

**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 GRANTING PETITIONERS' MOTION TO VACATE ORDER OF DISMISSAL**

¶ 1 Petitioners have moved the Court to vacate its July 10, 2012, Order Granting Respondent Insurers' Request for Dismissal,<sup>1</sup> and to grant leave for briefing to continue on the Request for Dismissal at issue.<sup>2</sup> The affected insurers (Affidavit Insurers)<sup>3</sup> object to Petitioners' motion to vacate.<sup>4</sup>

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<sup>1</sup> Docket Item No. 679; See Request for Dismissal, Docket Item No. 677.

<sup>2</sup> Motion to Vacate Order of Dismissal, and Supporting Brief (Opening Brief), Docket Item No. 680.

<sup>3</sup> American Alternative Ins. Corp., American Re-Insurance Co., Bituminous Fire & Marine Ins. Co., Old Republic Security Assurance Co., Centre Ins. Co., Clarendon National Ins. Co., Truck Ins. Exchange, Farmers Insurance Exchange, 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 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., Petroleum Casualty Co., Sentry Ins. Mutual Co., Sentry Select Ins. Co., Middlesex Ins. Co., Fairfield Ins. Co, Universal Underwriters Group, XL Ins. America, Inc., XL Ins. Co. of New York, XL Reinsurance. America, XL Specialty Ins. Co., Greenwich Ins. Co., Markel Ins. Co.

<sup>4</sup> Affidavit Insurers' Response in Opposition to Petitioners' Motion to Vacate Order of Dismissal (Response Brief), Docket Item No. 691.

¶ 2 In support of their motion to vacate, Petitioners state that after the Affidavit Insurers filed a request for dismissal on June 15, 2012, Petitioners' counsel contacted the Affidavit Insurers' counsel and requested an extended period of time to file a response brief. The parties agreed that Petitioners could have until July 13, 2012, to file their brief. However, Petitioners' counsel failed to notify the Court of the agreement. On July 10, 2012, this Court entered an Order granting the Affidavit Insurers' request for dismissal on the grounds that Petitioners did not file a response brief.<sup>5</sup>

¶ 3 Petitioners acknowledge that they neglected to notify the Court regarding the agreed-upon extension of time. They ask the Court to allow them to file their response brief and to allow the request for dismissal to be considered on its merits.<sup>6</sup> Affidavit Insurers respond that they have correctly followed the affidavit process this Court set forth and the Court's order of dismissal should stand.<sup>7</sup> Affidavit Insurers argue that no good cause exists to grant Petitioners' motion, and that Petitioners' counsel has consistently failed to meet deadlines throughout this litigation. Affidavit Insurers further argue that they will be prejudiced if the dismissal order is vacated, as they will then be forced back into this litigation.<sup>8</sup>

¶ 4 Affidavit Insurers set forth additional arguments regarding the merits of Petitioners' underlying objection to their request for dismissal.<sup>9</sup> Both parties further argue as to whether certain time computation extensions apply.<sup>10</sup> Whether Petitioners' brief was late because it failed to notify the Court that the parties had agreed to an extension of time, or whether Petitioners' brief was late because it failed to notify the Court that the parties had agreed to an extension of time and Petitioners then failed to meet that deadline, is, from the Court's perspective, immaterial: Either way, Petitioners' brief was late.

¶ 5 However, given the dispositive nature of the order in question, under ARM 24.5.349, I am waiving Petitioners' noncompliance in the interest of justice. Petitioners' counsel is cautioned, however, that I am running out of patience with communications lapses, and missed deadlines, and I am going to be far less inclined to accommodate such lapses as this case continues.

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<sup>5</sup> Opening Brief at 1.

<sup>6</sup> Opening Brief at 2.

<sup>7</sup> Response Brief at 1-2.

<sup>8</sup> Response Brief at 8-9.

<sup>9</sup> Response Brief at 2-8, 9-12.

<sup>10</sup> See Petitioners' Reply Brief in Support of Motion to Vacate Order of Dismissal, Docket Item No. 692.

ORDER

¶ 6 For the reasons set forth above, Petitioners' motion to vacate the order of dismissal is **GRANTED**.

¶ 7 Within five days of the date of this Order, Petitioners shall file the original "Petitioners' Response Brief Objecting to Request for Dismissal," which was submitted as Exhibit A to their motion to vacate.

¶ 8 Within ten days from the date of this Order, Affidavit Insurers may file a reply brief in support of their Request for Dismissal.

DATED in Helena, Montana, this 15<sup>th</sup> day of November, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Parties of Record Via Website  
Submitted: August 2, 2012