Group, XL Ins. America, Inc., XL Ins. Co. of New York, XL Reinsurance. America, XL Specialty Ins. Co., Greenwich Ins. Co., Zurich North America, American Guarantee & Liability Ins. Co., American Zurich Ins. Co., Assurance Co. of America, Colonial American Casualty & Surety, Fidelity & Deposit Co. of Maryland, Maryland Casualty Co., Northern Ins. Co. of New York, Valiant Ins. Co., Zurich American Ins. Co., and Zurich American Ins. Co. of Illinois.

Order of Certification - Page 2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

WORKERS' COMPENSATION COURT
IN AND FOR THE STATE OF MONTANA

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.

WCC No. 2000-0222

July 26, 2010
10:00 a.m.
Conference Call

FILED

JUL 26 2010

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

BEFORE THE HONORABLE JAMES JEREMIAH SHEA

The conference call in the above-entitled matter was held on Monday, July 26, 2010, at 10:00 a.m., at the Workers' Compensation Court, Helena, Montana.

APPEARANCES:

1

2

3 For the Petitioners:

Rex Palmer
 Attorney at Law
 301 W. Spruce
 Missoula, Montana 59802

4

5

6 For the Respondent:

Bradley J. Luck
 Attorney at Law
 PO Box 7909
 Missoula, Montana 59807

7

8

C

9

C

Thomas E. Martello
 Special Ass't Attorney General
 ----- Fund

10

11

12 For the Common Fund Insurers: Steven W. Jennings
(See below.)

Attorney at Law
 PO Box 2529
 Billings, Montana 59103

13

14

15 Court Reporter:

Kim Johnson, RPR

16

17 Common Fund Insurers:

18 AIU Ins. Co., American International Pacific Ins. Co.,
 American Home Assurance Co., Birmingham Fire Ins. Co.
 19 Commerce & Industry Ins. Co., Granite State Ins. Co., Ins. Co.
 Of the State of Pennsylvania, National Union Fire Ins. Co. Of
 20 Pittsburgh, Pa, New Hampshire Ins. Co., AIG National Ins. Co.,
 American International Specialty Lines Ins., American
 21 International Ins. Co., Illinois National Ins. Co., American
 General Corp., American Alternative Ins. Corp., American
 22 Re-Insurance Co., Bituminous Fire & Marine Ins. Co., Bituminous
 Casualty Corp, Old Republic Ins. Co., Old Republic Security
 23 Assurance Co., Centre Ins. Co., Clarendon National Ins. Co.,
 Everest National Ins. Co., Truck Ins. Exchange, Mid Century Ins.
 24 Co., Farmers Insurance Exchange, Federal Express Corporation,
 Great American Ins. Co., Great American Ins. Co. Of NY, Great
 25 American Assurance Co., Great American Alliance Ins. Co., Great
 American Spirit Ins. Co., Republic Indemnity of America,

1 Hartford Accident & Indemnity Co., Hartford Casualty Ins. Co.,
2 Hartford Fire Ins. Co., Hartford Ins. Co. Of the Midwest, Hartford
3 Underwriters Ins. Co., Property & Casualty Ins. Co. Of Hartford,
4 Sentinel Ins. Co. Ltd., Twin City Fire Ins. Co., Trumbull Ins. Co.,
5 Markel Ins. Co., Petroleum Casualty Co., SCOR Reinsurance Co.,
6 Sentry Ins. Mutual Co., Sentry Select Ins. Co., Middlesex Ins.
7 Co., PPG Industries, Inc., Connie Lee Ins. Co., Fairfield Ins. Co.,
8 United States Aviation Underwriters, Universal Underwriters
9 Group, XL Ins. America, Inc., XL Ins. Co. Of New York, XL
10 Reinsurance. America, XL Specialty Ins. Co., Greenwich Ins. Co.,
11 Zurich North America, American Guarantee & Liability Ins. Co.,
12 American Zurich Ins. Co., Assurance Co. Of America, Colonial
13 American Casualty & Surety, Fidelity & Deposit Co. Of Maryland,
14 Maryland Casualty Co., Northern Ins. Co. Of New York, Valiant
15 Ins. Co., Zurich American Ins. Co., and Zurich American Ins. Co.
16 Of Illinois.

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 BE IT REMEMBERED that on Monday, July 26, 2010,
2 in Helena, Montana, before the Honorable James Jeremiah Shea,
3 Workers' Compensation Judge, the following proceedings were
4 had:

5 * * * * *

6
7 THE COURT: Okay. Thank you. This is -- I don't
8 anticipate taking a lot of time. The reason why -- as you
9 probably gathered from the e-mail -- why I wanted to have this
10 conference call was because, as you are all aware, I have issued
11 three orders in the past month in Flynn and none of the orders
12 included the standard language pursuant to ARM 24.5.348(2),
13 "The judgment is certified as final, et cetera, for purposes of
14 appeal."

15 So frankly, it was probably an oversight on my part.
16 In a regular work comp case, these might not typically be orders
17 that would be certified as final for purposes of appeal. However,
18 obviously, this isn't a typical case. We are in common fund. And
19 Rex has pointed out, he contacted the Court, and I think it's a
20 fair point that -- and discussing first, just the "paid in full"
21 definition order that, you know, common fund counsel, as well
22 as the insurers, should be allowed to appeal it.

23 Because after Flynn II was issued, the consensus was
24 that this was an essential issue in the implementation process
25 not just of this case but of other common fund cases, as well.

1 I think and I hope that the paid in full order is
2 effectively the final piece of the puzzle that determines what
3 claims are subject to retroactive application of previous common
4 fund decisions and, therefore, which claimants may be entitled
5 to common fund benefits. So as a matter of due process, I think
6 the parties should be entitled to appeal this order.

7 Now, as far as certification goes, I was looking at it,
8 and I don't think that Rule 54(b) applies because I don't believe
9 there are any unadjudicated issues left remaining in this case.
10 And we are dealing with the unique animal of being common
11 fund and, certainly, substantive legal issue was decided in
12 Flynn I and there was the common fund certification, so we have
13 just got basically these implementation issues which,
14 nonetheless, in order to move forward, certainly, again, as a
15 matter of due process I think have to be -- if the parties elect to
16 appeal, should appeal it.

17 So my intent is to, as far as the paid in full issue goes,
18 to certify the order pursuant to ARM 24.5.348(2), just issue a
19 separate order reflecting that.

20 As far as the remaining two orders, I think it's
21 probably appropriate to certify them, as well. Both of these
22 motions were filed pursuant to the general motions deadline that
23 I set when we had the conference back in April of last year
24 identify any outstanding issues and to set a briefing schedule.
25 And the purpose for setting that deadline for general motions

1 was specifically to avoid any piecemeal litigation and bring the
2 matter to conclusion so we can get on with identifying and
3 paying whatever claims should appropriately be part of the class
4 here.

5 So therefore, it would be my intention, to avoid any
6 piecemeal litigation, to certify all three orders, frankly, as "final"
7 for purposes of appeal, all of them pursuant to 24.5.348(2).

8 So those are my thoughts on the matter. That's when
9 what my intent would be. And what I wanted to do is hear from
10 whatever parties wanted to be heard from in this regard, and so
11 with that, I guess we will start with you, Rex.

12 MR. PALMER: I think that your observations are
13 correct and I fully concur --

14 THE COURT: Okay.

15 MR. PALMER: -- proper course to take.

16 THE COURT: How about State Fund? Brad or Tom or
17 both?

18 MR. LUCK: Your Honor, this is Brad. I agree with
19 Rex, as I usually do.

20 THE COURT: This is on the record.

21 MR. LUCK: But I'm not under oath.

22 The other thing I would remind the Court is that we
23 were using the decision in Flynn on retroactivity to be the vehicle
24 for all the other cases, so I think that supports certifying it for
25 those who want to have it reviewed.

1 The other thing is that, as you recall, State Fund has
2 settled Flynn, so it's important for us to have this be considered
3 in relation to other cases. And then on Reesor and the
4 Stavenjord settlement, they are specifically subject to a final
5 decision in Flynn, so we need to have that reviewed and
6 determined before we can consider the settlements that were
7 made.

8 And consistent with that, we would also like to be
9 able to get, just so the record is clear, a stay on the enforcement
10 of this or the application of the paid in full decision pending
11 appeal so that there's no question in relation to the settlements
12 and activity on remediation that we have in Stavenjord and
13 Reesor.

14 THE COURT: Okay. Well, and that may very well be
15 appropriate, Brad. Frankly, I'm not prepared to really address
16 that issue today. I would like to go back and look at the stay
17 orders in both of those and see where we are at. After the
18 appeal is -- right now, there are stays in place, is my recollection
19 of it, and both Reesor and Stavenjord were kind of in a unique
20 posture because of the settlement, as you are well aware of the
21 circumstances that. So that's not what I am prepared to address
22 today.

23 I think it may very well be appropriate. I think let's
24 wait until this is -- everybody has filed appeals, whatever they
25 may be, and I have a chance to look at the stay orders and just

1 determine whether they just remain in place or not.

2 MR. LUCK: Okay. Thanks, Judge.

3 THE COURT: You betcha. Tom, anything?

4 MR. MARTELLO: No.

5 THE COURT: Okay, Steve?

6 MR. JENNINGS: I hate to not take an opportunity to
7 hear myself talk, but I agree with Rex's analysis and with your
8 analysis, sir.

9 THE COURT: Okay. With that, I will issue orders
10 certifying all three of these orders in Flynn: The order regarding
11 paid in full, Order Denying Common Fund Insurer's General
12 Motion to Dismiss, and Order Granting Petitioner's Motion to
13 Amend Petition For Hearing will all be certified as final for
14 purposes of appeal pursuant to ARM 24.5.348(2).

15 What I will do is, there's going to be -- since it's a
16 common fund case, there will be a final transcript of this. I will
17 probably just reference the conference call to get an order out
18 today, and then I'll issue the order certifying all three orders,
19 okay? Any other questions, comments, lamentations, final
20 chance to speak? Rex?

21 MR. PALMER: Nothing further. Thank you.

22 THE COURT: Brad?

23 MR. LUCK: No, sir.

24 THE COURT: Tom?

25 MR. MARTELLO: No.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Steve?

MR. JENNINGS: No, sir.

THE COURT: Thanks, everyone. Have a good day.

(The hearing concluded.)

(Time is 10:12 a.m.)

* * * * *

1 STATE OF MONTANA)
2 County of Lewis and Clark) : SS.

3
4 I, Kimberly Johnson, a Registered Professional
5 Reporter and Notary Public in and for the County of Lewis and
6 Clark, do hereby certify:

7 That the foregoing cause was taken before me at the
8 time and place herein named, that the foregoing cause was
9 reported by me, and that the foregoing pages contain a true
10 record of the testimony to the best of my ability.

11 IN WITNESS WHEREOF, I have hereunto set my hand
12 this 26th day of July, 2010.

13
14
15 *Kimberly E. Johnson*
16 Kimberly E. Johnson
17 Registered Professional Reporter
18 Notary Public

